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The President

Amending Regulations Relating to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 1 of title II of the Act of June 15, 1917, as amended (46 U.S.C. 70051) (the “Act”), and in addition to the finding in Executive Order 10173 of October 18, 1950, and any other declaration or finding in force under section 1 of the Act, I find that the security of the United States is endangered by reason of disturbances in the international relations of the United States that exist as a result of persistent and increasingly sophisticated malicious cyber campaigns against the United States, and that such disturbances continue to endanger such relations, and hereby order that:

Section 1. Amendments. Part 6 of title 33 of the Code of Federal Regulations is amended by:

(a) Amending section 6.01–3 to read as follows:

“**6.01–3. Captain of the Port.** *Captain of the Port*, as used in this part, means the officer of the Coast Guard, under the command of a District Commander, so designated by the Commandant for the purpose of giving immediate direction to Coast Guard law enforcement activities within the Captain of the Port’s assigned area. In addition, the District Commander will be Captain of the Port with respect to the remaining areas in the District not assigned to officers designated by the Commandant as Captain of the Port.”;

(b) Amending section 6.01–5 to read as follows:

“**6.01–5. Security zone.** *Security zone*, as used in this part, means all areas of land, water, or land and water, which are so designated by the Captain of the Port for such time as the Captain of the Port deems necessary to prevent damage or injury to any vessel or waterfront facility, to safeguard ports, harbors, territories, or waters of the United States or to secure the observance of the rights and obligations of the United States.”;

(c) Adding after the existing section 6.01–6 the following new section:

“**6.01–7. Damage.** *Damage*, as used in this part in connection with any data, information, network, program, system, or other digital infrastructure, has the meaning ascribed to “damage” under 18 U.S.C. 1030(e)(8).”;

(d) Adding after the new section 6.01–7 the following new section:

“**6.01–8. Cyber incident.** *Cyber incident*, as used in this part, has the meaning ascribed to an “incident” under 44 U.S.C. 3552(b)(2).”;

(e) Amending section 6.04–5 to read as follows:

“**6.04–5. Preventing access of persons, articles, or things, including any data, information, network, program, system, or other digital infrastructure, to vessels, or waterfront facilities.** The Captain of the Port may prevent any person, article, or thing, including any data, information, network, program, system, or other digital infrastructure, from boarding or being taken or placed on board any vessel or entering or being taken into or upon or placed in or upon any waterfront facility whenever it appears to the Captain of the Port that such action is necessary in order to secure such vessel from damage or injury or to prevent damage or injury to any vessel, or waterfront facility, including any data, information, network, program,

system, or other digital infrastructure therein or thereon, or waters of the United States, or to secure the observances of rights and obligations of the United States.”;

(f) Amending section 6.04–6 to read as follows:

“**6.04–6. Establishing security zones; prohibitions with respect thereto.** The Captain of a Port may establish security zones subject to the terms and conditions specified in § 6.01–5. No person or vessel shall enter a security zone without the permission of the Captain of the Port. No person shall board or take or place any article or thing, including any data, information, network, program, system, or other digital infrastructure, on board any vessel in a security zone without the permission of the Captain of the Port. No person shall take or place any article or thing upon any waterfront facility in any such zone without such permission.”;

(g) Amending section 6.04–7 to read as follows:

“**6.04–7. Visitation, search, and removal.** As consistent with law, the Captain of the Port may cause to be inspected and searched at any time any vessel, waterfront facility, or security zone, or any person, article, or thing, including any data, information, network, program, system, or other digital infrastructure thereon or therein, within the jurisdiction of the United States, may place guards upon any such vessel, waterfront facility, or security zone and may remove therefrom any and all persons, articles, or things, including any data, information, network, program, system, or other digital infrastructure, not specifically authorized by the Captain of the Port to go or remain thereon or therein.”;

(h) Amending section 6.04–8 to read as follows:

“**6.04–8. Possession and control of vessels.** The Captain of the Port may supervise and control the movement of any vessel and shall take full or partial possession or control of any vessel or any part thereof, within the territorial waters of the United States under the Captain of the Port’s jurisdiction, whenever it appears to the Captain of the Port that such action is necessary in order to secure such vessel from damage or injury, including damage to any data, information, network, program, system, or other digital infrastructure thereon or therein, or to prevent damage or injury to any vessel or waterfront facility or waters of the United States, or to secure the observance of rights and obligations of the United States.”;

(i) Amending section 6.10–7 to read as follows:

“**6.10–7. Identification credentials.** The identification credential to be issued by the Commandant shall be known as the Coast Guard Port Security Card, and the form of such credential, and the conditions and the manner of its issuance shall be as prescribed by the Commandant after consultation with the Secretary of Labor. The Commandant shall not issue a Coast Guard Port Security Card unless the Commandant is satisfied that the character and habits of life of the applicant therefor are such as to authorize the belief that the presence of such individual on board a vessel or within a waterfront facility would not be inimical to the security of the United States. The Commandant shall revoke and require the surrender of a Coast Guard Port Security Card when the Commandant is no longer satisfied that the holder is entitled thereto. The Commandant may recognize for the same purpose such other credentials as the Commandant may designate in lieu of the Coast Guard Port Security Card.”;

(j) Amending section 6.14–1 to read as follows:

“**6.14–1. Safety measures.** The Commandant, in order to achieve the purposes of this part, may prescribe such conditions and restrictions relating to the safety of waterfront facilities and vessels in port as the Commandant finds to be necessary under existing circumstances. Such conditions and restrictions may extend, but shall not be limited to, the inspection, operation, maintenance, guarding, and manning of, and fire-prevention measures for, such vessels and waterfront facilities. Such conditions and restrictions relating to the safety of waterfront facilities and vessels in port may also extend to measures the Commandant finds to be necessary under existing circumstances to prevent, detect, assess, and remediate an actual or threatened

cyber incident that could cause damage or injury to vessels, harbors, ports, or waterfront facilities.”;

(k) Amending section 6.14–2 to read as follows:

“**6.14–2. Condition of waterfront facility a danger to vessel.** Whenever the Captain of the Port finds that the mooring of any vessel to a wharf, dock, pier, or other waterfront structure would endanger such vessel, or any other vessel, or the harbor or any facility therein by reason of conditions existing on or about such wharf, dock, pier, or other waterfront structure, including inadequate guard service, insufficient lighting, fire hazards, inadequate fire protection, unsafe machinery, internal disturbance, damage to any data, information, network, program, system, or other digital infrastructure, actual or threatened cyber incident, or unsatisfactory operation, the Captain of the Port may prevent the mooring of any vessel to such wharf, dock, pier, or other waterfront structure until the unsatisfactory condition or conditions so found are corrected, and the Captain of the Port may, for the same reasons, after any vessel has been moored, compel the shifting of such vessel from any such wharf, dock, pier, or other waterfront structure.”;

(l) Amending section 6.16–1 to read as follows:

“**6.16–1. Reporting of sabotage, subversive activity, or an actual or threatened cyber incident.** Evidence of sabotage, subversive activity, or an actual or threatened cyber incident involving or endangering any vessel, harbor, port, or waterfront facility, including any data, information, network, program, system, or other digital infrastructure thereon or therein, shall be reported immediately to the Federal Bureau of Investigation, the Cybersecurity and Infrastructure Security Agency (for any cyber incident), and the Captain of the Port, or to their respective representatives.”;

(m) Amending section 6.16–3 to read as follows:

“**6.16–3. Precautions against sabotage.** The master, owner, agent, or operator of a vessel or waterfront facility shall take all necessary precautions to protect the vessel, waterfront facility, and cargo, including any data, information, network, program, system, or other digital infrastructure thereon or therein, from sabotage.”; and

(n) Amending section 6.19–1 to read as follows:

“**6.19–1. Primary responsibility.** Nothing contained in this part shall be construed as relieving the masters, owners, operators, and agents of vessels or other waterfront facilities from their primary responsibility for the protection and security of such vessels or waterfront facilities, including any data, information, network, program, system, or other digital infrastructure thereon or therein.”.

Sec. 2. Coordination. In enforcing regulations amended by this order, the Commandant shall coordinate with the Department of Justice and other relevant executive departments and agencies, as appropriate under applicable law or policy.

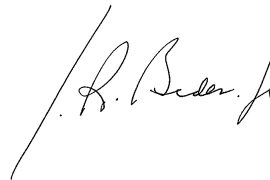
Sec. 3. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
February 21, 2024.

Rules and Regulations

Federal Register

Vol. 89, No. 38

Monday, February 26, 2024

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.

FARM CREDIT ADMINISTRATION

12 CFR Parts 614 and 620

RIN 3052-AD54

Loan Policies and Operations

AGENCY: Farm Credit Administration.

ACTION: Notification of effective date.

SUMMARY: The Farm Credit Administration (FCA, we, or our) issued a final rule amending our regulations governing young, beginning, and small farmers and ranchers (YBS).

DATES: The final rule was published on December 27, 2023 (88 FR 89280), and is effective as of February 14, 2024.

FOR FURTHER INFORMATION CONTACT:

Technical information: Jessica Tomlinson-Potter, Senior Policy Analyst, Office of Regulatory Policy, (703) 819-4667, TTY (703) 883-4056, potterj@fca.gov.

or

Legal information: Hazem Isawi, Senior Attorney, Office of General Counsel, (703) 883-4022, TTY (703) 883-4056, isawih@fca.gov.

SUPPLEMENTARY INFORMATION: On October 12, 2023, FCA issued a final rule amending our regulations at 12 CFR parts 614 and 620 governing service to YBS. The final rule clarifies the responsibilities of funding banks in the review and approval of direct lender association YBS programs, strengthens funding bank internal controls, and bolsters YBS business planning.

In accordance with 12 U.S.C. 2252(c)(1), the effective date of the rule is no earlier than 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is February 14, 2024.

Dated: February 21, 2024.

Ashley Waldron,
Secretary to the Board, Farm Credit Administration.

[FR Doc. 2024-03870 Filed 2-23-24; 8:45 am]

BILLING CODE 6705-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 1b

[Docket No. PL24-2-000]

Enforcement of Statutes, Orders, Rules, and Regulations

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Policy statement.

SUMMARY: The Federal Energy Regulatory Commission revises its process for resolving by settlement investigations pursuant to the Commission's regulations. Pursuant to this policy statement, the Commission grants the Director of Enforcement the discretion to authorize Office of Enforcement staff to engage in settlement negotiations without first seeking settlement authority from the Commission. When Office of Enforcement staff receives a viable offer of settlement from the subject of an investigation, it will present that offer to the Commission for voting, as is the case now. While the new process grants Office of Enforcement staff new discretion to commence settlement negotiations, it does not change the fact that it is the Commission that ultimately determines whether any proposed settlement of an investigation is in the public interest.

DATES: This policy statement is effective February 26, 2024.

FOR FURTHER INFORMATION CONTACT:

Jennifer Gordon, Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502-5908, jennifer.gordon@ferc.gov

John Hebden, Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502-8821, john.hebden@ferc.gov

SUPPLEMENTARY INFORMATION:

Policy Statement on Process for Resolving Investigations by Settlement

(Issued February 15, 2024)

1. The Commission issues this policy statement to provide updated guidance as to our enforcement process and policies concerning resolution by settlement of investigations that are initiated pursuant to part 1b of the Commission's regulations.¹ Based on our experience over the past 15 years operating pursuant to our existing settlement process as originally adopted in 2008,² consideration of other Federal enforcement program settlement processes, and related industry feedback, we have determined that the Commission's existing settlement process would benefit from certain enhancements. Specifically, and in recognition of the important role that settlements play in enforcement, the reforms discussed herein are designed to streamline the settlement process, to ensure that both the Commission and subjects of Commission investigations can resolve investigations efficiently.

2. As discussed in more detail below, pursuant to this Policy Statement, we replace the Commission's existing process whereby Office of Enforcement (Enforcement) staff must seek settlement authority from the Commission prior to engaging in settlement negotiations with the subject of an investigation, with a process where the Director of Enforcement has the discretion to authorize Enforcement staff to engage in such negotiations. Under this new process, formal settlement authority, with settlement terms pre-reviewed by the Commission, will not be a necessary precondition to the initiation of settlement negotiations. Instead, with the Director of Enforcement's authorization, Enforcement staff will engage in negotiations with the subject of an investigation and, if and when Enforcement staff receives a viable settlement offer from the subject, it will negotiate the applicable terms and thereafter present the written Offer of Settlement to the Commission for formal voting. Importantly, while the new process grants Enforcement staff new discretion to commence and engage in settlement negotiations, it does not

¹ 18 CFR pt. 1b (2023).

² See *Enft of Statutes, Reguls. and Ords.*, 123 FERC ¶ 61,156, at PP 33-34 (2008) (Revised Policy Statement on Enforcement).

change the fact that it is the Commission that ultimately determines whether a settlement of an investigation is in the public interest and should be approved.

3. Given the significant role settlements play in the Commission's enforcement program, it is important to ensure that the policies and practices governing the settlement process are efficient and effective. Ensuring that the Commission moves expeditiously benefits the subjects of Commission investigations who want to resolve investigations early, as well as any market participants, customers, and the public who may have been harmed by the alleged violations and to whom disgorgement and restitution may be directed once settlement is achieved. The reforms adopted herein to the Commission's settlement process enhance both Enforcement staff's and investigative subjects' ability to negotiate settlements and reduce the time it takes to reach resolution by settlement. As a result, the Commission's settlement practices will better align with those of similarly situated Federal agencies which do not require that Enforcement staff request settlement authority prior to engaging in settlement negotiations with subjects of investigations.

I. Introduction and Background

A. Role of Settlements in Part 1b Investigations

4. Settlement is the preferred means for the Commission to resolve investigations that would otherwise result in a recommendation of remedial action.³ Settlements allow the Commission to devote its limited resources to investigating other cases, rather than expending significant resources in protracted litigation, which supports our mission of ensuring the jurisdictional markets remain free from fraud, manipulation, and anti-competitive conduct.⁴ The Commission has explained that "the public interest is often better served through settlements because we are able to ensure that compliance problems are remedied faster and that disgorged profits may be returned to customers faster."⁵ In addition, while the Commission does not make findings as to whether a violation occurred in an order approving or rejecting a settlement offer,⁶ early and transparent publication

of settlements permits the Commission to expeditiously alert other market participants to potential compliance pitfalls and helps avoid repetition of unlawful conduct.

B. Revised Policy Statement on Enforcement

5. In 2008, the Commission issued its Revised Policy Statement on Enforcement to "provide guidance to the regulated community as to [its] enforcement policies concerning our governing statutes, regulations, and orders."⁷ The Revised Policy Statement on Enforcement was designed to "give the industry a fuller picture of how our investigative process works, including the considerations Enforcement staff takes into account in determining whether to open an investigation and, once opened, whether to close it without further action or to recommend sanctions."⁸ Consistent with this purpose, the Revised Policy Statement on Enforcement detailed the procedures the Commission, and in particular Enforcement staff, follow when initiating, conducting, and resolving an investigation.⁹

6. The Revised Policy Statement on Enforcement explained that, before recommending the Commission commence an enforcement proceeding, Enforcement staff will attempt to reach a settlement with the subject of an investigation. The Commission noted that this is valuable to the subjects of investigations, who benefit from potentially lower negotiated penalties¹⁰ and avoiding the costs and risks of litigation.¹¹ Further, the Commission explained that resolution of

FERC ¶ 61,251, at PP 14–20 (2022); *ISO-New England, Inc.*, 180 FERC ¶ 61,223, at PP 88–95 (2022); *Enervise Glob. Tech., LLC d/b/a CPower*, 180 FERC ¶ 61,126, at PP 17–18 (2022).

⁷ Revised Policy Statement on Enforcement at P 1. The Revised Policy Statement on Enforcement followed an earlier policy statement on Enforcement issued in 2005, following enactment of the Energy Policy Act of 2005, Public Law 109–58, 119 Stat. 594 (2005) (EPA Act 2005). See *Enft of Statutes, Ords., Rules, and Reguls*, 113 FERC ¶ 61,068 (2005) (Policy Statement on Enforcement).

⁸ Revised Policy Statement on Enforcement at P 5.

⁹ *Id.* PP 20–71.

¹⁰ In adopting and subsequently revising its Penalty Guidelines, the Commission formalized this financial benefit for settling parties, by providing a specific and transparent credit to subjects in the penalty calculation for resolving a matter without the need for a trial-type hearing. The Commission also separately provides credit for cooperating with Enforcement staff and for accepting responsibility. See FERC Penalty Guidelines Section 1C2.3(c) (detailing possible reductions to the culpability score, which is used to calculate the civil penalty guideline ranges for any particular violation of an organization).

¹¹ Revised Policy Statement on Enforcement at P 33.

investigations by settlement benefits the public interest, by ensuring the quick remediation of compliance problems and return to customers of any ill-gotten gains.¹²

7. With regard to process, the Revised Policy Statement on Enforcement set forth a means by which Enforcement staff would request settlement authority from the Commission, *prior to* engaging in settlement negotiations.¹³ It explained that Enforcement staff would seek "authority to negotiate within a range of potential civil penalties and/or disgorgement" and that this process would ensure that "the Commission, not staff, determines the appropriate range of remedies for purposes of settlement."¹⁴ If Enforcement staff and the subject of an investigation reach a settlement in principle, the Revised Policy Statement on Enforcement provides that staff will submit an executed Stipulation and Consent Agreement to the Commission for its consideration.¹⁵

C. Current Policies and Practices Regarding Settlement of Part 1b Investigations

8. Since issuance of the Revised Policy Statement on Enforcement in 2008, Enforcement staff has followed the process detailed therein whereby it seeks settlement authority from the Commission prior to entering into settlement negotiations with the subject of an investigation. Pursuant to this process, after commencing an investigation under part 1b of the Commission's regulations and engaging in initial discovery, but before any formal settlement negotiations take place, Enforcement staff presents to the Commission its views, as developed to that date by the investigation,¹⁶ and a recommended range of potential civil penalties¹⁷ and/or disgorgement. The

¹² *Id.*

¹³ *Id.* P 34.

¹⁴ *Id.* (requiring Enforcement staff to provide the Commission with the subject's written response to staff's views, if submitted, so that the Commission has both the views of its staff and the subject before it determines whether to authorize settlement negotiations).

¹⁵ *Id.*

¹⁶ If at any time Enforcement staff determines that no violation has occurred, the evidence is insufficient to warrant further investigation, or no further action is otherwise called for based on a totality of the circumstances, it closes the investigation. *Id.* P 31. Enforcement staff's annual Reports on Enforcement detail examples of cases that Enforcement staff closes without taking action. See e.g., 2023 Report on Enforcement, Docket No. AD07–13–017, at 19 (Nov. 16, 2023).

¹⁷ The civil penalty range for organizations is informed by the Commission's Penalty Guidelines. Penalties for individuals are determined on a case-by-case basis. See FERC Penalty Guidelines Section 1A1.1, Application Note 1.

³ *Id.* P 33.

⁴ *Id.*

⁵ *Id.*

⁶ Rather, the Commission determines only whether the settlement is a fair and equitable resolution of the matters concerned and is in the public interest. See, e.g., *Todd Meinershausen*, 181

subject's response to Enforcement staff's preliminary findings, if available, is also provided to the Commission.¹⁸ The Commissioners then determine whether to approve, modify, or deny the settlement authority, or provide alternative direction on how to proceed with the investigation.

9. Settlement authority is not pre-approval of any settlement ultimately reached between Enforcement staff and an investigative subject consistent with the authority granted. Any settlement reached after obtaining settlement authority must still subsequently be approved by the Commission to be effective, based on a finding that the settlement is in the public interest. Thus, while Enforcement staff can recommend a settlement to the Commission, it cannot guarantee that the Commission will approve a recommended settlement, including the specific terms and conditions of the final stipulation and agreement. After Enforcement staff reaches a proposed settlement with a subject, it submits a Stipulation and Consent Agreement—executed by both the subject and the Director of Enforcement—to the Commission for formal voting. The Stipulation and Consent Agreement, as well as the related order approving the settlement, are generally released publicly upon approval.¹⁹

II. Discussion

A. Need for Reform

10. The Commission's existing process for settling cases, which requires staff to seek settlement authority from the Commission in all cases prior to engaging in settlement negotiations, would benefit from certain improvements in light of both Enforcement staff's increased and broad experience investigating violations and recommending appropriate sanctions for such violations, and inefficiencies that the current authorization process can present in many cases for the Commission, Enforcement and other Commission staff, and investigative subjects.

11. The existing settlement authority process was adopted in the 2008 Revised Policy Statement on Enforcement, as part of the Commission's efforts to provide guidance to the regulated community as to our enforcement policies in light of the enhanced enforcement tools created

by EPAAct 2005.²⁰ At the time of issuance of the 2008 Revised Policy Statement on Enforcement, the Commission had little experience implementing its new enforcement authorities²¹ and had not yet adopted the Penalty Guidelines.²²

12. Over the past 15 years, the Commission has gained significant experience implementing its enhanced enforcement authorities. Since 2007, Enforcement staff has negotiated over 150 settlements, pursuant to which investigative subjects have agreed to pay almost a billion dollars in civil penalties and over a half a billion dollars in disgorgement.²³ The breadth and diversity of matters investigated and settled has allowed Enforcement staff to gain broad experience, which informs settlement negotiations by allowing Enforcement staff to compare factual circumstances to prior matters when considering appropriate remedies in those negotiations.²⁴ Similarly, in recent years the Federal courts have issued opinions interpreting the Commission's enforcement authorities. These Federal court cases shed light on legal principles, which in turn can help guide and inform settlement negotiations by giving insight into the strength of Enforcement staff's legal claims, for example.

13. Further, in 2010, after adoption of the existing settlement authority process, the Commission adopted its Penalty Guidelines to “add greater fairness, consistency, and transparency to our enforcement program.”²⁵ The Penalty Guidelines assign specific and transparent weight to each factor taken into consideration in calculating a proposed penalty, allowing organizations to know with more

certainty and in advance how each factor will be applied in any particular case, thereby allowing an organization to evaluate how much risk it could face in light of an investigation of potential violations.²⁶ Since their adoption, Enforcement staff has used the Penalty Guidelines to analyze and calculate an appropriate penalty range for any alleged violations of organizations being investigated, thus ensuring consistency and transparency across investigations. Given this experience, Enforcement staff need not obtain express sign-off from the Commission on a particular settlement range prior to engaging in settlement negotiations.²⁷ Similarly, Enforcement staff has also gained experience recommending civil penalties for individuals and settling such matters²⁸ and the Commission has precedent assessing civil penalties against individuals.²⁹

14. We note also that one of the only stated justifications for adopting the existing settlement authority process in the 2008 Revised Policy Statement on Enforcement was that it would “ensure[] that the Commission, not staff, determines the appropriate range of remedies for purposes of settlement.”³⁰ Under the revised

²⁶ *Id.* PP 2, 5 (“[T]he Penalty Guidelines . . . provide more clarity and consistency by assessing civil penalties based on objective characteristics and a uniform set of factors weighted similarly for similar violations and similar violators. . . . [T]he Penalty Guidelines . . . provide transparency by describing the factors we consider in our penalty determinations and the weight afforded to each factor.”).

²⁷ The Commission retains the discretion to depart from the Penalty Guidelines, based on an individualized assessment of the facts presented in any case, when appropriate. *Id.* PP 2, 5, 19. However, it is worth noting that departures from the Penalty Guidelines are uncommon. In the context of settlement negotiations, Enforcement staff will inform the subject of the investigation of any departures from the Penalty Guidelines it will recommend to the Commission. *Id.* P 32 n.51.

²⁸ See, e.g., *Todd Meinershagen*, 181 FERC ¶ 61,251.

²⁹ See, e.g., *Vitol Inc.*, 169 FERC ¶ 61,070 (2019) (assessing civil penalty of \$1,000,000 against Federico Corteggiano, a trader for Vitol Inc.); *Houlian Chen*, 151 FERC ¶ 61,179 (2015) (assessing civil penalty of \$1,000,000 against Houlian Chen, a trader for Powhatan Energy Fund, LLC, HEEP Fund, LLC, and CU Fund, Inc.); *Coaltrain Energy, L.P.*, 155 FERC ¶ 61,204 (2016) (assessing civil penalties of \$5,000,000 each against Peter Jones and Shawn Sheehan, co-owners of Coaltrain Energy, L.P., and \$1,000,000 against Robert Jones, \$500,000 against Jeff Miller, and \$500,000 against Jack Wells, traders for Coaltrain Energy, L.P.). Each of the aforementioned cases against individuals subsequently settled. See *Vitol Inc.*, 186 FERC ¶ 61,008 (2024); *Coaltrain Energy, L.P.*, 181 FERC ¶ 61,031 (2022); *Houlian Chen*, 177 FERC ¶ 61,076 (2021).

³⁰ Revised Policy Statement on Enforcement at P 34. Notably, this statement predates the Commission's adoption of Penalty Guidelines for organizations, the existence of which now provides

¹⁸ See Revised Policy Statement on Enforcement at P 32 (describing the process by which Enforcement staff shares its preliminary findings with investigative subjects and provides them the opportunity to respond).

¹⁹ *Id.* P 34.

²⁰ See generally Revised Policy Statement on Enforcement.

²¹ Revised Policy Statement on Enforcement at PP 10–11 (noting that from the time of EPAAct 2005 going into effect through the issuance of the 2008 Revised Policy Statement on Enforcement, the Commission had only resolved 14 investigations by settlement and had only issued two Orders to Show Cause, which at that time remained pending proceedings).

²² See *Enft of Statutes, Ords., Rules, and Reguls.*, 132 FERC ¶ 61,216 (2010) (Revised Policy Statement on Penalty Guidelines) (adopting the FERC Penalty Guidelines, which are modeled on the United States Sentencing Guidelines).

²³ See 2023 Report on Enforcement at 19. During this time, Enforcement has also initiated and subsequently closed without further action hundreds of investigations.

²⁴ See *id.* at 20–22 (describing the types of violations Enforcement staff has resolved by settlement, including violations of: the Federal Power Act, Natural Gas Act, and Interstate Commerce Act; RTO/ISO tariff provisions; the Reliability Standards; the Anti-Manipulation Rule and the Commission's market behavior rules; Commission orders; amongst others).

²⁵ Revised Policy Statement on Penalty Guidelines at P 2.

settlement process the Commission will continue to determine the appropriate remedy for purposes of settlement. The Commission must approve any settlement Enforcement staff negotiates and find that the settlement and its terms are in the public interest. Giving Enforcement staff the discretion to initiate settlement negotiations does not affect the Commission's ability to ultimately consider, discuss, and approve or reject the proposed resolution of any matter.

15. Further, in addition to developments over the past 15 years, the Commission has also found that, in its experience, requiring pre-authorization to engage in settlement negotiations in all cases—regardless of the seriousness of the alleged violation or the complexity of the case—creates unnecessary burdens on Commission staff and investigative subjects who are seeking prompt resolution of investigations.

16. The existing settlement authority process can result in an inefficient allocation of limited agency resources. Under the existing process, in all cases Enforcement staff and other Commission program offices invest significant time in seeking approval to commence negotiations, no matter how likely the prospects of settlement are. However, after all the time and effort spent on pre-authorization to engage in settlement negotiations, the parties may not agree to the terms of a settlement.³¹ In these cases, the Commission resources and time spent pre-authorizing settlement authority could have instead been expended on other Commission priorities.

17. Investigative subjects have also expressed frustration at the time it can take to complete the settlement authority process in some cases. Enforcement staff has found that increasingly subjects are inclined to try to resolve investigations quickly through settlement, particularly in cases where there are no factual disputes. Moreover, prolonging the settlement process by requiring authorization to negotiate can result in added burden and expense on investigative subjects. As a result, investigative subjects are often ready to begin negotiations and determine whether a settlement is attainable, and the existing settlement

authority process represents a delay—sometimes of several months or more—in getting to this step.

18. Finally, the prolonged settlement authority process also delays public dissemination of information about the alleged misconduct. Transparency can help prevent further misconduct by sending a message of deterrence. Moreover, expedient resolution of investigations by settlement ensures that ill-gotten gains are returned to harmed market participants and consumers as quickly as possible.

19. Both the experience Enforcement staff has gained investigating and settling diverse cases over the past 15 years and the adoption of, and experience applying, the Penalty Guidelines have created a strong framework for Enforcement staff to evaluate whether settlement of an investigation, and on what terms, can be recommended to the Commission to be found to be in the public interest. Further, we find that the existing settlement authority process is inefficient, in that it unnecessarily consumes limited agency resources and potentially delays resolution of investigations by settlement. These factors weigh heavily in favor of streamlining the settlement process to eliminate the unnecessary intermediate step of getting settlement authority.

B. Streamlined Settlement Process

20. In light of our experience and also feedback received from the regulated industry and subjects of Commission investigations, we hereby revise our existing process for settling investigations initiated pursuant to part 1b of the Commission's regulations. Specifically, we will no longer require Enforcement staff to obtain settlement authority from the Commission prior to initiating and negotiating a potential settlement of an investigation. Instead, we hereby grant the Director of Enforcement the authority to authorize Enforcement staff to commence settlement negotiations and/or respond with counteroffers to settlement negotiations initiated by a subject. The Director of Enforcement retains the existing discretion to engage with the Commission for feedback prior to authorizing staff to engage in such settlement negotiations on any particular investigation.

21. After engaging in settlement negotiations, should an investigative subject submit a viable Offer of Settlement,³² Enforcement staff will

submit the Offer of Settlement to the Commission for voting, along with any other information that might aid the Commission's determination as to whether to accept the Offer of Settlement, including for example, details about the specifics of the alleged violation(s), facts developed by the investigation to date, and/or the relevant law. Enforcement staff will also submit the subject's response to any preliminary findings issued by Enforcement staff, when available. The Offer of Settlement will be executed by the subject of the investigation and will remain non-public unless and until it is approved by the Commission.³³

22. The major benefit of this approach to settlement negotiations is that it will greatly improve the efficiency of the settlement process, thereby allowing Enforcement staff to devote time that would otherwise be spent seeking settlement authority to other Commission investigations or proceedings. Further, unlike the existing settlement authority process, this new process ensures that Commission staff and the Commissioners are only investing time analyzing settlement terms that are known to be acceptable to the subject of the investigation, as they have been presented in an Offer of Settlement. We expect that these efficiency gains will lead to speedier resolutions of investigations, which will better serve the subjects of investigations, as well as the public who will see the benefits of required remediation faster. We also note that the approach to settlement negotiations set forth in this policy statement aligns with other similarly situated Federal agency enforcement programs, including the Securities and Exchange Commission and the Commodity Futures Trading Commission.

23. Further, as previously stated, this new process does not change the fact that it is the Commission, not staff, that ultimately determines whether or not any settlement of an investigation is in the public interest. Consistent with our existing process, an Offer of Settlement, as well as the related order approving the settlement, will generally be released publicly upon approval.

staff significant guidance in their determination of appropriate penalties in a given matter.

³¹ Sometimes the subject of an investigation may not want to engage in settlement negotiations at all. Even in situations where Enforcement staff thinks settlement is unlikely, under the existing process it still requests settlement authority from the Commission. In such situations, this process ends up being a mere formality.

³² By "viable" we mean a settlement offer that Enforcement staff, in its considered discretion, believes is sufficient to recommend to the

Commission for approval based on Commission precedent, the facts of the case, and review of the Penalty Guidelines.

³³ This replaces the existing process whereby Enforcement staff typically submits for voting a Stipulation and Consent Agreement executed by both the subject of the investigation and the Director of Enforcement.

C. Other Considerations and Clarifications

24. The settlement authority process and enhancements detailed in this policy statement apply only to the process by which the Commission resolves investigations conducted by Enforcement staff pursuant to 18 CFR part 1b, including investigations that relate to violations of the mandatory Reliability Standards. The reforms discussed herein do not change the process by which parties to a docketed proceeding pending before the Commission or set for hearing submit settlements to the Commission for consideration,³⁴ nor do they affect the process by which the Commission reviews proposed penalties (including those agreed to by settlement) imposed by NERC and/or the Regional Entities for violations of the Reliability Standards.³⁵

III. Conclusion

25. As a Commission, we are always striving to responsibly implement our enforcement authorities, and to that end, to continually improve and enhance our enforcement policies and procedures to better serve the public. Consistent with that goal, we issue this policy statement and hereby streamline our settlement process by eliminating the requirement that Enforcement staff seek settlement authority from the Commission prior to initiating settlement negotiations, and instead grant new discretion to the Director of Enforcement to authorize the commencement of settlement negotiations. We believe these reforms will result in more effective and efficient resolutions of part 1b investigations by settlement.

IV. Document Availability

26. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested parties an opportunity to view and/or print the contents of this document via the internet through the Commission's homepage (<https://www.ferc.gov>).

27. From the Commission's homepage on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary,

type the docket number excluding the last three digits of this document in the docket number field.

28. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.referenceroom@ferc.gov.

V. Effective Date

29. This policy statement is effective February 26, 2024.

By the Commission.

Issued: February 15, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024-03609 Filed 2-23-24; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1150

[Docket No. FDA-2012-N-0920]

User Fees; Technical Amendment

AGENCY: Food and Drug Administration, (HHS).

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA or Agency) is amending its regulations to update a link regarding user fee disputes. This technical amendment is non-substantive.

DATES: This rule is effective February 26, 2024.

FOR FURTHER INFORMATION CONTACT: Nate Mease and Tamika Hopkins, Center for Tobacco Products, Food and Drug Administration, Document Control Center, 10903 New Hampshire Ave., Bldg. 71, Rm. G335, Silver Spring, MD 20993-0002, 1-877-287-1373, email: CTPRegulations@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: FDA is amending § 1150.15 (21 CFR 1150.15) to update the web address for information regarding user fee disputes. FDA's user fee dispute regulations currently link to FDA's general web page on tobacco products. FDA is revising § 1150.15 to specifically direct firms to FDA's web page on tobacco product user fees by replacing "<https://www.fda.gov/tobacco-products>" with "<https://www.fda.gov/tobacco-products/manufacturing/tobacco-user-fees>" in two places.

www.fda.gov/tobacco-products/manufacturing/tobacco-user-fees" in two places.

Publication of this document constitutes final action on these changes under the Administrative Procedure Act (APA) (5 U.S.C. 553). The APA generally exempts rules from the requirements of notice and comment rulemaking when an agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" (5 U.S.C. 553(b)(B)).

FDA has determined that notice and public comment are unnecessary because this amendment to the regulation provides only technical or non-substantive, ministerial changes to specify the location of information on FDA's web page regarding tobacco product user fee program. Such technical, non-substantive changes are "routine determination[s], insignificant in nature and impact, and inconsequential to the industry and to the public." (*Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012)) (quotation marks and citation omitted). Accordingly, FDA for good cause finds that notice and public procedure thereon are unnecessary for changing the cited FDA web page on tobacco user fees.

In addition, FDA finds good cause for these amendments to become effective on the date of publication of this action. The APA allows an effective date of less than 30 days after publication as "provided by the agency for good cause found and published with the rule" (5 U.S.C. 553(d)(3)). A delayed effective date is unnecessary in this case because the amendments do not impose any new regulatory requirements on affected parties. As a result, affected parties do not need time to prepare before the rule takes effect. Therefore, FDA finds good cause for this correction to become effective on the date of publication of this action.

List of Subjects in 21 CFR Part 1150

Tobacco products, User fees.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 1150 is amended as follows:

PART 1150—USER FEES

■ 1. The authority citation for part 1150 continues to read as follows:

Authority: 21 U.S.C. 371, 387a, 387b, 387i, 387s, 21 CFR 1100.1.

³⁴ See 18 CFR 385.602 (2023). For example, the reforms we announce today will not affect the settlement process during an Order to Show Cause proceeding stemming from a Part 1b investigation.

³⁵ See generally, *N. Am. Elec. Reliability Corp.*, 116 FERC ¶ 61,062 (2006).

■ 2. Amend § 1150.15 by revising paragraphs (a)(4) and (d) to read as follows:

§ 1150.15 Disputes.

(a) * * *

(4) Sent to the address found on our website (<https://www.fda.gov/tobacco-products/manufacturing/tobacco-user-fees>).

* * * * *

(d) A request for further Agency review under § 10.75 of this chapter may be submitted. Such a request must be submitted in writing by the domestic manufacturer or importer and received by FDA within 30 days from the date on FDA's response. The request for further Agency review must be legible, in English, and submitted to the address found on our website (<https://www.fda.gov/tobacco-products/manufacturing/tobacco-user-fees>).

Dated: February 20, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024-03777 Filed 2-23-24; 8:45 am]

BILLING CODE 4164-01-P

POSTAL SERVICE

39 CFR Part 501

Authorization To Manufacture and Distribute Postage Evidencing Systems

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is amending its Postage Evidencing Systems (PES) regulations to ensure compliance for Automated Clearinghouse or ACH payment transactions and to clarify obligations related to all payments. These changes require the applicable resetting company (RC) and PC Postage provider to comply with the latest NACHA rules published by the North American Clearing House Association for ACH transactions. These changes also require the applicable RC and PC Postage provider to obtain and store an agreement with each customer utilizing ACH debit as a payment method. Failure to comply may result in revocation of access to applicable Postal Service ACH programs.

DATES: Effective March 27, 2024.

FOR FURTHER INFORMATION CONTACT: Douglas Graham, Banking Manager, United States Postal Service, 475 L'Enfant Plaza SW, RM 8134, Washington, DC 20260. Phone: (202) 268-2188.

SUPPLEMENTARY INFORMATION: The Postal Service issued proposed revisions to 39 CFR part 501, set forth in the **Federal Register** on November 20, 2023 (Vol. 88, No. 222). It proposed amending the Postage Evidencing Systems regulations to ensure compliance for Automated Clearinghouse or ACH payment transactions and to clarify obligations related to all payments. Two sets of comments were received in response to the **Federal Register** Notice from industry participants.

NACHA Rules Compliance

Industry Comments

The proposal that PES providers must comply with NACHA rules received comments highlighting the need for clarification on which version of the NACHA rules will apply, as the rules are regularly updated. The commentors suggest including a provision for a grace period for PES providers to adopt and comply with future updates, which could either be fixed, or flexible and proportionate to the scope and complexity of future changes.

Postal Service Response

The rule will be re-worded to specify “must comply with the most recently published edition of NACHA Operating Rules & Guidelines, published by NACHA annually.” It is not the intention through this rulemaking to alter or supersede NACHA rules, but to follow existing NACHA rules and compliance that industry should reasonably understand and expect. Under this approach, the Postal Service cannot provide NACHA compliance exemptions as any entity involved in ACH related activity must already comply with NACHA rules, therefore the Postal Service will also not specify “sections to comply with” nor “grace periods”. Changes to the NACHA Operating Rules and Guidelines typically provide for future dated requirements and therefore an implementation period is normally provided within the NACHA rules.

NACHA Attestation of Compliance

Industry Comments

Commentors expressed opposition to the proposal's requirement for an annual written attestation of compliance for PES providers. One commentor opined that the requirement is unnecessary, since PES providers are already required to provide the Postal Service with System and Organizational Controls Reports (SOC 1 and SOC 2) that incorporate NACHA compliance. The proposed rule's requirement of a written plan to address any

noncompliance of NACHA rules is duplicative of the existing requirement for a remediation plan as a part of the SOC process. If the requirement is retained, one commentor recommends that the Postal Service should provide the text of the attestation or clarify what the attestation must contain.

Postal Service Response

The requirement to provide an annual written attestation of compliance will be removed.

ACH Debit Agreement

Industry Comments

Commentors expressed concerns about the proposed rule's new record-keeping requirements for ACH agreements for PES providers. One commenter suggested revising the requirements to minimize administrative burden and focus only on essential information. This commenter proposes accommodating customer agreements predating the rule by either grandfathering them for a specified period or providing an extended grace period, such as 12 to 18 months, for historic account information. The comment also argues against duplicative elements, such as the need for bank address information for every customer agreement. Another commenter also supports the idea of a grace period for providers to obtain and document the required contracts and suggest making a bank address an optional requirement, since it can be derived from the Routing/ABA number.

Postal Service Response

1. Regarding supplying the bank address information, it is agreed, and that data element requirement will be removed.

2. Regarding requiring signature evidence of termination, it is agreed, and that data element requirement will be removed.

3. To comply with NACHA rules, the ability to provide a copy of the ACH Debit upon request must already be in place, therefore “grandfathering” an exemption to this requirement is not an option. All customers of the providers must have an ACH Debit Agreement on file with the provider. All terminated ACH Debit Agreements must have a termination date noted on the agreement and the agreement must be kept on file for at least 2 years after the termination date.

4. It is agreed that an ACH Debit Agreement “form (hard copy or electronic)” revision period will be provided to update agreement “forms” to include the minimum data elements

listed until August 31, 2024. After the revision period all newly accepted ACH Debit Agreements must include the minimum data elements listed. During the revision period existing ACH Debit Agreement “forms” may continue to be used per item (3) above.

Reimbursement of Returned Payments

Industry Comments

One commenter expressed the view that the proposed rule’s specific timelines for reimbursement of the Postal Service by PES providers for ACH returned payments do not provide sufficient time for PES providers to work with customers on returned payments. The commenter recommends modifying the proposed sections to extend the reimbursement timeframe.

Postal Service Response

This is a comment based on §§ 501.15(g)(1) and 501.16(d)(1). While the text of these rules is included in the rulemaking, changes are not being made to these existing provisions of the rule that have been in effect prior to the proposed rulemaking. No changes to these existing provisions were intended to be included in this proposal, and none will be made in the final rule.

Additional Change

We also added one further conforming change to § 501.16 to aid in the implementation of these changes.

List of Subjects in 39 CFR Part 501

Administrative practice and procedure, Postal Service.

PART 501—AUTHORIZATION TO MANUFACTURE AND DISTRIBUTE POSTAGE EVIDENCING SYSTEMS

■ 1. The authority citation for part 501 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 410, 2601, 2605; Inspector General Act of 1978, as amended (Pub. L. 95–452, as amended); 5 U.S.C. App. 3.

■ 2. Amend § 501.15 by revising paragraph (g) to read as follows:

§ 501.15 Computerized Meter Resetting System.

* * * * *

(g) The RC must reimburse the Postal Service for returned payments promptly, comply with NACHA rules, and maintain customer ACH debit agreements.

(1) *Financial responsibility for returned payments.* The RC is required to reimburse the Postal Service upon request for any returned payments. The RC must, upon first becoming aware of a returned payment, immediately lock

the customer’s CMRS account to prevent a meter reset until the RC receives confirmation of payment for the returned payment. If a fee, penalty or fine is assessed against the Postal Service for returned payments from an RC’s customer, the Postal Service may request reimbursement for such fee, penalty or fine from the RC. The RC is required to remit the amount of the returned payment to the Postal Service plus the reimbursement request, to the extent applicable, within ten (10) banking days. Invoices will be created monthly for returns and/or applicable penalties or fines incurred for the previous month. The ten (10) banking days will start once the invoice is mailed. The RC has discretion to decide whether to charge its customer for any such reimbursement costs (of fees, penalties, or fines) the RC pays to the Postal Service in connection with the customer’s returned payment.

(2) *Responsibility to comply with NACHA rules.* The RC is required to comply with the most recent edition of the NACHA rules, published annually by the North American Clearing House Association. Failure to comply may result in revocation of access to applicable Postal Service ACH programs.

(3) *Responsibility to maintain customer ACH agreements.* The RC must obtain and store an agreement with each and every customer utilizing ACH debit as a payment method. The customer agreement must authorize the RC to debit the designated bank account identified to pay for postage through the Postal Service account of its choice. The agreement must have at least the following elements: Company Name (if applicable), Name and Title and Address of the person entering into the agreement, Contact Information (Phone Number, Fax Number and eMail Address as applicable), Date and Signature (or appropriate electronic signature evidence) of Agreement, Customer’s Bank Name, Bank Routing Number, Account Number and Account Type (Checking or Savings, Business or Personal) being agreed to transact upon, an Attestation that the person submitting the form is authorized to act on behalf of the account, and Termination Date of the Agreement (if applicable). A revision period until August 31, 2024, will be provided to update agreement forms to include the minimum data elements listed. The agreement must be stored for at least two years after termination of the agreement, must be easily reproducible, and must be provided electronically to the Postal Service within three business days of electronic written request by the

Postal Service in a format that can be easily and readily used for all NACHA and ACH related purposes including, without limitation, audit and defense of claims. The Postal Service will provide specific written guidance separately if requested. Failure to comply may result in revocation of access to applicable Postal Service ACH programs.

* * * * *

■ 3. Amend § 501.16 by revising paragraphs (d) and (i)(5)(ii)(C) to read as follows:

§ 501.16 PC postage payment methodology.

* * * * *

(d) The provider must reimburse the Postal Service for returned payments promptly, comply with NACHA rules, and maintain customer ACH agreements.

(1) *Financial responsibility for returned payments.* The provider must reimburse the Postal Service upon request for any returned payments. The provider must, upon first becoming aware of a returned payment, immediately lock the customer account to prevent resetting the account until the provider receives confirmation of payment for the returned payment. If a fee, penalty or fine is assessed against the Postal Service for returned payments from a provider’s customer, the Postal Service may request reimbursement for such fee, penalty or fine from the provider. The provider is required to remit the amount of the returned payment plus the amount of the reimbursement request, to the extent applicable, to the Postal Service within ten (10) banking days. Invoices will be created monthly for returns and/or applicable penalties or fines incurred for the previous month. The ten (10) banking days will start once the invoice is mailed. The provider has discretion to decide whether to charge its customer for any such reimbursement costs (of fees, penalties or fines) the provider pays to the Postal Service in connection with the customer’s returned payment.

(2) *Responsibility to comply with NACHA rules.* The provider is required to comply with the most recent edition of the NACHA rules, published annually by the North American Clearing House Association. Failure to comply may result in revocation of access to applicable Postal Service ACH programs.

(3) *Responsibility to maintain customer ACH agreements.* The provider must obtain and store an agreement with each and every customer utilizing ACH debit as a payment method. The customer agreement must authorize the provider

to debit the designated bank account identified to pay for postage through the Postal Service account of its choice. The agreement must have at least the following elements: Company Name (if applicable), Name and Title and Address of the person entering into the agreement, Contact Information (Phone Number, Fax Number and eMail Address as applicable), Date and Signature (or appropriate electronic signature evidence) of Agreement, Customer's Bank Name, Bank Routing Number, Account Number and Account Type (Checking or Savings, Business or Personal) being agreed to transact upon, an Attestation that the person submitting the form is authorized to act on behalf of the account, and Termination Date of the Agreement (if applicable). A revision period until August 31, 2024, will be provided to update agreement forms to include the minimum data elements listed. The agreement must be stored for at least two years after termination of the agreement, must be easily reproducible, and must be provided electronically to the Postal Service within three business days of electronic written request by the Postal Service in a format that can be easily and readily used for all NACHA and ACH related purposes including, without limitation, audit and defense of claims. The Postal Service will provide specific written guidance separately if requested. Failure to comply may result in revocation of access to applicable Postal Service ACH programs.

(4) *Credit cards.* Unless otherwise established in a written agreement between the Postal Service and the provider, the provider is fully responsible for its own credit card compliance.

* * * * *

(i) * * *

(5) * * *

(ii) * * *

(C) Authorizes the PC Postage provider to disclose the customer's personal information to the Postal Service, and such other information retained by the PC Postage provider that may enable the Postal Service to collect debts owed to it, and has the proper authority to disclose such information;

* * * * *

Sarah Sullivan,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2024-03079 Filed 2-23-24; 8:45 am]

BILLING CODE 7710-12-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 3160 and 9230

[BLM_HQ_FRN_MO4500177329]

RIN 1004-AE94

Onshore Oil and Gas Operations and Coal Trespass—Annual Civil Penalties Inflation Adjustments

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: This final rule adjusts the amounts of civil monetary penalties contained in the Bureau of Land Management's (BLM) regulations governing onshore oil and gas operations and coal trespass. This final rule is required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and consistent with applicable Office of Management and Budget (OMB) guidance. The adjustments made by this final rule constitute the 2024 annual inflation adjustments and account for one year of inflation spanning the period from October 2022 through October 2023.

DATES: This rule is effective on February 26, 2024.

FOR FURTHER INFORMATION CONTACT: For information regarding the BLM's Fluid Minerals Program, please contact Yvette Fields, Division Chief, Fluid Minerals Division, telephone: 204-712-8358; email: yfields@blm.gov. For information regarding the BLM's Solid Minerals Program, please contact Rebecca Good, Acting Division Chief, Solid Minerals Division, telephone: 307-251-3487; email: rgood@blm.gov.

For questions relating to regulatory process issues, please contact Stephen Pollard, Division of Regulatory Affairs, email: spollard@blm.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:

I. Background

II. Calculation of 2024 Adjustments

III. Procedural Requirements

A. Administrative Procedure Act

B. Regulatory Planning and Review

(Executive Orders 12866 and 13563)

C. Regulatory Flexibility Act

D. Congressional Review Act
E. Unfunded Mandates Reform Act
F. Takings (E.O. 12630)
G. Federalism (E.O. 13132)
H. Civil Justice Reform (E.O. 12988)
I. Consultation With Indian Tribes (E.O. 13175 and Departmental Policy)
J. Paperwork Reduction Act
K. National Environmental Policy Act
L. Effects on the Energy Supply (E.O. 13211)

I. Background

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Sec. 701, Pub. L. 114-74) (the 2015 Act) became law, amending the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410).

On an annual basis, the 2015 Act requires agencies to:

1. Adjust the level of civil monetary penalties for inflation; and
2. Report inflation adjustments in the Agency Financial Reports as directed by OMB Circular A-136, or any successor thereto.

The purpose of these adjustments is to maintain the deterrent effect of civil monetary penalties and promote compliance with the law (*see* Sec 1, Pub. L. 101-410).

As required by the 2015 Act, on June 28, 2016, the BLM issued an interim final rule that adjusted the level of civil monetary penalties in BLM regulations with the initial "catch-up" adjustment (RIN 1004-AE46, 81 FR 41860). In subsequent years, the BLM has issued final rules, adjusting the level of civil monetary penalties for inflation, as appropriate for 2017 to 2023.

OMB issued Memorandum M-24-07 on December 19, 2023, entitled, Implementation of Penalty Inflation Adjustments for 2024, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which explains agency responsibilities for identifying applicable penalties and calculating the annual adjustment for 2024 in accordance with the 2015 Act.

II. Calculation of 2024 Adjustments

In accordance with the 2015 Act and OMB Memorandum M-24-07, the BLM has identified applicable civil monetary penalties in its regulations and calculated the annual adjustments. A civil monetary penalty is any assessment with a dollar amount that is levied for a violation of a Federal civil statute or regulation and is assessed or enforceable through a civil action in Federal court or an administrative proceeding. A civil monetary penalty does not include a penalty levied for violation of a criminal statute, nor does

it include fees for services, licenses, permits, or other regulatory review. The calculated annual inflation adjustments are based on the percentage change between the Consumer Price Index for all Urban Consumers (CPI-U) for the October preceding the date of the adjustment and the prior year's October CPI-U. Consistent with guidance in OMB Memorandum M-24-07, the BLM divided the October 2023 CPI-U by the October 2022 CPI-U to calculate the multiplier. In this case, October 2023

CPI-U (307.671)/October 2022 CPI-U (298.012) = 1.03241. OMB Memorandum M-24-07 confirms that this is the proper multiplier. (OMB Memorandum M-24-07 at 1.)

The 2015 Act requires the BLM to adjust the civil penalty amounts in 43 CFR 3163.2 and 9239.5-3(f)(1). To accomplish this, the BLM multiplied the current penalty amounts in those paragraphs by the multiplier set forth in OMB Memorandum M-24-07 (1.03241) to obtain the adjusted penalty amounts.

The 2015 Act requires that the resulting amounts be rounded to the nearest \$1.00 at the end of the calculation process.

The adjusted penalty amounts will take effect immediately upon publication of this rule. Pursuant to the 2015 Act, the adjusted civil penalty amounts apply to civil penalties assessed after the date the increase takes effect, even if the associated violation predates such increase. This final rule adjusts the following civil penalties:

CFR citation	Description of the penalty	Current penalty	Adjusted penalty
43 CFR 3163.2(b)(1)	Failure to comply	\$1,291	\$1,333
43 CFR 3163.2(b)(2)	If corrective action is not taken	12,924	13,343
43 CFR 3163.2(d)	If transporter fails to permit inspection for documentation	1,291	1,333
43 CFR 3163.2(e)	Failure to permit inspection, failure to notify	25,847	26,685
43 CFR 3163.2(f)	False or inaccurate documents; unlawful transfer or purchase	64,618	66,712
43 CFR 9239.5-3(f)(1)	Coal exploration for commercial purposes without an exploration license	4,838	4,995

III. Procedural Requirements

A. Administrative Procedure Act

In accordance with the 2015 Act, agencies must adjust civil monetary penalties “notwithstanding Section 553 of the Administrative Procedure Act” (Sec. 4(b)(2), 2015 Act). The BLM is promulgating this 2024 inflation adjustment for civil penalties as a final rule pursuant to the provisions of the 2015 Act and OMB guidance. A proposed rule is not required because the 2015 Act expressly exempts the annual inflation adjustments from the notice and comment requirements of the Administrative Procedure Act. In addition, the 2015 Act does not give the BLM any discretion to vary the amount of the annual inflation adjustment for any given penalty to reflect any views or suggestions provided by commenters. Accordingly, the BLM will not provide an opportunity for public comment on this rule.

B. Regulatory Planning and Review (Executive Orders 12866, 14094 and 13563)

Executive Order (E.O.) 12866, as amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the OMB will review all significant rules. OIRA has determined that this rule is not significant. (See OMB Memorandum M-24-07 at 3).

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability and to reduce uncertainty and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O.

13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science, and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner that is consistent with these requirements to the extent permitted by the 2015 Act.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency to prepare a regulatory flexibility analysis for all rules unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency is required to first publish a proposed rule. See 5 U.S.C. 603(a) and 604(a). The 2015 Act expressly exempts these annual inflation adjustments from the requirement to publish a proposed rule for notice and comment (see sec. 4(b)(2), 2015 Act). Because the final rule in this case does not include publication of a proposed rule, the RFA does not apply to this final rule.

D. Congressional Review Act

This rule is not a major rule under the Congressional Review Act. This rule:

- (a) Will not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or

local government agencies, or geographic regions; and

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

E. Unfunded Mandates Reform Act

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

F. Takings (E.O. 12630)

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

G. Federalism (E.O. 13132)

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

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

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

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and

ambiguity and be written to minimize litigation; and

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

I. Consultation With Indian Tribes (E.O. 13175 and Departmental Policy)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 and have determined that it has no substantial direct effects on federally recognized Indian Tribes and that consultation under the Department's Tribal consultation policy is not required.

J. Paperwork Reduction Act

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

K. National Environmental Policy Act (NEPA)

This rule does not constitute a major federal action because of the non-discretionary nature of the civil penalty adjustment as required by law (see 40 CFR 1508.1(q)(1)(ii)). The Department of Labor's Consumer Price Index sets the amount of the annual civil penalty adjustment to account for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. Accordingly, BLM has no discretion in the execution of the civil penalty adjustments. Even if this were a discretionary action, which it is not, a detailed statement under NEPA would also not be required because, as a regulation of an administrative nature, this rule would otherwise be covered by a categorical exclusion. See 43 CFR 46.210(i). BLM has determined that the rule does not implicate any of the extraordinary circumstances listed in 43 CFR 46.215 that would prevent reliance on the categorical exclusion. Because this rule is not a major federal action, it is therefore not subject to the requirements of NEPA.

L. Effects on the Energy Supply (E.O. 13211)

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

List of Subjects

43 CFR Part 3160

Administrative practice and procedure; Government contracts; Indians—lands; Mineral royalties; Oil and gas exploration; Penalties; Public lands—mineral resources; Reporting and recordkeeping requirements.

43 CFR Part 9230

Penalties, Public lands.

For the reasons given in the preamble, the BLM amends Chapter II of Title 43 of the Code of Federal Regulations as follows:

PART 3160—ONSHORE OIL AND GAS OPERATIONS

■ 1. The authority citation for part 3160 continues to read as follows:

Authority: 25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359, and 1751; 43 U.S.C. 1732(b), 1733, 1740; and Sec. 107, Pub. L. 114–74, 129 Stat. 599, unless otherwise noted.

Subpart 3163—Noncompliance, Assessments, and Penalties

§ 3163.2 [Amended]

■ 2. In § 3163.2:

■ a. In paragraphs (b)(1) and (d), remove “\$1,291” and add in its place “\$1,333”.

■ b. In paragraph (b)(2), remove “\$12,924” and add in its place “\$13,343”.

■ c. In paragraph (e) introductory text, remove “\$25,847” and add in its place “\$26,685”.

■ d. In paragraph (f) introductory text, remove “\$64,618” and add in its place “\$66,712”.

PART 9230—TRESPASS

■ 3. The authority citation for part 9230 continues to read as follows:

Authority: R.S. 2478; 43 U.S.C. 1201.

Subpart 9239—Kinds of Trespass

§ 9239.5–3 [Amended]

■ 4. In § 9239.5–3(f)(1), remove “\$4,838” and add in its place “\$4,995”.

This action by the Principal Deputy Assistant Secretary is taken pursuant to an existing delegation of authority.

Steven H. Feldgus,

Principal Deputy Assistant Secretary, Land and Minerals Management.

[FR Doc. 2024–03842 Filed 2–23–24; 8:45 am]

BILLING CODE 4331–29–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 372

[Docket No. FMCSA–2023–0007]

RIN 2126–AC57

Exemption From Operating Authority Regulations for Providers of Recreational Activities

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FMCSA amends its regulations to implement the statutory exemption from its operating authority registration requirements for providers of recreational activities. The exemption applies to motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the beginning of the trip. FMCSA also defines *recreational activities* to clarify the exemption, adopting, in response to a comment, a definition modified from that proposed in the notice of proposed rulemaking (NPRM).

DATES: This final rule is effective April 26, 2024.

Petitions for Reconsideration of this final rule must be submitted to the FMCSA Administrator no later than March 27, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Antonio Harris, Registration, Licensing and Insurance Division, Office of Research and Registration, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; (202) 366–2964; antonio.harris@dot.gov. If you have questions on viewing or submitting material to the docket, call Dockets Operations at (202) 366–9826.

SUPPLEMENTARY INFORMATION: FMCSA organizes this final rule as follows:

- I. Availability of Rulemaking Documents
- II. Executive Summary
 - A. Purpose and Summary of the Regulatory Action
 - B. Costs and Benefits
- III. Abbreviations
- IV. Legal Basis
- V. Discussion of Proposed Rulemaking and Comments
 - A. Proposed Rulemaking
 - B. Comments and Responses
- VI. Changes From the NPRM
- VII. Severability
- VIII. Section-by-Section Analysis
- IX. Regulatory Analyses
 - A. E.O. 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), E.O. 14094 (Modernizing Regulatory Review), and DOT Regulatory Policies and Procedures
 - B. Congressional Review Act
 - C. Regulatory Flexibility Act
 - D. Assistance for Small Entities
 - E. Unfunded Mandates Reform Act of 1995
 - F. Paperwork Reduction Act
 - G. E.O. 13132 (Federalism)
 - H. Privacy
 - I. E.O. 13175 (Indian Tribal Governments)
 - J. National Environmental Policy Act of 1969

I. Availability of Rulemaking Documents

To view any documents mentioned as being available in the docket, go to <https://www.regulations.gov/docket/FMCSA-2023-0007/document> and choose the document to review. To view comments, click this final rule, then click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations at U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

II. Executive Summary

A. Purpose and Summary of the Regulatory Action

Section 23012 of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58, 135 Stat. 429 (H.R. 3684, Nov. 15, 2021)) amended 49 United States Code (U.S.C.) 13506 by adding, in paragraph (b)(4), a new exemption from FMCSA’s operating authority registration requirements. FMCSA adds new regulatory text implementing this statutory exemption. The exemption from operating authority registration applies to motor carriers operating a motor vehicle designed or used to

transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person¹ that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip.

FMCSA also defines *recreational activities* to clarify the exemption. The statute, which requires that the motor vehicle be operated “by a person that provides recreational activities,” does not define *recreational activities*. The Agency’s definition clarifies the types of recreational activities FMCSA has determined would qualify for the exemption in 49 U.S.C. 13506(b)(4). FMCSA adopts a definition of *recreational activities* consistent with the activities that Congress outlined in another section of the IIJA that uses this term. Section 11512 of the IIJA provided examples of “groups representing recreational activities and interests” in subsection (c)(4) which provided some insight as to legislative intent for the term *recreational activities* in section 23012. The definition FMCSA adopts in implementing section 23012 includes activities Congress mentions in section 11512 and also describes activities that fall outside the intended scope of the term. This language is intended to illustrate which activities are within the exemption, based on the intent of Congress, and to allow sufficient flexibility for analysis of the term’s applicability to activities not specified in the regulation.

B. Costs and Benefits

The cost savings associated with this rulemaking include changes in paperwork, fees, and insurance costs associated with maintaining for-hire operating authority. Because there is no pre-existing definition of *recreational activities*, motor carriers previously may have been interpreting their eligibility for the operating authority exemption in varying ways. Through this rulemaking, there will be increased costs for motor carriers that inappropriately interpreted their eligibility for the exemption, and decreased costs for those carriers that now have clear regulatory language to support use of the exemption. The differing interpretations by regulated entities and enforcement officials may have hindered consistent enforcement practices, thereby impacting business-

¹ While the statute refers to a “person,” that term can refer both to an individual or to a motor carrier under the definitions of that term in 49 U.S.C. 13102(18) and 1 U.S.C. 1.

related decisions in providing transportation for recreational activities. The clarification in this rule may resolve possible information asymmetry and enforcement differences by creating a common understanding between FMCSA and motor carriers. Because this rule may also lead to an increase in exemption use, it will benefit carriers by improving the efficiency of their business operations and increase both consumer and producer surplus.

III. Abbreviations

AOA America Outdoors Association
 AWM AWM Associates, LLC
 BEA Bureau of Economic Analysis
 BLS Bureau of Labor Statistics
 CE Categorical Exclusion
 CFR Code of Federal Regulations
 DOL U.S. Department of Labor
 DOT Department of Transportation
 E.O. Executive Order
 FMCSA Federal Motor Carrier Safety Administration
 FMCSRs Federal Motor Carrier Safety Regulations
 FR Federal Register
 FRFA Final Regulatory Flexibility Analysis
 GDP Gross Domestic Product
 ICR Information Collection Request
 IRFA Initial Regulatory Flexibility Analysis
 IIJA Infrastructure Investment and Jobs Act
 MCMIS Motor Carrier Management Information System
 NAICS North American Industry Classification System
 NAMIC National Association of Mutual Insurance Companies
 NPRM Notice of Proposed Rulemaking
 OEWS Occupational Employment and Wage Statistics
 OMB Office of Management and Budget
 PIA Privacy Impact Assessment
 PTA Privacy Threshold Assessment
 RIA Regulatory Impact Analysis
 Secretary The Secretary of the Department of Transportation
 SBA Small Business Administration
 UMRA Unfunded Mandates Reform Act of 1995
 URS Unified Registration System
 U.S.C. United States Code
 USDOT United States Department of Transportation
 Vehicle Associations Motorcycle Industry Council, Specialty Vehicle Institute of America, and Recreational Off-Highway Vehicle Association

IV. Legal Basis

Section 23012 of the IIJA amended 49 U.S.C. 13506 by adding a new exemption from the requirement to obtain operating authority registration for “providers of recreational activities” operating passenger vehicles designed or used to transport between 9 and 15 passengers (including the driver) (see 49 U.S.C. 13506(b)(4)). The statute, which requires that the motor vehicle be operated “by a person that provides recreational activities,” does not define

recreational activities. This final rule defines *recreational activities* to clarify the exemption's applicability.

Under Title 49, Code of Federal Regulations (CFR) 1.87(a)(5), the authority of the Secretary of the Department of Transportation (the Secretary) to carry out the functions relating to the registration requirements in 49 U.S.C. 13901 and 13902 is delegated to the FMCSA Administrator. Sections 13901 and 13902 generally require that any person wishing to provide transportation subject to jurisdiction under subchapter I of chapter 135² must be registered as a *motor carrier*, defined in 49 U.S.C. 13102(14) as “a person providing motor vehicle transportation for compensation.” The requirements of these sections, which are enforced under § 392.9a (“Operating authority”), are the basis for the rules governing applications for operating authority registration in 49 CFR part 365.

Under 49 CFR 1.87(a)(3), the authority of the Secretary to carry out the functions related to the jurisdiction requirements in 49 U.S.C. 13506 is delegated to the FMCSA Administrator. Section 13506 provides miscellaneous motor carrier transportation exemptions, including the exemption from operating authority for providers of recreational activities added by the IJA. The statutory exemption provided in section 13506 provides the basis for the regulatory exemption added under this rule in 49 CFR 372.113, including the definition of recreational activities added to 49 CFR 372.107.

V. Discussion of Proposed Rulemaking and Comments

A. Proposed Rulemaking

On June 21, 2023, FMCSA published in the **Federal Register** (Docket No. FMCSA–2023–0007, 88 FR 40146) an NPRM titled “Exemption from Operating Authority Regulations for Providers of Recreational Activities.” The NPRM proposed a new § 372.113 that outlines the exemption from operating authority registration for providers of recreational activities in 49 U.S.C. 13506(b)(4). This new section would reflect the statutory language and incorporate the exemption into the FMCSRs. The NPRM also proposed adding a definition of *recreational activities* to § 372.107 which would

provide a clear description of the types of activities that qualify for the exemption in 49 U.S.C. 13506(b)(4). The proposed definition set out the meaning of *recreational activities*, provided a non-exhaustive list of included activities, and identified two types of excluded activities. The NPRM asked for comments addressing whether the last part of the definition, excluding certain types of activities, should be retained or removed.

B. Comments and Responses

FMCSA solicited comments concerning the NPRM for 60 days ending August 21, 2023, and by that date four comments were received. AWM Associates, LLC (AWM), the National Association of Mutual Insurance Companies (NAMIC), and a private citizen each submitted a comment, and a joint comment was submitted by the Motorcycle Industry Council, Specialty Vehicle Institute of America, and Recreational Off-Highway Vehicle Association (the “Vehicle Associations”).

FMCSA did not receive any comments regarding the portion of the *recreational activities* definition that excludes certain types of activities. The exclusions are provided to clarify that certain activities are exempt activities where the service provided by the motor carriers mainly focuses on transportation from one location to another. In such cases, the motor carrier's business is in fact selling transportation—not providing recreational activities. FMCSA has received inquiries illustrative of these types of activities. For example, a bus company offering scheduled route service with multiple stops would not fall within the exemption merely because one of the scheduled stops was at or near a water park or a horseback riding stable. Likewise, motor carriers that advertise and provide alcohol, music, or other “party” activities on board the vehicle as the principal activity or purpose of the transportation would not be eligible for the exemption. In these situations, the activity cannot be completed and has no purpose without the transportation. The transportation in such circumstances is integral to the activities, rather than incidental. Accordingly, the definition in § 372.107 explicitly excludes any activity: (1) for which the activity offered or sold is occurring simultaneously with the transportation; or (2) for which the transportation is the primary service offered for sale.

AWM

Comment: AWM objected to the creation of an exemption from the operating authority registration rules for providers of recreational activities and questioned whether the cost of compliance for providers of recreational activities under the current regulations is burdensome. Going beyond the exemption at issue, AWM stated that the FMCSRs are unclear regarding which motor carriers are required to apply for operating authority under part 365. AWM also questioned whether the providers of recreational activities would be required to obtain operating authority under part 365.

Response: The exemption being added to § 372.113 simply reflects the statutory language in 49 U.S.C. 13506(b)(4) that is currently in effect and incorporates the statutory exemption from operating authority registration into the FMCSRs for convenient reference. FMCSA is not determining through this rulemaking whether there should be an exemption from the operating authority registration rules for providers of recreational activities; that decision was made by Congress when it passed the IJA which created a statutory exemption. FMCSA's role in this rulemaking is to define the term *recreational activities* and consider the regulatory and economic impacts of clarifying the definition. The Agency considers the objection to the creation of the exemption outside the scope of the rule and declines to make any changes to the rule based on it.

AWM's comment questions whether the cost of obtaining and maintaining operating authority is burdensome, and it critiques portions of the comment from the America Outdoors Association (AOA) relating to this issue. The AOA comment, which relates to operating authority for recreational activity providers, predates both the IJA and this rule, and AOA submitted it in response to a DOT notice requesting that the public identify and provide input on the Department's existing guidance documents that are good candidates for repeal, replacement, or modification.³ The Agency added AOA's comment to the docket for this rulemaking and cited it in the NPRM in support of its proposed definition of the term *recreational activities*. However, the Agency did not rely on AOA's comment in the regulatory impact analysis (RIA). The Agency's analysis accounts for the impact of the statutory exemption, which was enacted after AOA's

² Absent an exemption, the Secretary has jurisdiction over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier in interstate commerce (49 U.S.C. 13501). This authority has been delegated to the FMCSA Administrator under 49 CFR 1.87(a)(3).

³ AOA's comment was submitted in response to DOT's Notice of Review of Guidance, 84 FR 1820, Feb. 5, 2019.

comment was submitted to FMCSA. The Agency's RIA considers the impact of codifying and clarifying the statutory exemption currently in effect, whereas AWM's comment is directed towards AOA's comments on cost and the impact of establishing the exemption as an initial matter. Therefore, the Agency considers this portion of AWM's comment outside the scope of the rule and declines to make any changes to the rule based on it.

Regarding the applicability of operating authority requirements in part 365, 49 U.S.C. 13901 and 13902 generally require that any person that wishes to provide transportation subject to jurisdiction under subchapter I of chapter 135 be registered as a *motor carrier*, defined in 49 U.S.C. 13102(14) as "a person providing motor vehicle transportation for compensation." The requirements of these sections, which are enforced under § 392.9a ("Operating authority"), are the basis for the rules governing applications for operating authority registration in 49 CFR part 365. Part 365 states that the rules governing applications for operating authority apply to motor carriers of property or passengers.⁴ Congress established the operating authority registration exemption for providers of recreational activities carrying 9 to 15 passengers when it passed the IIJA. This rulemaking seeks only to clarify the statutory exemption by defining the term *recreational activities*. This rulemaking does not make any changes to the operating authority provisions in 49 CFR part 365. The Agency considers this portion of AWM's comment outside the scope of the rule and declines to change the rule based on it.

The Vehicle Associations

Comment: The Vehicle Associations generally supported the proposed exemption but proposed a modification to the definition of *recreational activities*. They proposed modifying the definition to state that *recreational activities* means motorized and non-motorized activities, and to add off-highway vehicle driving and riding to the list of activities expressly included. The Vehicle Associations stated that this modification is supported by the inclusion of off-highway motorcycling, all-terrain vehicles, and other off-road motorized vehicle activities in section 11512 of the IIJA, which is the IIJA section the Agency cited in the NPRM in support of the proposed definition.

The Vehicle Associations also stated that the modified definition would be consistent with recreation-related terms defined elsewhere in Federal statute, as well as lists of recreational activities provided as examples by Federal land management agencies.

Response: The Agency adopts the Vehicle Associations' proposed modification in part. The Agency agrees that adding "off-highway vehicle driving and riding" to the non-exhaustive list of covered activities will help clarify the exemption. As the Vehicle Associations note, inclusion of these activities is supported by the list of recreational activities in section 11512 of the IIJA. Although that section appears in a separate division and title of the IIJA from the motor carrier safety provisions in Division B, Title III, and does not conclusively define the scope of the exemption in section 23012, it does provide some insight into the legislative intent, as explained in the NPRM. The Agency adopts the addition of "off-highway vehicle driving and riding" to align with that intent. The Agency considers the other part of the proposed modification, the addition of the phrase "motorized and non-motorized," unnecessary and declines to adopt it.

NAMIC

Comment: NAMIC raised a concern that "expanding eligibility for an exemption from federal requirements for insurance coverage . . . could create confusion for policyholders and may not be administratively possible for insurers." NAMIC raised a further concern that differing State and Federal requirements for insurance coverage risk confusion and underinsurance among motor carriers. NAMIC suggested further investigation into the availability of "coverage on a monthly basis and for which coverage can be stopped and started at reasonable notice periods," and whether "states will permit similar staggering of insurance coverage for such vehicles."

Response: As explained in response to AWM's comment, this rule codifies and clarifies in the CFR an existing statutory exemption from operating authority requirements. Although operating authority is linked to insurance through financial responsibility requirements, this rule does not create or expand any exemption to Federal insurance requirements more broadly because motor carriers eligible for the operating authority exemption may still be required to maintain financial responsibility under other regulations in the FMCSRs (see, e.g., 49 CFR 387.31(a)). The Agency declines to make

any changes to the final rule based on NAMIC's concern regarding expansion of an exemption from Federal insurance requirements.

Regarding potential confusion with State insurance requirements, the Agency believes this rule will alleviate confusion. The rule provides a definition for *recreational activities*, consistent with the Agency's understanding of congressional intent when establishing the exemption, to create a common understanding among motor carriers and enforcement officials about the exemption. The rule should clarify the Federal requirements and has no impact on the applicable State requirements. The Agency disagrees that the rule increases the risk of confusion as compared to the statutory exemption in 49 U.S.C. 13506(b)(4) standing alone, and it declines to make any changes to the exemption based on NAMIC's comment. State insurance requirements are relevant to two scenarios in the RIA, because a seasonal motor carrier eligible for the exemption may still have to carry insurance in the off-season to satisfy State requirements, depending on its particular circumstances. The Agency has added a statement in the RIA to clarify that cost impacts will vary depending on State insurance coverage requirements.

Whether certain insurance policies are available to motor carriers providing recreational activities eligible for the operating authority exemption, where such policies offer cost savings to the motor carriers due to the exemption, is a separate concern from the applicability of the exemption. Changing the extent of the exemption is outside the Agency's authority, and the Agency declines to make any changes to the exemption based on this portion of NAMIC's comment but does consider it in relation to the RIA for the rule.

In the NPRM, the Agency's RIA included an estimate of potential insurance cost savings, among other potential cost savings, for eligible motor carriers.⁵ The Agency requested comments on its estimates of liability insurance costs and the administrative costs of researching liability insurance or other financial responsibility options,

⁵ Whether a motor carrier eligible for the operating authority exemption in this rule sees an impact to their insurance costs as a result of this rule depends on a number of factors: (1) whether the motor carrier operates year-round, (2) whether they operate only seasonally, but maintain year-round insurance coverage to satisfy other Federal or State requirements, or (3) whether they are already using the statutory operating authority exemption. Although the exemption in this rule will not impact the insurance costs for all carriers, they may realize other benefits such as administrative cost savings, as described elsewhere in the rule.

⁴ Further explanation of the regulations applicable to passenger motor carriers is provided in Appendix A to Part 390—Applicability of the Registration, Financial Responsibility, and Safety Regulations to Motor Carriers of Passengers.

but the Agency did not receive any comments on this issue. NAMIC suggested further research into the availability of monthly insurance coverage options for exemption-eligible motor carriers, but otherwise the Agency did not receive any data or other information regarding its insurance cost estimates.

Based on the information gathered and the Agency's experience administering the relevant regulations, FMCSA believes it is possible for a motor carrier providing recreational activities on a seasonal basis to carry an insurance policy during its operating season, terminate the policy at the end of the season, and obtain a new policy at the beginning of its next operating season.⁶ The NPRM RIA used the forgone insurance premiums in the offseason as an estimate of insurance cost savings for motor carriers in this scenario. The Agency maintains that this method provides a reasonable estimate of the potential insurance cost savings, even though the actual insurance cost savings realized by motor carriers in this scenario may differ depending on their specific insurer, policy, location, and other particular circumstances. The Agency has added a statement in the RIA to clarify that cost impacts will vary depending on State insurance coverage requirements and has removed quantified estimates of insurance cost savings. For further assumptions made on insurance coverage, refer to the section labeled "Insurance" in the RIA.

Comments Outside the Scope of the Rulemaking

Comment: A private citizen objected to the creation of an exemption from the operating authority registration rules for providers of recreational activities.

Response: As explained in response to AWM's comment, the exemption that is being added to § 372.113 reflects the statutory language in 49 U.S.C. 13506(b)(4) and incorporates the statutory exemption into the FMCSRs. FMCSA is not determining through this rulemaking whether there should be an exemption from the operating authority registration rules for providers of recreational activities. The Agency considers this comment outside the scope of the rule and declines to make any changes to the rule based on it.

⁶For example, Progressive offers policyholders the option to adjust coverage based on seasonal changes (Progressive Commercial Auto Insurance, available at <https://www.progressivecommercial.com/commercial-auto-insurance/> (accessed Sept. 20, 2023)).

VI. Changes From the NPRM

In response to a comment, FMCSA is changing the definition of *recreational activities* in this final rule from that proposed in the NPRM. The Agency is modifying the definition of *recreational activities* in § 372.107 to include off-highway vehicle driving and riding in the non-exhaustive list of activities provided as examples within the definition. The Agency is also making a grammatical change to the last sentence of the definition to give the numbered clauses parallel structure.

VII. Severability

Congress created an exemption from FMCSA's operating authority registration rules for "providers of recreational activities." (49 U.S.C. 13506(b)(4)). This final rule adds new regulatory text implementing this statutory exemption and defines the term *recreational activities*. This final rule is meant to operate holistically in addressing a range of issues necessary to ensure the implementation of the exemption. However, FMCSA recognizes that certain provisions focus on unique topics. Therefore, FMCSA finds that the various provisions within this rule are severable and able to operate functionally if one or more provisions were rendered null or otherwise eliminated. The remaining provision or provisions within the rule will continue to operate functionally if any one or more provisions were invalidated and any other provision(s) remained. In the event a court were to invalidate one or more of this final rule's unique provisions, the remaining provisions should stand, thus allowing this congressionally mandated exemption to continue to operate.

VIII. Section-by-Section Analysis

This section-by-section analysis describes the proposed changes in numerical order.

Section 372.107 Definitions

As proposed in the NPRM, FMCSA adds a new paragraph (i), which defines *recreational activities*.

Section 372.113 Providers of Recreational Activities

As proposed in the NPRM, FMCSA adds a new § 372.113 to subpart A of 49 CFR 372. This new section outlines the exemption from operating authority registration in 49 U.S.C. 13506(b)(4).

IX. Regulatory Analyses

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), E.O. 14094 (Modernizing Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA has considered the impact of this final rule under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and E.O. 14094 (88 FR 21879, Apr. 11, 2023), Modernizing Regulatory Review. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) determined that this final rule is not a significant regulatory action under section 3(f) of E.O. 12866, as supplemented by E.O. 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. Accordingly, OMB has not reviewed it under that E.O.

Purpose

This final rule codifies the exemption for providers of recreational activities in regulation and defines *recreational activities* to clarify this exemption by providing a clear description of what types of recreational activities do and do not qualify for the exemption in 49 U.S.C. 13506(b)(4). This ensures that providers of recreational activities are aware of their eligibility for the exemption from filing for operating authority that FMCSA is adding in new § 372.113. Specifically, this rule affects motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip.

This rule provides clarity to both motor carriers and enforcement officials regarding which carriers qualify for the new exemption in section 23012 of the IJJA as of November 15, 2021. Because Congress did not define *recreational activities* and there is no pre-existing definition of *recreational activities* in statute or regulation, FMCSA is bringing the FMCSRs into alignment with the IJJA's exemption by adding a new definition of that term. This clarity resolves possible information asymmetry currently affecting the regulated industry and enforcement

officials as to which carriers qualify for the operating authority exemption.

Baseline

For the purposes of this analysis, the changes in this rule are compared to the baseline established by section 23012 of the IJA and the current requirements for providers of recreational activities under 49 U.S.C. 13901 and 13902 and 49 CFR part 365. As discussed above, the IJA created a new exemption from the requirement to obtain FMCSA operating authority registration for providers of recreational activities. Accordingly, this exemption has been available to these motor carriers since the IJA was enacted on November 15, 2021. Therefore, the incremental impacts of this rule relative to the baseline lie in how the affected industry and enforcement officials have been interpreting the term in the absence of a definition in the FMCSRs.

Uncertainties

The Agency relies on the Motor Carrier Management Information System (MCMIS) database to obtain information on commercial motor carriers subject to the FMCSRs. While MCMIS does contain data on passenger vehicle size (e.g., weight and capacity) and type, it does not track industry type, nor whether an operating authority exemption is applicable. Consequently, the Agency knows neither the

magnitude of the population affected by this rule, nor the degree to which passenger carriers are currently taking advantage of the exemption. Therefore, FMCSA estimates how different carriers will be impacted by costs and benefits on a per-unit basis, depending on their current behavior.

In the NPRM, the Agency invited the public to provide information to address uncertainty surrounding the size of the affected population and the frequency of exemption use. While FMCSA did not receive such information, a comment from AWM provided questions about whether an exemption from the current requirements for obtaining and maintaining operating authority was necessary. However, FMCSA is not determining through this rulemaking whether there should be an exemption from the operating authority registration rules for providers of recreational activities. This decision was made by Congress when it passed the IJA in 2021, which created a statutory exemption. FMCSA's role in this rulemaking is only to define the term *recreational activities* and consider the impacts of clarifying the exemption. The Agency will therefore not revise the rule in response to comments outside of that scope.

Carrier Cost Components

The resulting cost impacts of the definitional clarification in this rule

include changes in paperwork, fees, and insurance costs associated with maintaining operating authority. Because there is no pre-existing definition of recreational activities, motor carriers may be interpreting their eligibility for the operating authority exemption in varying ways. Depending on current interpretations, this rule will either increase, decrease, or have no incremental impact on the degree to which the operating authority exemptions are used relative to the baseline. Because FMCSA is unable to ascertain how various carriers interpreted this exemption set forth by section 23012 of the IJA in 2021, the Agency estimates the impacts of this rule based on four hypothetical scenarios of exemption use. These four scenarios make use of the forms and insurance cost analyses set forth below, in advance of the scenarios.

Forms

Currently, there are several forms that providers of recreational activities are responsible for submitting to FMCSA in order to maintain operating authority registration. As detailed later in this analysis, the use of these forms, as explained in Table 1, may change as a result of this rule, depending on how the affected carriers are interpreting this exemption.

TABLE 1—FORMS CURRENTLY USED IN MAINTAINING OPERATING AUTHORITY

Form	Affected groups
Motor Carrier Automobile Bodily Injury and Property Damage Liability Certificate of Insurance (BMC-91 or BMC-91X)	Carriers that must provide proof of liability insurance meeting the minimum levels of financial responsibility.
Motor Carrier Records Change (MCSA-5889)	Carriers reinstating operating authority.
Request for Revocation of Authority Granted (OCE-46)	Carriers voluntarily revoking operating authority.
Application for Motor Passenger Carrier Authority (OP-1(P))	Carriers with an existing USDOT number wishing to expand to an operation requiring operating authority.

Tables 2 and 3 display the paperwork burden of these forms to private entities and to the Government, respectively. These estimates are based on the Information Collection Request (ICR)

supporting statements associated with each form. For example, Table 2 shows that Forms BMC-91 and BMC-91X are estimated to take 10 minutes to complete by an insurance claims and

policy processing clerk at a wage rate⁷ of \$39.36, leading to a paperwork burden of \$7 (10 minutes × \$39.36 = \$7).^{8,9}

TABLE 2—PAPERWORK COSTS TO PRIVATE SECTOR
[2022\$]

Paperwork	Wage	Hours to submit form	Cost per form	Filing fee	Total cost
Forms BMC-91 or BMC-91X by insurance claims processor	\$39.36	0.17	\$7		\$7
Form MCSA-5889 by office clerk	31.99	0.25	8	\$80	88

⁷ DOL, BLS. Occupational Employment and Wage Statistics (OEWS). National. May 2022. 43-9041 Insurance Claims and Policy Processing Clerks. Available at <https://www.bls.gov/oes/current/oes439041.htm> (accessed Sept. 1, 2023).

⁸ This estimate is based on the calculations used in the ICR titled, "Financial Responsibility Motor Carriers, Freight Forwarders and Brokers," covered by OMB Control Number 2126-0017.

⁹ The supporting statement for the "Financial Responsibility Motor Carriers, Freight Forwarders and Brokers" ICR estimates Government costs for Forms BMC-91 and BMC-91X at \$0, as they are filed electronically.

TABLE 2—PAPERWORK COSTS TO PRIVATE SECTOR—Continued
[2022\$]

Paperwork	Wage	Hours to submit form	Cost per form	Filing fee	Total cost
Form OCE-46 by office clerk	31.99	0.25	8	.....	8
Form OP-1(P) by office clerk	31.99	2	64	300	364

Estimates may not total due to rounding.

TABLE 3—PAPERWORK COSTS TO GOVERNMENT
[2023\$]

Paperwork	GS-9, Step 5 wage	Hours to process form	Cost per form
Form MCSA-5889	\$73.71	0.25	\$18
Form OCE-46	73.71	0.25	18
Form OP-1(P)	73.71	6.5	479

Estimates may not total due to rounding.

FMCSA computes its estimates of labor costs using data gathered from several sources. Labor costs comprise wages, fringe benefits, and overhead. Fringe benefits include paid leave, bonuses and overtime pay, health and other types of insurance, retirement plans, and legally required benefits (Social Security, Medicare, unemployment insurance, and workers compensation insurance). Overhead includes any expenses to a firm associated with labor that are not part of employees' compensation; this typically includes many types of fixed costs of managing a body of employees, such as management and human resource staff salaries or payroll services. The economic costs of labor to a firm should include the costs of all forms of compensation and labor-related expenses. For this analysis, costs of labor to a firm have been calculated relative to total compensation (base wages, plus fringe benefits, plus overhead).

The primary source for industry wages is the median hourly wage data (May 2022) from the U.S. Department of Labor (DOL), Bureau of Labor Statistics (BLS), Occupational Employment and Wage Statistics (OEWS).¹⁰

BLS does not publish data on fringe benefits for specific occupations, but it does for the broad industry groups in its Employer Costs for Employee Compensation release. For office clerk employees, this analysis uses an average hourly wage of \$28.89 and average hourly benefits of \$14.85 for private industry workers in "transportation and

warehousing"¹¹ to estimate that fringe benefits are equal to 51.4 percent (\$14.85 ÷ \$28.89) of wages. For insurance claims processors, this RIA uses an average hourly wage of \$37.31 and average hourly benefits of \$18.92 for private industry workers in "financial activities"¹² to estimate that fringe benefits are equal to 50.7 percent (\$18.92 ÷ \$37.31) of wages.

For estimating the overhead rates on wages, the Agency used industry data gathered for the Truck Costing Model developed by the Upper Great Plains Transportation Institute, North Dakota State University as a proxy for the overhead cost of employees in the transportation intermediary and surety and trustee industries.¹³ Research conducted for this model found an average cost of \$0.107 per mile of commercial motor vehicle operation for management and overhead, and \$0.39 per mile for labor, indicating an overhead rate of 27 percent (27 percent = \$0.107 ÷ \$0.39, rounded to the nearest whole percent).

It is assumed that FMCSA reviewers will be Federal government employees located in the Washington, DC region at the GS-9 Step 5 wage rate.¹⁴ OPM does

not publish annual rates that include fringe benefits or overhead. OMB does publish an object class analysis of the budget of the U.S. Government. The Object Class Analysis estimates that, in 2021, DOT spent \$6,351 million in employee compensation and \$2,840 million in employee benefits. FMCSA estimates a fringe benefit rate of 45 percent (\$2,840 ÷ \$6,351) for FMCSA personnel. FMCSA uses the DOT Volpe Center overhead rate of 64 percent for Federal personnel.¹⁵ The Volpe Center is a Federal fee-for-service research and innovation center in the DOT. Unlike most Federal agencies, Volpe receives no direct appropriation from Congress and must cover direct and indirect expenses through agreements with project sponsors.^{16 17} These indirect costs are recovered through the overhead rate charged on direct labor costs. Volpe employees are compensated according to the Federal locality pay tables used for all Federal employees and their labor costs include the same employee benefits. Therefore, FMCSA believes that the overhead rate for Volpe personnel is similar to the rate for all DOT personnel.

¹¹ DOL, BLS. *Table 4: Employer costs for Employee Compensation for private industry workers by occupation and industry group, Dec 2022*. Available at: https://www.bls.gov/news.release/archives/ecec_03172023.htm (accessed Sept. 1, 2023).

¹² *Ibid.*

¹³ Berwick, Farooq. *Truck Costing Model for Transportation Managers*. North Dakota State University. Upper Great Plains Transportation Institute. August 2003. Appendix A, pp. 42–47. Available at: <https://www.ugpti.org/resources/reports/downloads/mpc03-152.pdf> (accessed Jan. 5, 2024).

¹⁴ OPM Pay & Leave Salaries & Wages. Salary Table 2023–DCB, Hourly Basic (B) Rates by Grade and Step. Available at <https://www.opm.gov/policy->

[data-oversight/pay-leave/salaries-wages/salary-tables/23Tables/html/DCB_h.aspx](https://www.volpe.dot.gov/work-with-us/volpe-project-costs) (accessed Sept. 5, 2023).

¹⁵ DOT, Volpe Center. *Volpe Project Costs*. Available at: <https://www.volpe.dot.gov/work-with-us/volpe-project-costs> (accessed Jan. 4, 2024).

¹⁶ DOT, Volpe Center. *How to Initiate Work*. Available at: <https://www.volpe.dot.gov/work-with-us/how-initiate-work> (accessed Jan. 4, 2024).

¹⁷ DOT, Volpe Center. *Volpe Project Costs*. Available at: <https://www.volpe.dot.gov/work-with-us/volpe-project-costs> (accessed Jan. 4, 2024).

¹⁰ DOL, BLS. *Occupational Employment and Wage Statistics (OEWS)*. National. May 2022. Available at: https://www.bls.gov/oes/current/oes_nat.htm (accessed Sept. 1, 2023).

Insurance

In addition to submitting forms to FMCSA, providers of recreational activities wishing to maintain a valid operating authority registration must

also have proof of liability insurance filed with FMCSA. The Agency estimates that such liability insurance currently costs entities an average of \$190 per month for one vehicle, or \$2,280 per year ($\$190 \times 12 = \$2,280$).¹⁸

Using a range of fleet sizes for illustrative purposes, Table 4 presents the estimated costs currently associated with maintaining liability insurance by fleet size.

TABLE 4—CURRENT INSURANCE ESTIMATES BY FLEET SIZE
[2022\$]

Number of vehicles in fleet	Monthly premium	Yearly premium
1	\$190	\$2,280
5	950	11,400
10	1,900	22,800

Exemption Use Scenarios for Analyzing Carrier Costs

The following four scenarios build on the forms and insurance cost analyses detailed above and examine how the impact of this rule on carrier costs may vary under different exemption use conditions. The scenarios are an increase in exemption use by carriers, a decrease in exemption use by carriers, no change in exemption use, and exemption use by new carriers entering the industry.

Scenario One: Increase in Exemption Use

Scenario One includes providers of recreational activities that have been eligible for the operating authority exemption established by section 23012 of the IIJA in 2021 but are not utilizing it due to the definitional ambiguity of *recreational activities*. If there are such carriers, after publication of this final rule they will understand they are classified as providers of recreational activities and are, therefore, eligible for this exemption. This would lead to an incremental increase in the number of operational authority exemptions being used relative to the baseline. As explained in detail below, these carriers will be impacted in different ways by the following costs and cost savings: financial responsibility compliance costs, operating authority registration fees, and paperwork costs.

Carriers under Scenario One that are currently maintaining their operating authority registration year-round would experience cost savings associated with maintaining financial responsibility. In the NPRM, the Agency invited the public to provide additional information

on the scenarios presented in the RIA, and the estimated insurance premiums. While no data were provided on these estimates, NAMIC suggested that the Agency further research the availability of insurance policies that provide coverage on a monthly basis, and whether States would permit similar staggering of required insurance coverage.

As detailed above in section V.B. Comments and Responses, based on the information gathered and the Agency's experience administering the relevant regulations, FMCSA believes it is possible for a motor carrier providing recreational activities on a seasonal basis to carry an insurance policy during its operating season, terminate the policy at the end of the season, and obtain a new policy at the beginning of its next operating season.¹⁹ The Agency declines to make any modifications to this analysis based on this comment.

Regarding the second part of NAMIC's comment, the Agency concurs that the degree of insurance cost savings is dependent on several factors, including other Federal or State insurance requirements. FMCSA amends this RIA by removing quantified estimates of insurance cost savings and acknowledging the varying impacts State insurance requirements will have on the degree of cost savings.

As described above, FMCSA estimates average monthly insurance premiums of \$190 per vehicle. The Agency maintains that certain motor carriers will experience insurance cost savings; however, the quantified amount of those savings may be offset by the need to satisfy other Federal or State insurance requirements. Motor carriers that do not have to meet other Federal or State

insurance requirements would save on insurance costs during months they are not in operation.

There may also be cost savings as a result of avoided insurance-related administrative requirements. Currently, carriers must choose an insurance plan or other acceptable form of financial responsibility, and have proof filed with FMCSA whenever they apply for or reinstate operating authority. The Agency estimates that it takes carriers 8 hours to research and identify which insurance company, financial surety, or bond provider they will use. Assuming this task is performed by an office clerk, this activity is estimated to cost each carrier \$256 ($\$31.99 \times 8 \text{ hours} = \$256$).²⁰

As displayed in Table 2, carriers under Scenario One were also required to ensure that their financial responsibility provider submit Forms BMC-91 or BMC-91X to FMCSA at a cost of \$7 per form. These administrative requirements for insurance were no longer required after the enactment of the IIJA in 2021; therefore, the definitional clarification in this rule may lead to cost savings of \$256 to the carrier and \$7 to the insurance company.

Some carriers under Scenario One were filing Form OCE-46 to voluntarily revoke their operating authority registrations during the off-season months so that they did not need to maintain insurance at FMCSA's minimum prescribed levels during those months. To resume operations, the providers were then required to submit Form MCSA-5889 to reinstate their operating authority registrations during the months when they were operating. As displayed in Tables 2 and 3, it is estimated to cost \$8 to submit Form

¹⁸ Insuranks Online Insurance Comparison Marketplace. <https://www.insuranks.com/commercial-van-insurance> (accessed Sept. 12, 2023). These estimates are quoted from 12 different insurance companies, including Geico, Progressive, State Farm, and others. The monthly quotes were summed and then divided by 12 to obtain an

estimated monthly average for the industry: ($\$115 + \$120 + \$130 + \$183 + \$165 + \$180 + \$195 + \$210 + \$221 + \$232 + \$254 + \$270$) $\div 12 = \$190$.

¹⁹ For example, Progressive offers policyholders the option to adjust coverage based on seasonal changes (Progressive Commercial Auto Insurance, available at <https://www.progressivecommercial.com/commercial-auto-insurance/> (accessed Sept. 20, 2023)).

²⁰ DOL, BLS. Occupational Employment and Wage Statistics (OEWS). National. May 2022. 43–4071 Office Clerks, General. Available at: <https://www.bls.gov/oes/current/oes434071.htm> (accessed Sept. 9, 2023).

MCSA–5889, plus a fee of \$80 to carriers, and \$18 in costs to FMCSA.²¹ Form OCE–46 is also estimated to cost \$8 per carrier and \$18 for FMCSA processing time.²² As a result of this rule, if there are carriers under this scenario, they would no longer be subject to the costs associated with submitting Form MCSA–5889 or Form OCE–46.

Scenario Two: Decrease in Exemption Use

It is also possible that this rule will limit the use of this exemption for certain carriers. Because neither FMCSA nor Congress provided a definition of *recreational activities*, there may be carriers that incorrectly believed they are providers of recreational activities, but upon issuance of this rule, would realize they are not. These carriers may currently be incorrectly utilizing this exemption and revoking their operating authority when they were not eligible to do so. Therefore, if such carriers exist, they may incur a cost of \$88 to submit Form MCSA–5889 as a result of this rulemaking for reinstatement of their operating authority (Table 2). They would also need to resume paying for financial responsibility in order to maintain valid operating authority. Illustrative examples of possible insurance-related costs are displayed in Tables 4 and 5.

Scenario Three: No Incremental Change in Exemption Use

There may also be eligible carriers that correctly interpreted Congress' intent and have been utilizing the exemption correctly since the IJA's enactment. These carriers are not expected to be impacted by this rule relative to the baseline. They have already gone through the steps of voluntarily revoking their operating authority with FMCSA, are maintaining financial responsibility only while in operation, and are not paying fees or completing paperwork associated with maintaining operating authority.

Scenario Four: New Providers

This rule may also affect eligible providers considering engaging in providing recreational activities in the future. If there are new carriers considering entering this field that were

not aware of the IJA exemption, they would no longer need to account for the following costs as a result of this rule: year-round financial responsibility premiums required by FMCSA, financial responsibility-related administrative costs, and operating authority fees and paperwork.

Prior to the enactment of the IJA, new providers of recreational activities had to submit the "Application for Motor Passenger Carrier Authority" (Form OP–1(P)).²³ The Agency estimates that this form costs \$64 with a \$300 fee for carriers, and \$479 in Government costs (Tables 2 and 3, respectively).²⁴ Additionally, as described in the *Financial Responsibility under Scenario One* section, the avoided insurance-related administrative costs would be \$7 for insurance companies and \$256 for carriers. An illustrative example of potential avoided insurance premium costs is presented in Table 5.

Government Costs

In addition to the cost to carriers analyzed in the four scenarios above, this rule may have government costs. The changes implemented by this rule will not require additional training for enforcement personnel. The Agency expects that the definitional clarification set forth in this rule will be communicated to FMCSA personnel and the Agency's State-based enforcement partners through existing means, such as policy updates and ongoing training. The Agency will be impacted by the costs and cost savings associated with this rule, as outlined in Table 3 (\$479 for Form OP–1(P), \$18 for Form OCE–46 and Form MCSA–5889).

Benefits

The affected entities are providers of recreational activities that typically consist of physically demanding outdoor experiences or excursions that do not have transportation as an integral part of the activity itself. Overall, the outdoor recreation economy accounted for 1.9 percent (\$454 billion) of current-dollar gross domestic product (GDP) for the nation in 2021.²⁵ Hawaii, Montana, Vermont, Alaska, and Maine are among

the States where outdoor recreation as a percent of that States' GDP ranks the highest. For example, in 2021, outdoor recreation accounted for \$4.4 billion of Hawaii's \$91.1 billion overall GDP, or 4.8 percent—the highest proportion of any State. In terms of actual levels, the States that produced the highest outdoor recreation GDP in 2021 were California (\$54.7 billion), Florida (\$41.9 billion), and Texas (\$37.5 billion).

Differences in interpretation between regulated entities and enforcement officials may be hindering consistent enforcement practices, thereby impacting business-related decisions in providing transportation for recreational activities. This rule may resolve this information asymmetry by creating a common understanding between FMCSA and motor carriers. Because this rule may also lead to an increase in exemption use, it will benefit carriers by improving the efficiency of their business operations and therefore increase both consumer and producer surplus.

B. Congressional Review Act

This rule is not a *major rule* as defined under the Congressional Review Act (5 U.S.C. 801–808).²⁶

C. Regulatory Flexibility Act (Small Entities)

The Regulatory Flexibility Act of 1980, Public Law 96–354, 94 Stat. 1164 (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857, March 29, 1996) and the Small Business Jobs Act of 2010 (Pub. L. 111–240, 124 Stat. 2504, September 27, 2010), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term *small entities* comprises small businesses and 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. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that

²¹ This estimate is based on the calculations used in the ICR titled, "Motor Carrier Records Change Form" (Form MCSA–5889), covered by OMB Control Number 2126–0060. The cost of a paper submission is \$7 and the cost of an electronic submission is \$0.

²² This estimate is based on the calculations used in the ICR titled "Request for Revocation of Authority Granted," covered by OMB Control Number 2126–0018.

²³ Applicants that have never held a USDOT number or any other registration issued by FMCSA must file the URS online application (Form MCSA–1) to obtain a USDOT number and register for operating authority.

²⁴ This estimate is based on calculations used in the ICR titled "Licensing Applications for Motor Carrier Operating Authority," covered by OMB Control Number 2126–0016.

²⁵ DOL, Bureau of Economic Analysis (BEA). BEA Data, Special Topics, Outdoor Recreation Satellite Account, U.S. and States, 2021. Current release Nov. 9, 2022. Available at <https://www.bea.gov/data/special-topics/outdoor-recreation> (accessed Sept 13, 2023).

²⁶ A *major rule* means any rule that OMB finds has resulted in or is likely to result in (a) an annual effect on the economy of \$100 million or more; (b) a major increase in costs or prices for consumers, individual industries, geographic regions, Federal, State, or local government agencies; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (5 U.S.C. 802(4)).

agencies strive to lessen any adverse effects on these businesses.

FMCSA has not determined whether this final rule will have a significant economic impact on a substantial number of small entities. Therefore, FMCSA prepared an initial regulatory flexibility analysis (IRFA) for the NPRM and a final regulatory flexibility analysis (FRFA) for the final rule.

A FRFA must contain the following:

1. A statement of the need for, and objectives of, the rule.
2. A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.
3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.
4. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.
5. A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.
6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.
7. Description of steps taken by a covered agency to minimize costs of credit for small entities.

1. A statement of the need for, and objectives of, the rule.

Section 23012 of the IIJA amended 49 U.S.C. 13506 by adding a new exemption in paragraph (b)(4) from the operating authority registration requirements. FMCSA is adding a new regulatory section incorporating that statutory exemption and also including a definition for the exempt operations. The exemption from operating authority registration applies to motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver) whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the

motor vehicle at the outset of the trip. The new statutory exemption did not include a definition of recreational activities, creating some ambiguity in the exemption's applicability. The Agency is codifying the exemption in regulation and removing ambiguity by defining *recreational activities*.

2. A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

The public comments raised no significant issues in response to the IRFA. The Agency received four comments from AWM, NAMIC, the Vehicle Associations, and a private citizen.

In response to the Vehicle Associations' comment, the Agency is modifying the definition of *recreational activities* in § 372.107 to include off-highway vehicle driving and riding in the non-exhaustive list of activities provided as examples within the definition. As detailed in section V. Discussion of Proposed Rulemaking and Comments of this final rule, the Vehicle Associations proposed modifying *recreational activities* to include motorized and non-motorized activities, such as off-highway vehicle driving and riding. The Agency adopts the Vehicle Associations' proposed modification in part.

As detailed in paragraph 4 of this FRFA, FMCSA provided a wide range of North American Industry Classification System (NAICS) codes of the recreational activities industry in the IRFA, in order to capture all of the potential sectors that providers of recreational activities may operate under. The addition of "off-highway vehicle driving and riding" to the list of examples is intended for additional clarification and will not expand the list of affected NAICS codes that were estimated in the IRFA, as presented in Table 6.

As described in section IX.A Regulatory Analyses, the Agency's preliminary RIA included quantified estimates of potential insurance cost savings, among other potential cost savings, for eligible motor carriers and the Agency invited the public to provide additional information on these estimates. While no data were provided as to the estimated premiums, NAMIC suggested that the Agency further research the availability of insurance policies that provide coverage on a monthly basis. The Agency maintains that certain motor carriers may save on insurance costs as a result of this rule,

depending on their particular circumstances as detailed in section IX.A, but the Agency removes the quantified estimates of that savings from the RIA.

The Agency concurs that the degree of insurance cost savings is dependent on several factors, including other Federal or State insurance requirements. Therefore, FMCSA amends this RIA by removing quantified estimates of insurance cost savings and acknowledging the varying impacts State insurance requirements will have on the degree of cost savings. The quantified amount of those savings may be offset by the need to satisfy other Federal or State insurance requirements. Motor carriers that do not have to meet other Federal or State insurance requirements would save on insurance costs during months they are not in operation.

The remaining comments from AWM and the private citizen did not relate to the clarification of the recreational activities exemption. AWM questioned the magnitude of the burden associated with obtaining and maintaining operating authority, and the private citizen raised concerns about effects on public land usage. As detailed in section V. Discussion of Proposed Rulemaking and Comments, FMCSA is not determining through this rulemaking whether there should be an exemption from the operating authority registration rules for providers of recreational activities. This decision was made by Congress when it passed the IIJA in 2021, which created a statutory exemption. FMCSA's scope in this rulemaking is only to define the term *recreational activities* and consider the impacts of providing that definition to clarify the exemption. The Agency considers the objections to the creation of the exemption outside the scope of the rule and declines to make any changes to the rule based on them.

3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

The Chief Counsel for Advocacy of the SBA filed no comments to the proposed rule. Thus, FMCSA has nothing to respond to from the Chief Counsel for Advocacy of the SBA.

4. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

Small entity is defined in 5 U.S.C. 601. Section 601(3) defines a *small entity* as having the same meaning as

small business concern under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated and is not dominant in its field of operation. Section 601(4), likewise includes within the definition of *small entities* not-for-profit enterprises that are independently owned and operated and are not dominant in their fields of operation. Additionally, section 601(5) defines *small entities* as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

This final rule affects motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver) whether operated alone or with a trailer attached to the transport vehicle, if the

motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip. Providers of recreational activities affected by this rule operate under many different NAICS²⁷ codes with differing size standards. The SBA has released updated small entity size standards since the publication of the IRFA. The new size standards became effective March 17, 2023.²⁸ FMCSA has updated the estimates and size standards in this FRFA where needed.

In the IRFA for the proposed rule, FMCSA provided a wide range of NAICS codes in the recreational activities industry, in order to capture all of the potential NAICS codes that

providers of recreational activities may operate under. In doing so, FMCSA highlighted many entities that perform various other functions beyond transporting passengers to and from recreational activities. The Agency also requested public comment on the NAICS codes analyzed in the IRFA but did not receive any such comments. Therefore, the Agency assumes the NAICS codes analyzed in the IRFA are representative of the composition of the affected industries and is retaining those codes for the purposes of this FRFA.

As shown in Table 6 below, the SBA size standards for providers of recreational activities range from \$9 million in revenue per year for the All Other Amusement Recreation Industries NAICS national industry, to \$47 million in revenue per year for Racetracks.

TABLE 6—SBA SIZE STANDARDS FOR SELECTED INDUSTRIES
[in millions of 2023\$]

NAICS code	NAICS industry description	SBA size standard in millions
Subsector 487—Scenic and Sightseeing Transportation		
487110	Scenic and Sightseeing Transportation, Land	\$20.5
487210	Scenic and Sightseeing Transportation, Water	14.0
487990	Scenic and Sightseeing Transportation, Other	25.0
Subsector 561—Administrative and Support Services		
561520	Tour Operators	25.0
Subsector 711—Performing Arts, Spectator Sports, and Related Industries		
711212	Racetracks	47.0
711219	Other Spectator Sports	16.5
Subsector 713—Amusement, Gambling, and Recreation Industries		
713910	Golf Courses and Country Clubs	19.0
713920	Skiing Facilities	35.0
713940	Fitness and Recreational Sports Centers	17.5
713990	All Other Amusement Recreation Industries	9.0

FMCSA examined data from the 2017 Economic Census, the most recent Census for which data were available, to determine the percentage of firms that have revenue at or below SBA's thresholds within each of the NAICS industries.²⁹ Boundaries for the revenue categories used in the Economic Census do not precisely coincide with the SBA thresholds. Instead, the SBA threshold generally falls between two different revenue categories. However, FMCSA was able to make reasonable estimates

as to the percent of small entities within each NAICS code.

The Agency estimates that many entities affected by this rule fall under the Scenic and Sightseeing Transportation NAICS subsector (487). Firms in this subsector utilize transportation equipment to provide recreation and entertainment. These operations are distinct from passenger transportation carried out for other types of for-hire transportation. The recreational activities involved are local

in nature, usually involving a same-day return to the point of departure.³⁰ Industry groups under this subsector include Scenic and Sightseeing Transportation, Land (4871), Scenic and Sightseeing Transportation, Water (4872), and Scenic and Sightseeing Transportation, Other (4879).

The Scenic and Sightseeing Transportation, Land NAICS national industry (487110) has a revenue size standard of \$20.5 million, which falls between two Economic Census revenue

²⁷ More information about NAICS is available at <http://www.census.gov/naics> (accessed Sept. 13, 2023).

²⁸ SBA Table of Small Business Size Standards Matched to NAICS effective Mar. 17, 2023, located at <https://www.sba.gov/sites/sbagov/files/2023-06/>

[Table%20of%20Size%20Standards_Effective%20March%202017%2C%202023%20%28%29.pdf](https://data.census.gov/cedsci/table?q=Table%20of%20Size%20Standards_Effective%20March%202017%2C%202023%20%28%29.pdf) (accessed Sept. 13, 2023).

²⁹ U.S. Census Bureau. 2017 Economic Census. Available at <https://data.census.gov/cedsci/table?q=EC1700&n=48-49&tid=ECNSIZE2017>.

[EC1700SIZEREVEST&hidePreview=true](https://www.census.gov/naics/EC1700SIZEREVEST&hidePreview=true) (accessed Sept. 13, 2023).

³⁰ U.S. Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=48&year=2022&details=487> (accessed Sept. 13, 2023).

categories, \$10 million and \$25 million. This industry comprises firms engaged in various outdoor excursions, including horse-drawn sightseeing rides. The percentages of Scenic and Sightseeing Transportation, Land with revenue less than these amounts ranged from 97 percent to 98 percent. Because the SBA threshold is closer to the higher of these two boundaries, FMCSA has assumed that the percent of Scenic and Sightseeing Transportation, Land entities that are small will be closer to 98 percent and is using that figure.

For Scenic and Sightseeing Transportation, Water (487210), the \$14 million SBA threshold falls between two Economic Census revenue categories, \$10 million and \$25 million. Entities in this national industry are primarily engaged in providing scenic and sightseeing transportation on water, such as fishing boat charter operation. The percentages of Scenic and Sightseeing Transportation, Water with revenue less than these amounts ranged from 97 percent to 99 percent. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of these entities that are small will be closer to 97 percent and is using that figure.

Scenic and Sightseeing Transportation, Other (487990) focuses on all other scenic and sightseeing transportation, such as hot air balloon rides and glider excursions. The SBA size standard for this national industry is \$25 million. The \$25 million SBA threshold falls between two Economic Census revenue categories, \$10 million and \$25 million. The percentages of these entities with revenue less than these amounts were 93 percent and 98 percent. Because the SBA threshold coincides with the higher of these two boundaries, FMCSA has assumed that the percent of these providers that are small will be closer to 98 percent and is using that figure.

Firms falling under the Travel Arrangement and Reservation Services industry group (5615) may also be impacted by this NPRM. This industry group comprises the Travel Agencies (561510), Tour Operators (561520), and Convention and Visitors Bureaus (561591) national industries.³¹ The Agency assumes that providers of recreational activities fall under the Tour Operators national industry.

Tour Operators (561520) focuses on arranging and assembling tours, including travel or wholesale tour

operators. The SBA size standard for this national industry is \$25 million, which falls between two Economic Census revenue categories, \$25 million and \$100 million. The percentages of Tour Operators with revenue less than these amounts were 92 percent and 100 percent. The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than \$100,000, which would be considered small, are suppressed by the Economic Census to avoid disclosing for individual companies. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that all such firms fall under the \$25 million SBA threshold and would be considered small. The low-end estimate assumes the suppressed firms are not small. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Tour Operators that is small will be closer to 92 percent and is using that figure.

The Agency estimates that many providers of recreational activities affected by this NPRM would also fall under the Arts, Entertainment, and Recreation sector (71). This sector includes a wide range of firms operating facilities that meet varied cultural, entertainment, and recreational interests of patrons.³² Subsectors under this group include Performing Arts, Spectator Sports, and Related Industries (711), Amusement, Gambling, and Recreational Industries (713), and others.

The industry groups under the Spectator Sports and Related Industries (711) subsector cover Spectator Sports (7112). Spectator Sports includes the Racetracks (711212) and Other Spectator Sports (711219) national industries.

Racetracks (711212) focuses on firms operating racetracks without casinos, such as auto, motorcycle, snowmobile, and horse races. The SBA size standard for this national industry is \$47 million. The \$47 million SBA threshold falls between two Economic Census revenue categories, \$25 million and \$100 million. The percentages of these entities with revenue less than these amounts were 83 percent and 100 percent.³³ Because the SBA threshold is

closer to the lower of these two boundaries, FMCSA has assumed that the percent of Racetracks entities that are small will be closer to 83 percent and is using that figure.

Other Spectator Sports (711219) focuses on independent athletes, owners of racing participants (such as cars, dogs, and horses), and firms engaged in specialized services in support of said participants. The SBA size standard for this national industry is \$16.5 million, which falls between two Economic Census revenue categories, \$10 million and \$25 million. The percentages of these entities with revenue less than these amounts were 82 percent and 100 percent.³⁴ Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Other Spectator Sports entities that are small will be closer to 82 percent and is using that figure.

The industry groups under the Amusement, Gambling, and Recreation Industries (713) subsector include Amusement Parks and Arcades (7131), Gambling Industries (7132), and Other Amusement and Recreation Industries (7139).³⁵ The Agency estimates the entities affected by this NPRM would fall into the third industry group, Other Amusement and Recreation Industries (7139). This group, as detailed below, covers firms operating golf courses and country clubs, skiing facilities, and all other amusement and recreation activities.³⁶

Entities falling under Golf Courses and Country Clubs (713910) primarily engage in operating such facilities, and providing food and beverage services, equipment rental, or golf instruction. The SBA size standard for this national industry is \$19 million, which falls between two Economic Census revenue categories, \$10 million and \$25 million. The percentages of Golf Courses and

avoid disclosing for individual companies. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that all such firms fall under the \$47 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

³⁴ The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than \$100,000, which would be considered small, are suppressed by the Economic Census. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that all such firms fall under the \$16.5 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

³⁵ US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=71&year=2022&details=713> (accessed Sept. 5, 2023).

³⁶ US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=71&year=2022&details=7139> (accessed Sept. 5, 2023).

³¹ US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=56&year=2022&details=5615> (accessed Sept. 14, 2023).

³² US Census Bureau 2022 NAICS Definition. Available at <https://www.census.gov/naics/?input=71&year=2022&details=71> (accessed Sept. 5, 2023).

³³ The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than \$100,000, which would be considered small, are suppressed by the Economic Census to

Country Clubs with revenue less than these amounts were 95 percent and 99 percent. In the IRFA, FMCSA presented the estimated percent of small entities using a low-end estimate of 95 percent. However, the SBA size standard for this national industry increased from \$16.5 million in 2022 to \$19 million in 2023, making the new threshold closer to the higher of the revenue boundaries. Therefore, FMCSA has assumed that the percent of these entities that are small will be closer to 99 percent and is using that figure in the FRFA.

Skiing Facilities (713920) industries primarily operate downhill, cross country, or related skiing areas, and provide food and beverage services, equipment rental, and ski instruction. The SBA size standard for this national industry is \$35 million, which falls between two Economic Census revenue categories, \$25 million and \$100 million. The percentages of Skiing

Facilities with revenue less than these amounts were 93 percent and 98 percent.³⁷ Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of these facilities that are small will be closer to 93 percent and is using that figure.

The Agency estimates that the majority of entities affected by this Final Rule would fall under the All Other Amusement Recreation Industries (713990) national industry. This includes whitewater rafting, hunting, horseback riding stables, boating clubs, canoeing, archery and shooting ranges, hiking, and others. The SBA size standard for this national industry is \$9 million. The \$9 million SBA threshold falls between two Economic Census revenue categories, \$5 million and \$10 million. The percentages of these providers with revenue less than these amounts were 60 percent and 99.6

percent. The Agency estimates a wide range in estimates due to limitations in Economic Census data for this NAICS category. Specifically, of the 12,688 firms in this industry, 12,631 have revenue between \$100,000 and \$10 million. However, data on small entities with revenue under \$250,000 are suppressed. There are 7,490 small entities (59 percent) with revenue between \$250,000 and \$5 million, and 139 firms with revenue between \$5 million and \$10 million (1.1 percent). Of the 12,688 firms in All Other Amusement Recreation Industries, there are 5,002 firms without revenue data (39.4 percent). The high-end estimate assumes all such firms are small (99.6 percent) and FMCSA uses that figure.

Table 7 below shows the complete estimates of the number of small entities within the national industries affected by this rule.

TABLE 7—ESTIMATES OF NUMBERS OF SMALL ENTITIES

NAICS code	Description	Total number of firms	Number of small entities	Percent of all firms
487110	Scenic and Sightseeing Transportation, Land	520	512	98
487210	Scenic and Sightseeing Transportation, Water	1,129	1,097	97
487990	Scenic and Sightseeing Transportation, Other	169	165	98
561520	Tour Operators	2,175	1,991	92
711212	Racetracks	299	248	83
711219	Other Spectator Sports	1,916	1,577	82
713910	Golf Courses and Country Clubs	8,076	7,712	99
713920	Skiing Facilities	203	189	93
713990	All Other Amusement Recreation Industries	12,688	7,629	60

5. A description of the reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities subject to the requirements and the type of professional skills necessary for preparation of the report or record.

This rule will not result in new recordkeeping requirements.

6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

Given that the recreational activities exemption was statutorily mandated, FMCSA did not have an alternative or

discretion as to whether to adopt the exemption but did consider whether to clarify a definition of the term *recreational activities* or to remain silent. FMCSA also considered the alternative of adding a definition without including non-exhaustive examples. However, FMCSA believes that remaining silent or proposing a definition without such examples could result in confusion or inconsistent enforcement and that it is better to provide a definition with examples consistent with the legislative intent to minimize any significant economic impact on small entities.

7. Description of steps taken by a covered agency to minimize costs of credit for small entities.

FMCSA is not a covered agency as defined in section 609(d)(2) of the Regulatory Flexibility Act and has taken no steps to minimize the additional cost of credit for small entities.

D. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), FMCSA wants to assist small entities in understanding this final rule so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the final rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman (Office of the National Ombudsman, see

³⁷ The Agency presents a high-end estimate of 98 percent which includes assumptions about limitations in Economic Census data. Some revenue data for firms that would be considered small

(revenue categories of \$100,000 or more and \$250,000 to \$499,999) are suppressed by the Economic Census. Because the Agency is unable to ascertain the revenue for the suppressed firms, the

high-end estimate assumes that all such firms fall under the \$35 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

<https://www.sba.gov/about-sba/oversight-advocacy/office-national-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 FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) requires Federal agencies to assess the effects of their discretionary regulatory actions. 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 \$192 million (which is the value equivalent of \$100 million in 1995, adjusted for inflation to 2022 levels) or more in any 1 year. Though this final rule would not result in such an expenditure, and the analytical requirements of UMRA do not apply as a result, the Agency discusses the effects of this rule elsewhere in this preamble.

F. Paperwork Reduction Act

This final rule contains no new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

G. E.O. 13132 (Federalism)

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has “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.”

FMCSA has determined that this rule will not have substantial direct costs on or for States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

H. Privacy

The Consolidated Appropriations Act, 2005,³⁸ requires the Agency to assess the privacy impact of a regulation that will affect the privacy of individuals. This rule would not require the

collection of personally identifiable information (PII).

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency that receives records contained in a system of records from a Federal agency for use in a matching program.

The E-Government Act of 2002,³⁹ requires Federal agencies to conduct a PIA for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form. No new or substantially changed technology will collect, maintain, or disseminate information as a result of this rule. Accordingly, FMCSA has not conducted a PIA.

In addition, the Agency submitted a Privacy Threshold Assessment (PTA) to evaluate the risks and effects the proposed rulemaking might have on collecting, storing, and sharing personally identifiable information. The PTA was adjudicated by DOT's Chief Privacy Officer on December 15, 2023.

I. E.O. 13175 (Indian Tribal Governments)

This rule does not have Tribal implications under E.O. 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.

J. National Environmental Policy Act of 1969

FMCSA analyzed this rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680), Appendix 2, (6)(b). The categorical exclusion (CE) in paragraph (6)(b) covers regulations which are editorial or procedural, such as those updating addresses or establishing application procedures, and procedures for acting on petitions for waivers, exemptions and reconsiderations, including technical or other minor amendments to existing FMCSA regulations. The requirements in this rule are covered by this CE, there are no extraordinary circumstances present, and the action

does not have the potential to significantly affect the quality of the environment.

List of Subjects in 49 CFR Part 372

Agricultural commodities, Buses, Cooperatives, Freight forwarders, Motor carriers, Moving of household goods, Seafood.

Accordingly, FMCSA amends 49 CFR chapter III, part 372 as follows:

PART 372—EXEMPTIONS, COMMERCIAL ZONES, AND TERMINAL AREAS

■ 1. The authority citation for part 372 continues to read as follows:

Authority: 49 U.S.C. 13504 and 13506; Pub. L. 105–178, sec. 4031, 112 Stat. 418; and 49 CFR 1.87.

■ 2. Amend § 372.107 by adding paragraph (i) to read as follows:

§ 372.107 Definitions.

* * * * *

(i) *Recreational activities.* The term “recreational activities” means activities consisting of an outdoor experience or excursion typically of a physical or athletic nature which require transportation for the sole purpose of moving customers to another location or locations where the outdoor experience or excursion will take place and collecting those customers to transport them back to the place of initial boarding or another outpost of the motor carrier. Recreational activities include but are not limited to hiking, biking, horseback riding, canoeing, whitewater rafting, water trails, tubing, skiing, snowshoeing, snowmobiling, hunting, fishing, mountain climbing, swimming, and off-highway vehicle driving and riding. The term does not include any activity:

(1) for which the activity offered or sold is occurring simultaneously with the transportation; or

(2) for which the transportation is the primary service offered for sale.

■ 3. Add § 372.113 to read as follows:

§ 372.113 Providers of recreational activities.

Transportation by a motor vehicle designed or used to transport not fewer than 9, and not more than 15, passengers (including the driver), whether operated alone or with a trailer attached for the transport of recreational equipment, is exempted from regulation promulgated pursuant to Part B of Title 49 U.S.C. subtitle IV if:

(a) the motor vehicle is operated by a person that provides recreational activities;

³⁸ Public Law 108–447, 118 Stat. 2809, 3268, note following 5 U.S.C. 552a (Dec. 4, 2014).

³⁹ Public Law 107–347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002).

(b) the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip; and

(c) in the case of a motor vehicle transporting passengers over a route

between a place in a State and a place in another State, the person operating the motor vehicle is lawfully providing transportation of passengers over the entire route in accordance with applicable State law.

Issued under authority delegated in 49 CFR 1.87.

Sue Lawless,
Acting Deputy Administrator.

[FR Doc. 2024–03782 Filed 2–23–24; 8:45 am]

BILLING CODE 4910–EX–P

Proposed Rules

Federal Register

Vol. 89, No. 38

Monday, February 26, 2024

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 ENERGY

10 CFR Parts 433 and 435

[EERE–2010–BT–STD–0031]

RIN 1904–AB96

Clean Energy for New Federal Buildings and Major Renovations of Federal Buildings; Correction

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Supplemental notice of proposed rulemaking; correction.

SUMMARY: On December 21, 2022, the U.S. Department of Energy (“DOE”) published a supplemental notice of proposed rulemaking that proposed energy performance standards for certain new Federal buildings and Federal buildings undergoing major renovations. This document corrects errors in the proposed regulatory text published with the supplemental notice of proposed rulemaking. These errors do not affect the substance of the rulemaking or any conclusions reached in support of the proposed rule.

DATES: Effective February 26, 2024.

FOR FURTHER INFORMATION CONTACT:

Mr. Rick Mears, U.S. Department of Energy, Office of the Under Secretary for Infrastructure, Federal Energy Management Program, FEMP–1, 1000 Independence Avenue SW, Washington, DC 20585–0121. Email: cer-information@hq.doe.gov.

Ms. Laura Zuber, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (240) 306–7651. Email: laura.zuber@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2022, DOE published a supplemental notice of proposed rulemaking (2022 SNOPR) that proposed energy performance standards for certain new Federal

buildings and Federal buildings undergoing major renovations. The 2022 SNOPR proposed revisions to the energy performance standards at title 10 of the Code of Federal Regulations (“CFR”) parts 433 and 435. 87 FR 78382. Since publication of the 2022 SNOPR, DOE has identified printing errors in the regulatory text proposed by the 2022 SNOPR. DOE is issuing this correction to address certain errors in the 2022 SNOPR, specifically in 10 CFR 433.200 and 10 CFR 435.1. The corrections are described in the following paragraphs.

In the 2022 SNOPR, DOE proposed a compliance date of one year after the publication of the final rule. The proposed revisions to 10 CFR 433.1 reflect this proposed compliance date. However, the proposed revisions to 10 CFR 433.200(a) do not reflect this proposed compliance date. Instead, proposed 10 CFR 433.200(a) includes a compliance date of December 21, 2023, which was one year after the 2022 SNOPR was published in the **Federal Register**. Similarly, proposed 10 CFR 433.200(b) and 10 CFR 435.1 also reference a compliance date of December 21, 2023. 87 FR 78328, 78421 and 78430. These references to December 21, 2023, in proposed 10 CFR 433.200(a), 433.200(b), and 435.1 should have referenced a compliance date of “[Date one year after date of publication in the **Federal Register**].” This document corrects these printing errors and clarifies the intended proposed compliance dates.

II. Need for Correction

As published, the proposed regulatory text in the 2022 SNOPR may lead to confusion on the application of the energy performance standards proposed in the 2022 SNOPR. Because this document would simply correct printing errors in the proposed regulatory text without making substantive changes to energy performance standards proposed in the 2022 SNOPR, the changes addressed in this document are technical in nature.

III. Procedural Issues and Regulatory Review

DOE has concluded that the determinations made pursuant to the various procedural requirements applicable to the 2022 SNOPR remain unchanged for these technical corrections to the proposed regulatory text. These determinations are set forth

in the 2022 SNOPR. 87 FR 78328, 78412–78420.

Pursuant to the Administrative Procedure Act, 5 U.S.C. 553(b), DOE finds that there is good cause to not issue a separate notice to solicit public comment on the technical corrections contained in this document. Issuing a separate notice to solicit public comment would be impracticable, unnecessary, and contrary to the public interest. As explained previously, the corrections in this document do not affect the substance of or any of the conclusions reached in support of the 2022 SNOPR. Additionally, given the 2022 SNOPR is a product of an extensive administrative record with numerous opportunities for public comment, DOE finds additional comment on the technical corrections is unnecessary. Therefore, providing prior notice and an opportunity for public comment on correcting objective errors that do not change the substance of the proposed energy performance standards serve no useful purpose.

Correction

In the **Federal Register** of December 21, 2022 (87 FR 78382) in FR Doc. 2022–27098, the following corrections are made:

§ 433.200 [Amended]

■ 1. On page 78421, third column, in § 433.200, paragraphs (a)(1) and (b)(1), remove the words “December 21, 2023” and add in their place the words “[Date one year after date of publication in the **Federal Register**]”.

§ 435.1 [Amended]

■ 2. One page 78430, first column, in § 435.1 in paragraph (b), remove the words “December 21, 2023” and add, in their place the words “[Date one year after date of publication in the **Federal Register**]”.

Signing Authority

This document of the Department of Energy was signed on February 21, 2024, by Mary Sotos, the Director of the Federal Energy Management Program, 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 February 21, 2024.

Treena V. Garrett,

*Federal Register Liaison Officer, U.S.
Department of Energy.*

[FR Doc. 2024-03876 Filed 2-23-24; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2024-0269; Airspace
Docket No. 24-ASW-2]

RIN 2120-AA66

Amendment of Class D and Class E Airspace; Beaumont/Port Arthur, TX

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking
(NPRM).

SUMMARY: This action proposes to amend the Class D and Class E airspace at Beaumont/Port Arthur, TX. The FAA is proposing this action as the result of airspace reviews conducted as part of the decommissioning of the Beaumont very high frequency omnidirectional range (VOR) as part of the VOR Minimum Operational Network (MON) Program. This action would also update the name and geographic coordinates of various airports. This action will bring the airspace into compliance with FAA orders to support instrument flight rule (IFR) operations.

DATES: Comments must be received on or before April 11, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA-2024-0269 and Airspace Docket No. 24-ASW-2 using any of the following methods:

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

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

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12-140 of the West Building

Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

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

FAA Order JO 7400.11H, 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 Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222-5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the Class D airspace, Class E surface airspace, and Class E airspace extending upward from 700 feet above the surface at Jack Brooks Regional Airport, Beaumont/Port Arthur, TX, and the Class E airspace extending upward from 700 feet above the surface at Beaumont Municipal Airport, Beaumont, TX, and Orange County Airport, Orange, TX, (Contained within the Beaumont/Port Arthur, TX, airspace legal description.) to support IFR operations at these airports.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by

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

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

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

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Incorporation by Reference

Class D and E airspace is published in paragraphs 5000, 6002, and 6005 of

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

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

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 by:

Modifying the Class D airspace at Jack Brooks Regional Airport, Beaumont/Port Arthur, TX, by updating the name of the airport (previously Jefferson County Airport) to coincide with the FAA's aeronautical database; updating the header of the airspace legal description to Beaumont/Port Arthur, TX (previously Beaumont, TX) to coincide with the FAA's aeronautical database; removing the city associated with the airport in the airspace legal description to comply with changes to FAA Order JO 7400.2P, Procedures for Handling Airspace Matters; and replacing the outdated terms "Notice to Airmen" and "Airport/Facility Directory" with "Notice to Air Missions" and "Chart Supplement";

Modifying the Class E surface airspace at Jack Brooks Regional Airport by updating the name of the airport (previously Jefferson County Airport) to coincide with the FAA's aeronautical database; updating the header of the airspace legal description to Beaumont/Port Arthur, TX (previously Beaumont, TX) to coincide with the FAA's aeronautical database; removing the city associated with the airport in the airspace legal description to comply with changes to FAA Order JO 7400.2P; and replacing the outdated terms "Notice to Airmen" and "Airport/Facility Directory" with "Notice to Air Missions" and "Chart Supplement";

And modifying the Class E airspace extending upward from 700 feet above the surface to within a 7.5-mile (decreased from a 7.7-mile) radius of Jack Brooks Regional Airport; removing the extension northwest of Beaumont Municipal Airport, Beaumont, TX, from the airspace legal description as it is no longer needed; within a 6.5-mile (decreased from a 6.6-mile) radius of Orange County Airport, Orange, TX; updating the name of Jack Brooks Regional Airport (previously Southeast

Texas Regional Airport) to coincide with the FAA's aeronautical database; updating the geographic coordinates of Beaumont Municipal Airport and Orange County Airport to coincide with the FAA's aeronautical database; updating the header of the airspace legal description to Beaumont/Port Arthur, TX (previously Beaumont, TX) to coincide with the FAA's aeronautical database; and removing the cities associated with the airports in the airspace legal description to comply with changes to FAA Order JO 7400.2P.

This action is the result of airspace reviews conducted as part of the decommissioning of the Beaumont VOR as part of the VOR MON Program and supports instrument procedures at these airports.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 5000 Class D Airspace.

* * * * *

ASW TX D Beaumont/Port Arthur, TX [Amended]

Jack Brooks Regional Airport, TX
(Lat 29°57'03" N, long 94°01'15" W)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 5-mile radius of Jack Brooks Regional Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective dates and times will thereafter be continuously published in the Chart Supplement.

* * * * *

Paragraph 6002 Class E Airspace Areas Designated as Surface Areas.

* * * * *

ASW TX E2 Beaumont/Port Arthur, TX [Amended]

Jack Brooks Regional Airport, TX
(Lat 29°57'03" N, long 94°01'15" W)

Within a 5-mile radius of Jack Brooks Regional Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective dates and times will thereafter be continuously published in the Chart Supplement.

* * * * *

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

* * * * *

ASW TX E5 Beaumont/Port Arthur, TX [Amended]

Jack Brooks Regional Airport, TX
(Lat 29°57'03" N, long 94°01'15" W)
Beaumont Municipal Airport, TX
(Lat 30°04'13" N, long 94°12'54" W)
Orange County Airport, TX
(Lat 30°04'06" N, long 93°48'14" W)

That airspace extending upward from 700 feet above the surface within a 7.5-mile radius of Jack Brooks Regional Airport; and within a 6.4-mile radius of Beaumont Municipal Airport; and within a 6.5-mile radius of Orange County Airport.

* * * * *

Issued in Fort Worth, Texas, on February 21, 2024.

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

[FR Doc. 2024–03831 Filed 2–23–24; 8:45 am]

BILLING CODE 4910–13–P

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

[Docket No. FAA–2024–0270; Airspace
Docket No. 24–ASW–3]

RIN 2120–AA66

**Amendment of Class D and Class E
Airspace; Lake Charles, LA**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking
(NPRM).

SUMMARY: This action proposes to amend the Class D and Class E airspace at Lake Charles, LA. The FAA is proposing this action as the result of airspace reviews conducted as part of the decommissioning of the Beaumont very high frequency omnidirectional range (VOR) as part of the VOR Minimum Operational Network (MON) Program. This action would also update the geographic coordinates of various airports. This action will bring the airspace into compliance with FAA orders to support instrument flight rule (IFR) operations.

DATES: Comments must be received on or before April 11, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2024–0270 and Airspace Docket No. 24–ASW–3 using any of the following methods:
* *Federal eRulemaking Portal:* Go to www.regulations.gov and follow the online instruction for sending your comments electronically.

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

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

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

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

FAA Order JO 7400.11H, 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 Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend: the Class D airspace, Class E surface airspace, and Class E airspace extending upward from 700 feet above the surface at Lake Charles Regional Airport, Lake Charles, LA; the Class D airspace and Class E airspace extending upward from 700 feet above the surface at Chennault International Airport, Lake Charles, LA; and the Class E airspace extending upward from 700 feet above the surface at Southerland Field, Sulphur, LA, (Contained within the Lake Charles, LA, airspace legal description.) to support IFR operations at these airports.

Comments Invited

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

comments if comments are filed in writing.

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

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

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Incorporation by Reference

Class D and E airspace is published in paragraphs 5000, 6002, and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published subsequently in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 by:

Modifying the Class D airspace at Lake Charles Regional Airport, Lake Charles, LA, by removing the Lake Charles VORTAC and associated extension as they are no longer required; and replacing the outdated terms “Notice to Airmen” and “Airport/Facility Directory” with “Notice to Air Missions” and “Chart Supplement”;

Modifying the Class D airspace to within a 4.4-mile (decreased from a 4.5-mile) radius of Chennault International Airport, Lake Charles, LA; adding an extension within 1 mile each side of the 334° bearing from the airport extending from the 4.4-mile radius to 4.5 miles northwest of the airport; updating the header of the airspace legal description from “Lake Charles, Chennault International Airport, LA” to “Lake Charles, LA” to comply with changes to FAA Order JO 7400.2P, Procedures for Handling Airspace Matters; and removing the city associated with the airport to comply with changes to FAA Order JO 7400.2P; updating the geographic coordinates of the airport to coincide with the FAA’s aeronautical database; and replacing the outdated terms “Notice to Airmen” and “Airport/Facility Directory” with “Notice to Air Missions” and “Chart Supplement”;

Modifying the Class E surface airspace at Lake Charles Regional Airport by removing the Lake Charles VORTAC and associated extension as they are no longer required; and replacing the outdated terms “Notice to Airmen” and “Airport/Facility Directory” with “Notice to Air Missions” and “Chart Supplement”;

And modifying the Class E airspace extending upward from 700 feet above the surface to within a 6.9-mile (decreased from a 7-mile) radius of Chennault International Airport; removing the extension southeast of Chennault International Airport from the airspace legal description as it is no longer required; removing the Sulphur NDB and associated extension as they are no longer required; updating the geographic coordinates of Chennault International Airport to coincide with the FAA’s aeronautical database; and removing the cities associated with the airports in the airspace legal description to comply with changes to FAA Order JO 7400.2P.

This action is the result of airspace reviews conducted as part of the decommissioning of the Beaumont VOR

as part of the VOR MON Program and supports instrument procedures at these airports.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures” prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 5000 Class D Airspace.

* * * * *

ASW LA D Lake Charles, LA [Amended]

Lake Charles Regional Airport, LA

(Lat 30°07′34″ N, long 93°13′24″ W)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 5-mile radius of Lake Charles Regional Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective dates and times will thereafter be continuously published in the Chart Supplement.

ASW LA D Lake Charles, LA [Amended]

Chennault International Airport, LA

(Lat 30°12′38″ N, long. 93°08′35″ W)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 4.5-mile radius of Chennault International Airport, and within 1 mile each side of the 334° bearing from the airport extending from the 4.4-mile radius to 4.5 miles northwest of the airport, excluding that airspace within the Lake Charles Regional Airport, Lake Charles, LA, Class D airspace. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective dates and times will thereafter be continuously published in the Chart Supplement.

* * * * *

Paragraph 6002 Class E Airspace Areas Designated as Surface Areas.

* * * * *

ASW LA E2 Lake Charles, LA [Amended]

Lake Charles Regional Airport, LA

(Lat 30°07′34″ N, long 93°13′24″ W)

Within a 5-mile radius of Lake Charles Regional Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective dates and times will thereafter be continuously published in the Chart Supplement.

* * * * *

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

* * * * *

ASW LA E5 Lake Charles, LA [Amended]

Lake Charles Regional Airport, LA

(Lat 30°07′34″ N, long 93°13′24″ W)

Chennault International Airport, LA

(Lat 30°12′38″ N, long 93°08′36″ W)

Southland Field, LA

(Lat 30°07′53″ N, long 93°22′34″ W)

That airspace extending upward from 700 feet above the surface within a 7.5-mile radius of Lake Charles Regional Airport; and within a 6.9-mile radius of Chennault International Airport; and within a 6.5-mile radius of Southland Field.

* * * * *

Issued in Fort Worth, Texas, on February 21, 2024.

Martin A. Skinner,

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

[FR Doc. 2024–03832 Filed 2–23–24; 8:45 am]

BILLING CODE 4910–13–P

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

[Docket No. FAA–2023–1852; Airspace
Docket No. 23–AWP–50]

RIN 2120–AA66

**Modification of Class E Airspace;
Hollister Municipal Airport, Hollister,
CA**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking
(NPRM).

SUMMARY: This action proposes to amend the Class E airspace extending upward from 700 feet above the surface of Hollister Municipal Airport, Hollister, CA, due to the newly developed Area Navigation (RNAV) (Global Positioning System [GPS]) Runway (RWY) 13 approach. This action would support the safety and management of instrument flight rules (IFR) operations at the airport.

DATES: Comments must be received on or before April 11, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1852 and Airspace Docket No. 23–AWP–50 using any of the following methods:

* *Federal eRulemaking Portal:* Go to 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, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

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

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

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

FAA Order JO 7400.11H, 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 would modify Class E airspace to support IFR operations at Hollister Municipal Airport, Hollister, CA.

Comments Invited

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

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

this proposal in light of the comments it receives.

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

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

Incorporation by Reference

Class E5 airspace designations are published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 that would modify the Class E airspace extending upward from 700 feet above the surface at Hollister Municipal Airport, Hollister, CA.

The FAA is proposing to reduce the Class E airspace extending upward from 700 feet above the surface within 2 miles on either side of the 142° bearing from the airport extending from the 6.5-mile radius to 13.5 miles southeast of the airport to better contain arriving IFR

operations below 1,500 feet above the surface on the RNAV (GPS) RWY 31 approach.

In addition, the FAA is proposing to extend the Class E airspace extending upward from 700 feet above the surface northwest to include that airspace within 2 miles on either side of the airport's 322° bearing extending from the 6.5-mile radius to 9.6 miles northwest of the airport. This would contain arriving IFR operations below 1,500 feet above the surface while executing the RNAV (GPS) RWY 13 approach.

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, *Environmental Impacts: Policies and Procedures*, prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

- 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, 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.

* * * * *

AWP CA E5 Hollister, CA [Amended]

Hollister Municipal Airport, CA
(Lat. 36°53'36" N, long. 121°24'37" W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the airport, within 1.2 miles northeast and 1.1 miles southwest of the 142° bearing from the airport extending from the 6.5-mile radius to 8.2 miles southeast of the airport, and that airspace within 2 miles either side of the 322° bearing from the airport extending from the 6.5-mile radius to 9.6 miles northwest of the airport.

* * * * *

Issued in Des Moines, Washington, on February 20, 2024.

B.G. Chew,

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

[FR Doc. 2024–03815 Filed 2–23–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2024–0272; Airspace
Docket No. 24–AGL–3]

RIN 2120–AA66

Amendment of Class E Airspace; Greenville and Vandalia, IL

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking
(NPRM).

SUMMARY: This action proposes to amend the Class E airspace at Greenville, IL, and Vandalia, IL. The FAA is proposing this action as the result of airspace reviews conducted due to the decommissioning of the Vandalia very high frequency omnidirectional range (VOR) as part of the VOR Minimum Operating Network (MON) Program. The geographic coordinates of the airports would also be updated to coincide with the FAA's aeronautical database. This action will bring the airspace into compliance with FAA orders to support instrument flight rule (IFR) operations.

DATES: Comments must be received on or before April 11, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2024–0271 and Airspace Docket No. 24–AGL–3 using any of the following methods:

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

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

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

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

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

FAA Order JO 7400.11H, 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 Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the Class E airspace extending upward from 700 feet above the surface at Greenville Airport, Greenville, IL, and Vandalia Municipal Airport, Vandalia, IL, to support IFR operations at these airports.

Comments Invited

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

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

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

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address,

phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Incorporation by Reference

Class E airspace is published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published subsequently in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

The Proposal

The FAA is proposing to amend 14 CFR part 71 by:

Modifying the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (decreased from a 7-mile) radius of Greenville Airport, Greenville, IL; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database;

And modifying the Class E airspace extending upward from 700 feet above the surface at Vandalia Municipal Airport, Vandalia, IL, by updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

The FAA is proposing this action as the result of airspace reviews conducted due to the decommissioning of the Vandalia VOR as part of the VOR MON Program and to support IFR operations.

Regulatory Notices and Analyses

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

Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, 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.

* * * * *

AGL IL E5 Greenville, IL [Amended]

Greenville Airport, IL
(Lat 38°50'10" N, long 89°22'44" W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Greenville Airport.

* * * * *

AGL IL E5 Vandalia, IL [Amended]

Vandalia Municipal Airport, IL
(Lat 38°59'29" N, long 89°09'58" W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Vandalia Municipal Airport.

* * * * *

Issued in Fort Worth, Texas, on February 21, 2024.

Martin A. Skinner,

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

[FR Doc. 2024–03833 Filed 2–23–24; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1 and 23

RIN 3038–AF23

Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Extension of comment period.

SUMMARY: On December 18, 2023, the Commodity Futures Trading Commission (Commission) issued a notice of proposed rulemaking (NPRM) titled Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants. The comment period for the NPRM was to close on March 2, 2024. The Commission is extending the comment period for this NPRM by an additional 30 days to April 1, 2024.

DATES: The comment period for the NPRM titled Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants is extended through April 1, 2024.

ADDRESSES: You may submit comments, identified by RIN 3038–AF23, by any of the following methods:

- **CFTC Comments Portal:** <https://comments.cftc.gov>. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.

- **Mail:** Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

- **Hand Delivery/Courier:** Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an

English translation. Comments will be posted as received to <https://comments.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission’s regulations.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all of your submission from <https://comments.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

FOR FURTHER INFORMATION CONTACT:

Amanda L. Olear, Director, at 202–418–5283 or aolear@cftc.gov; Pamela Geraghty, Deputy Director, at 202–418–5634 or pgeraghty@cftc.gov; Fern Simmons, Associate Director, at 202–418–5901 or fsimmons@cftc.gov; Elise Bruntel, Special Counsel, at 202–418–5577 or ebruntel@cftc.gov; Market Participants Division, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION: On December 13, 2023, the Commission approved an NPRM proposing to require that futures commission merchants, swap dealers, and major swap participants establish, document, implement, and maintain an Operational Resilience Framework (ORF) reasonably designed to identify, monitor, manage, and assess risks relating to information and technology security, third-party relationships, and emergencies or other significant disruptions to normal business operations.² The framework would include three components—an information and technology security program, a third-party relationship

program, and a business continuity and disaster recovery plan—supported by broad requirements relating to governance, training, testing, and recordkeeping. The proposed rule would also require certain notifications to the Commission and customers or counterparties. The Commission further proposed guidance relating to the management of risks stemming from third-party relationships.

The ORF NPRM was published on the Commission’s website on December 18, 2023, making it available for public comment through March 2, 2024, for a total comment period of 75 days.³ In response to a request from commenters, the Commission is extending the comment period for the ORF NPRM by an additional 30 days to April 1, 2024, for a total comment period of 105 days.⁴ This extension of the comment period will allow interested persons additional time to analyze the proposal and prepare their comments.

Issued in Washington, DC, on February 21, 2024, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix to Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants—Commission Voting Summary

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, Mersinger, and Pham voted in the affirmative. No Commissioner voted in the negative.

[FR Doc. 2024–03826 Filed 2–23–24; 8:45 am]

BILLING CODE 6351–01–P

³ See “CFTC Approves Two Proposals and a DCO Application,” CFTC Rel. No. 8838–23 (Dec. 18, 2023), available at <https://www.cftc.gov/PressRoom/PressReleases/8838-23>. The ORF NPRM was subsequently published in the **Federal Register** on January 24, 2024. See Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants, 89 FR 4706 (Jan. 24, 2024).

⁴ See Letter from Kyle Brandon, Managing Director, Head of Derivatives at the Securities Industry and Financial Markets Association (SIFMA), on behalf of the Futures Industry Association (FIA), the Institute of International Bankers (IIB), the International Swaps and Derivatives Association (ISDA), and SIFMA (Jan. 24, 2024) (requesting a 30 day extension to the comment period), available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73231&SearchText>.

¹ 17 CFR 145.9.

² See “CFTC to Hold a Commission Open Meeting on December 13,” CFTC Rel. No. 8830–23 (Dec. 6, 2023) available at <https://www.cftc.gov/PressRoom/PressReleases/8830-23>.

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Parts 1 and 301**

[REG–131418–14]

RIN 1545–BN27

Reporting for Qualified Tuition and Related Expenses, Education Tax Credits; Comment Period Reopening

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking; reopening of comment period.

SUMMARY: The Department of the Treasury and the IRS are reopening the comment period for REG–131418–14, relating to the reporting requirements for qualified tuition and related expenses under Section 6050S, as well as to the proposed amendments to the regulations on the education tax credits under section 25A.

DATES: The comment period for REG–131418–14, 81 FR 50657 (August 2, 2016) is reopened, and additional written or electronic comments and requests for a public hearing must be received by April 26, 2024.

ADDRESSES: Commenters are strongly encouraged to submit additional public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG–131418–14) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (the “Treasury Department”) and the Internal Revenue Service (the “IRS”) will publish for public availability any comment submitted electronically, and on paper, to its public docket. Send paper submissions to: CC:PA:01:PR (REG–131418–14), Room 5203, Internal Revenue Service, P.O. 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning section 25A, Mon Lam or YoungNa Lee at (202) 317–4178; concerning section 6050S, Blaise Dusenberry at (202) 317–5405 (not toll-free numbers); Concerning submissions of comments, Vivian Hayes, (202) 317–6901 (not a toll-free number) or by email to publichearings@irs.gov (preferred).

SUPPLEMENTARY INFORMATION: The proposed regulations were published on August 2, 2016, (81 FR 50657) and a correction was made on September 26,

2016 (81 FR 65983) (the “2016 proposed regulations”). Generally, the 2016 proposed regulations provided guidance to educational institutions relating to the preparation and submission of reporting forms under section 6050S, for use by students claiming educational credits under section 25A. The 2016 proposed regulations also would amend the Income Tax Regulations on the education tax credits under section 25A to conform the regulations to the rules for changes made to section 25A by the Trade Preferences Extension Act of 2015 (Pub. L. 114–27 (129 Stat. 362)) (TPEA) and the Protecting Americans from Tax Hikes Act of 2015 (Pub. L. 114–113 (129 Stat. 2242)) (PATH Act). In addition, the 2016 proposed regulations would amend the Income Tax Regulations on the education tax credits under section 25A to update the definition of qualified tuition and related expenses in § 1.25A–2(d) to reflect changes made by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5 (123 Stat. 115)), to clarify the prepayment rule in § 1.25A–5(e), and to clarify the rule for refunds in § 1.25A–5(f).

The Treasury Department and the IRS are considering finalizing the 2016 proposed regulations and, therefore, are reopening the comment period with respect to the 2016 proposed regulations for 60 days. Comments that were previously submitted in accordance with the 2016 proposed regulations will be considered and do not need to be submitted again in response to this reopening of the comment period. The Treasury Department and the IRS are particularly interested in comments regarding the impact of any statutory changes on the reporting process. The Treasury Department and the IRS are also interested in the impact of technological changes to the reporting process.

In addition, the Treasury Department and the IRS are also considering updating the section 25A regulations to reflect statutory changes to the education tax credits under section 25A since the TPEA and PATH Act, including changes made by the Tax Cuts and Jobs Act (Pub. L. 115–97 (131 Stat. 2054)), the Consolidated Appropriations Act, 2018 (Pub. L. 115–141 (132 Stat. 351)), and the Consolidated Appropriations Act, 2020 (Pub. L. 116–260 (134 Stat. 1182)). Specifically, the statutory changes modify the amount of the American Opportunity Tax Credit (AOTC); modify the number of years an eligible student can claim the AOTC; increase the phaseouts for the Lifetime Learning Credit and the AOTC; repeal the inflation adjustment; and change the “Hope Credit” to the “American

Opportunity Tax Credit” and remove the terminology of “Hope Credit.” The Treasury Department and the IRS request comments on the need for updating the section 25A regulations to reflect any such statutory changes in final regulations.

Oluwafunmilayo A. Taylor,
Section Chief, Publications and Regulations Section, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2024–03862 Filed 2–23–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF AGRICULTURE**Forest Service****36 CFR Part 242****DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 100**

[Docket No. FWS–R7–SM–2024–0017; FXRS12610700000–234–FF07J00000]

RIN 1018–BH67

Subsistence Management Regulations for Public Lands in Alaska—Subpart B; Federal Subsistence Board Membership

AGENCY: Forest Service, Agriculture; Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the regulations concerning the composition of the Federal Subsistence Board (Board) by adding three public members nominated or recommended by federally recognized Tribal governments, requiring that those nominees have personal knowledge of and direct experience with subsistence uses in rural Alaska including Alaska Native subsistence uses, defining requirements used for the selection of the Board Chair, affirming the Secretaries’ authority to replace members from the Board, and affirming the Secretaries’ responsibility and oversight regarding Board decisions while incorporating a ratification requirement. In January 2022, the Department of the Interior (DOI) and the U.S. Department of Agriculture (USDA) held joint consultations with federally recognized Tribes of Alaska and various Tribal Consortia. Later during October–November 2022, DOI leadership and the Department of Commerce, National Oceanic and Atmospheric Administration, held joint consultations with various Alaska Tribes regarding

fisheries. Approximately 445 individual subsistence users and representatives from Alaska Native Tribes, Tribal consortia, Alaska Native organizations, and Native corporations participated in the consultations, and a majority of the commenters specifically requested increasing the number of public members to five and adding more voting members who represent Alaska Native Villages and have local knowledge and direct subsistence experience.

DATES: Comments on this proposed rule must be received or postmarked by April 26, 2024.

ADDRESSES: You may submit comments by one of the following methods:

Electronically: Go to the Federal eRulemaking Portal: <https://www.regulations.gov>. In the Search box, enter FWS-R7-SM-2024-0017, which is the docket number for this rulemaking action. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

By hard copy: Submit by U.S. mail or hand delivery: Public Comments Processing, Attn: FWS-R7-SM-2024-0017; U.S. Fish and Wildlife Service; 5275 Leesburg Pike; MS: PRB (JAO/3W); Falls Church, VA 22041-3803.

We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Public Review Process—Comments below for more information).

FOR FURTHER INFORMATION CONTACT:

Amea Howard, Deputy Assistant Regional Director, Office of Subsistence Management; 907-786-3888; subsistence@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. Please see Docket No. FWS-R7-SM-2024-0017 on <https://www.regulations.gov> for a document that summarizes this proposed rule.

SUPPLEMENTARY INFORMATION:

Background

When Alaska became a State in 1959, Alaska Natives held aboriginal title to lands across the new State. Immediately after statehood, Alaska Natives filed blanket protests to State land selections

authorized by the Statehood Act. Because the State's land selection rights were only for "vacant, unappropriated and unreserved lands," the Secretary of the Interior imposed a formal land freeze on any title transfers to Alaska in 1969. After oil was discovered at Prudhoe Bay in the late 1960s, an injunction against the Secretary of the Interior's attempt to grant a right of way for the Trans-Alaska Pipeline made it clear that Congress would have to settle aboriginal claims before an oil pipeline across Alaska could be built. Congress then extinguished aboriginal title in the Alaska Native Claims Settlement Act (ANCSA) in 1971. 43 U.S.C. 1603(b). The ANCSA conference report reflects that Congress anticipated that the Secretary of the Interior would "exercise his existing withdrawal authority" to "protect Native subsistence needs and requirements." H. Conf. Rep. No. 92-746 at 37 (1971). The Secretary immediately reinitiated withdrawals to protect subsistence while a solution was negotiated. In 1980, this issue, among others, was addressed in the Alaska National Interest Lands Conservation Act (ANILCA). Title VIII of ANILCA addressed the loss of aboriginal hunting and fishing rights by providing rural residents, including Alaska Native rural residents, with protections for continuing use of subsistence uses on the public lands. The congressional findings in ANILCA describe this intent and purpose:

The Congress finds and declares that—
 . . . (4) *in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and*

(5) *the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.*

16 U.S.C. 3111 (emphasis added). Based on these findings, Congress declared that there would be a subsistence priority for "rural residents" on "public lands" in Alaska:

nonwasteful subsistence uses of fish and wildlife and other renewable resources shall

be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses;

16 U.S.C. 3112 (2). Congress's references to fulfilling the purposes of ANCSA (where aboriginal hunting and fishing rights had been lost), and its constitutional authority over Native affairs clarify that title VIII's rural subsistence provisions are intended, among other purposes, to address the loss of Alaska Native aboriginal hunting and fishing rights. See Robert T. Anderson, *The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights After ANCSA*, 51 Ariz. St. L.J. 506, 522 (2017).

Title VIII originally contemplated the State administering the ANILCA rural subsistence priority. It outlined a State regulatory structure to protect subsistence uses by rural Alaska residents, providing that if, within one year of ANILCA's enactment, the State "enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA for rural residents, then the Secretary shall not implement the provisions of ANILCA directing the establishment of regional advisory councils. 16 U.S.C. 3115(d). And such State laws, "unless and until repealed, shall supersede such sections [of ANILCA] . . . for the taking of fish and wildlife on the public lands for subsistence uses." *Id.*

However, the State was unable to implement title VIII through State regulations. When ANILCA was enacted in 1980, an Alaska statute provided a priority for nonwasteful subsistence use of wild, renewable resources, but it did not limit the priority to "rural Alaska residents," as ANILCA requires. See *Bobby v. Alaska*, 718 F. Supp. 764, 767, 788-791 (D. Alaska 1989). The State promulgated regulations recognizing the rural priority, and, after the Federal Government reviewed and approved the regulatory scheme, the State became responsible for overseeing implementation of title VIII. See *id.* at 767. Then, in 1985, the Alaska Supreme Court struck down the State regulations' limitation of the subsistence priority to rural Alaska residents. *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985). Without that eligibility limitation, the State's subsistence priority no longer complied

with ANILCA, and the Secretary of the Interior withdrew certification of the State's regulatory scheme, pending enactment of State subsistence-use legislation consistent with ANILCA. *See Bobby*, 718 F. Supp. at 768. The Alaska Legislature then amended the State's subsistence laws to remedy the inconsistency with ANILCA. *See id.*; *see also Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314 (9th Cir. 1988). But in 1989, the Alaska Supreme Court voided the amended State subsistence statute after finding that a rural priority violates Alaska's Constitution. *See McDowell v. State*, 785 P.2d 1 (Alaska 1989).

As a result of Alaska's inability to satisfy ANILCA's requirements for State management, the Secretaries of the Interior and Agriculture were obligated under ANILCA to effectuate the rural subsistence priority. *See* 16 U.S.C. 3115. ANILCA authorizes the Secretaries to "prescribe such regulations as are necessary and appropriate to carry out [their] responsibilities" under title VIII. 16 U.S.C. 3124; *see* 16 U.S.C. 3102(12). In 1990, the Secretaries promulgated regulations providing "[s]ubsistence taking and uses of fish and wildlife on public lands shall be administered by a Federal Subsistence Board." *See* Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 FR 27114 at 27123 (June 29, 1990); Final Regulations, 57 FR 22940 (May 29, 1992). As a result, pursuant to title VIII and its regulations, which have been amended several times since 1992, the Secretaries jointly implement the Federal Subsistence Management Program (Program), which provides a priority for taking of fish and wildlife resources for subsistence uses in Alaska. Only Alaska residents of areas identified as rural are eligible to participate in the Program.

Because the Program is a joint effort between the Departments of the Interior and Agriculture (USDA), these regulations are located in two different titles of the Code of Federal Regulations (CFR): The USDA regulations are at title 36, "Parks, Forests, and Public Property," and the DOI regulations are at title 50, "Wildlife and Fisheries," at 36 CFR 242.1–28 and 50 CFR 100.1–28, respectively. Consequently, to indicate that identical changes are proposed for regulations in both titles 36 and 50, in this document we present references to the specific section of both titles of the CFR as: § _____.10.

The Program regulations contain subparts as follows: Subpart A, General Provisions; Subpart B, Program Structure; Subpart C, Board Determinations; and Subpart D,

Subsistence Taking of Fish and Wildlife. Consistent with subpart B of these regulations, the Secretaries established a Federal Subsistence Board to administer the Program. Subpart C sets forth important Board determinations regarding program eligibility, *i.e.*, which areas of Alaska are considered rural and which species are harvested in those areas as part of a "customary and traditional use" for subsistence purposes. Subpart D sets forth specific harvest seasons and limits. Subparts A and B fall under the purview of the Secretaries, but the Board participates in the development of regulations for subparts C and D.

In administering the Program, the Secretaries divided Alaska into 10 subsistence resource regions, each of which is represented by a Federal Subsistence Regional Advisory Council (Council). The Councils provide a forum for rural residents with personal knowledge of local conditions and resource requirements to have a meaningful role in the subsistence management of fish and wildlife on Federal public lands in Alaska. The Council members represent varied geographical, cultural, and user interests within each region.

The current Board comprises:

- A Chair appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture;
- The Alaska Regional Director, U.S. Fish and Wildlife Service;
- The Alaska Regional Director, National Park Service;
- The Alaska State Director, Bureau of Land Management;
- The Alaska Regional Director, Bureau of Indian Affairs;
- The Alaska Regional Forester, USDA Forest Service; and
- Two public members appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture.

Proposed Rulemaking Action

In January 2022, DOI and USDA held joint consultations with approximately 445 individual subsistence users and representatives from federally recognized Tribes of Alaska, Tribal consortia, Native organizations, and Alaska Native corporations. In October–November 2022, DOI leadership and the Department of Commerce, National Oceanic and Atmospheric Administration, held joint consultations with various Alaska Tribes regarding fisheries. During all of these consultations, a primary request from commenters was to make changes to the Federal Subsistence Board, including increasing the number of public

members to five and adding more voting members who represent Alaska Native Villages and have local knowledge and direct subsistence experience.¹ The report detailing the information received during these consultations is the "Federal Subsistence Policy Consultation Summary Report," which can be found as a supplementary document in Docket No. FWS–R7–SM–2024–0017 at <https://www.regulations.gov>.

We propose to revise titles 36 (in part 242) and 50 (in part 100) of the CFR at § _____.10 to be responsive to that request by defining the requirements used for the selection of the Board Chair, increasing the number of public members of the Board, and including a voice for federally recognized Tribal governments to nominate or recommend a certain number of the public members of the Board. We propose that the Board Chair, like the two current public members, be required to possess personal knowledge of and direct experience with subsistence uses in rural Alaska. We further propose adding three public members to the Board, all of whom will be required to possess personal knowledge of and direct experience with subsistence uses in rural Alaska, including Alaska Native subsistence uses, and will be nominated or recommended by federally recognized Tribal governments.

As is currently required in the regulations, the Board Chair and all public members will be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture. Also as is currently the case, the public members will become special governmental employees for the purpose of serving on the Board. The Secretaries retain the authority to remove public members from the Board, and also retain their existing authorities to replace agency personnel on the Board, and we have added language affirming those authorities in this proposed rule. Because this proposed rule would increase the total number of Board members, the number required for a quorum would increase to six.

Lastly, consistent with title VIII, we propose clarifying that the Secretaries retain the authority to modify, disapprove, or stay any action taken by the Board, and also propose incorporating a requirement for ratification. Recognizing that a Board's action may be time sensitive, we propose that for temporary special actions (36 CFR 242.19(b) and 50 CFR

¹ The references to "commenters" below refer to the comments received from these same participants in connection with the consultations.

100.19(b)), Board actions will not become effective for 10 calendar days, allowing an opportunity for the Secretaries to modify, disapprove, stay, or expressly ratify Board actions. If the 10 calendar days elapse without action by the Secretaries, the Board decision will be deemed automatically ratified by the Secretaries (with the Secretaries retaining discretion to revisit the ratification). For emergency special actions (36 CFR 242.19(a) and 50 CFR 100.19(a)), the Board action will likewise not become effective for 10 calendar days unless the Board determines that the emergency situation calls for responsive action within 24 hours to protect subsistence resources or public safety. For other Board actions (*i.e.*, actions that follow the regular adoption process in 36 CFR 242.18 or 50 CFR 100.18), the Secretaries retain, and will exercise when appropriate, their authority to modify or disapprove actions prior to publication in the **Federal Register**, as is the current practice.

I. Increase in Number of Public Board Members

The current Board includes a Chair, two public Board members, and five Federal agency personnel. None of the current agency personnel, nor any of their predecessors, are federally qualified subsistence users while serving on the Board as a result of the urban location for their duty location. The Secretaries are proposing to add three public members nominated or recommended by Tribes, while also requiring that they possess personal knowledge of and direct experience with subsistence uses in rural Alaska, including Alaska Native subsistence uses, for the purpose of ensuring adequate representation by members with rural subsistence experience on the Board at any particular meeting. Adding three public members to the Board could further the goals of ANILCA and also could be responsive to commenters' requests for: (1) an increase in the number of public board members to five; and (2) adding more voting members who represent Alaska Native villages and have local knowledge of direct subsistence experience.

Related to this, the Secretaries specifically request public comments on the issues listed below:

(1) Are federally recognized Tribal governments the only groups that should nominate/recommend public board members that possesses the qualifications identified in this proposed rule? Should Alaska Native Corporations and other entities also be included as entities to nominate/

recommend public board members, so long as the nominees possess personal knowledge of and direct experience with subsistence uses in rural Alaska (including Alaska Native subsistence uses)?

(2) Would it be preferable for federally recognized Tribes to nominate/recommend only two of the three new public board members?

(3) How should the Secretaries solicit and receive nominations/recommendations? Should the Secretaries broadly solicit nominations or recommendations from federally recognized Tribal governments, or should the Secretaries identify as a matter of their sole discretion one or more specific federally recognized Tribal governments?

(4) Is the proposed quorum of six appropriate with the addition of the three new public board members, or should it be increased?

Commenters also expressed concerns that the public Board members at present do not have alternates who can stand in for them in times of illness or unavailability due to conflicts with subsistence activities. This is not the case for Federal agency personnel, who have qualified designees who can act in their stead. This issue was specifically raised by the Board in a meeting with the Secretary. While the Secretaries preliminarily view the proposal to add additional public board members as eliminating the need to further consider whether public board members should have the ability to appoint alternates, the Secretaries invite public comment on this issue.

Commenters also focused on the desirability of considering Indigenous Knowledge in connection with Board decision making. The Secretaries preliminarily view this approach/practice as consistent with the Secretaries' policies and broader Federal Government policy. For example, on November 22, 2022, the White House Office of Science and Technology Policy and Council on Environmental Quality released the "Guidance for Federal Departments and Agencies on Indigenous Knowledge" at the White House Tribal Nations Summit. The guidance and accompanying implementation memorandum recognized that, to make the best scientific and policy decisions, the Federal Government should value and, as appropriate, respectfully consider Indigenous Knowledge in the decision-making process. The implementation memorandum for all Federal agencies noted that ". . . the U.S. Government can fulfill its trust responsibilities to Tribal Nations, recognize Tribal

sovereignty and self-governance, and honor its commitment to strengthening relations with Indigenous Peoples by including Indigenous Knowledge in Federal decision making." Further, the implementation memorandum encouraged Federal agencies "to pursue and promote inclusion of Indigenous Knowledge in Federal scientific and policy decisions consistent with this Guidance. . . ." The Guidance started with the following recognition:

The Federal Government recognizes the valuable contributions of the Indigenous Knowledge that Tribal Nations and Indigenous Peoples have gained and passed down from generation to generation and the critical importance of ensuring that Federal departments and agencies' (Agencies) consideration and inclusion of Indigenous Knowledge is guided by respect for the sovereignty and self-determination of Tribal Nations; the Nation-to-Nation relationship between the United States and Tribal Nations and the United States' trust responsibility; and the need for the consent of and honest engagement with Tribal Nations and Indigenous Peoples.

As discussed further below, incorporating to a greater degree this substantial and diverse body of Indigenous Knowledge into its decision making might better enable the Board to address subsistence uses for all federally qualified users in implementing the title VIII rural subsistence priority.

Alaska, given its vast and varied geography, has a wide variety of subsistence uses based on place and seasons. The variations include differences in species of fish, land mammals, and marine mammals subject to harvest, in addition to seasonal availability of the same resource, such as salmon, across different areas of the State. The breadth of subsistence practices may indicate a need for a diversity of subsistence use experiences on the Board to improve Federal decision making.

Consistent with this, many commenters highlighted the importance of Alaska Native "ecological knowledge and observations by local stakeholders to promote sustainable harvests and protect habitats." Federal Subsistence Policy Consultation Summary Report (June 14, 2022) (*bia.gov*). One of the five questions asked of attendees to the January 2022 consultations on subsistence was "How has climate change affected subsistence?" The followup question posed was "What changes could be made to subsistence policies, regulations, or laws to help you adapt to those changes?" The commenters requested the inclusion of Indigenous Knowledge to inform decision making as noted above, and

they “emphasized the need to make real-time management decisions that are responsive to evolving, on-the-ground conditions and fluctuations caused by climate change.” Federal Subsistence Policy Consultation Summary Report (June 14, 2022) (*bia.gov*).

These comments reflect the unprecedented challenges the Alaska subsistence community is facing regarding the availability of subsistence resources as a result of climate change and other factors. The Secretaries acknowledge that the regional advisory councils provide opportunities to incorporate Indigenous Knowledge into Board decision making. The Secretaries view this proposed rule as creating another structural path for providing Indigenous Knowledge to the Board. Additional public board members who meet the specified qualifications have the potential to expand and diversify the kinds of evidence and knowledge available to the Board for critical decisions. *See* “What is “Indigenous Knowledge” And Why Does It Matter? Integrating Ancestral Wisdom and Approaches into Federal Decision-Making,” available at <https://www.whitehouse.gov/ostp/news-updates/2022/12/02/> (last accessed Oct. 24, 2023). The Secretaries again invite comments on all of these issues.

The Secretaries’ inclusion of recommendations/nominations from federally recognized Tribes honors the Secretaries’ political relationship with Tribal Nations and their commitment to strengthening relations with Indigenous Peoples. The Secretaries’ consideration of these nominations/recommendations also would recognize Tribes’ qualifications to identify individuals who possess personal knowledge of and direct experience with subsistence uses in rural Alaska, both Native and non-Native, and also to identify individuals who are best able to present Indigenous Knowledge that can be included in the Board’s decision making. Tribal governments are well-situated to make these recommendations in part because Alaska Natives comprise approximately 55 percent of the rural population in all areas of the State and constitute a much larger majority—82 percent of the population—in the most remote and roadless regions. *See* James A. Fall, *Alaska Populations Trends and Patterns, 1960–2018* at 11, ADF&G Div. of Subsistence, Alaska Dep’t of Fish & Game (2019); Alaska Native Population, Alaska Native Policy Center.²

In proposing this rule, the Secretaries acknowledge that they will retain ultimate authority to decide whether to appoint to the Board the particular individuals nominated or recommended by Tribes; the Secretaries are not delegating their authority to appoint.

II. Qualifications of Chair

In addition, the Secretaries propose to require that the Board Chair possess personal knowledge of and direct experience with subsistence uses in rural Alaska.

III. Term Limits

The Secretaries also are considering whether to impose term limits as to public Board members, including potentially the Chair. The proposed regulatory text includes reference to the potential for the Secretaries to establish term limits for service of Board members in such circumstances as the Secretaries deem appropriate. The Secretaries invite public comment on other possible approaches, such as including specific term limit requirements, with or without staggered terms, in the regulatory text that would apply when new appointments are made (and not to existing members). The comments may address, for example, what specific term limits may be appropriate (*i.e.*, what duration measured in years) and whether and how they should be renewable.

IV. Oversight Responsibility and Ratification Requirement

Consistent with title VIII, the Secretaries propose clarifying that the Secretary of the Interior, or the Secretary of Agriculture with respect to a unit of the National Forest System, retains the authority to modify, disapprove, stay, or expressly ratify any action taken by the Board. The Secretaries also propose to incorporate a requirement for ratification. Under the proposal, recognizing that the Board may need to act quickly in response to changed circumstances, temporary special actions of the Board will not become effective for 10 calendar days (or any longer period specified by the Board when taking the action), allowing an opportunity for the Secretaries to modify, disapprove, stay, or expressly ratify the actions. For emergency special actions (36 CFR 242.19(a) and 50 CFR

100.19(a)), the Board action will likewise not become effective for 10 calendar days unless the Board determines that the emergency situation calls for responsive action within 24 hours to protect subsistence resources or public safety. If the Secretaries do not take action (*i.e.*, to modify, disapprove, stay, or expressly affirm) during the 10 calendar days (or the longer period), the Board decision will be deemed automatically ratified by the Secretary for purposes of the proposed regulation (with the Secretary retaining discretion to revisit prior express or automatic ratifications). For other Board actions (*i.e.*, actions that follow the regular adoption process in 36 CFR 242.18 and 50 CFR 100.18), the Secretaries retain, and will exercise when appropriate, their authority to modify or disapprove actions prior to publication in the **Federal Register**, as is the current practice.

The Secretaries provide proposed draft regulatory text for this specific proposal at the end of this document, but also invite public comment on this proposal and expressly request comments on the following:

(1) Should the Secretaries consider adopting a different framework that, while not requiring ratification, allows for review of emergency and temporary Board actions? For example, should the Secretaries consider a framework in which the effective date of Board actions would be delayed to allow the Secretaries a limited time to review those actions (and potentially stay the action for a further limited time to facilitate decision making concerning whether to modify or disapprove the action)?

(2) Are the proposed timeframes for ratification of special actions and emergency actions sufficient to allow for the Board to respond to evolving resource and subsistence issues in real time while allowing for appropriate Secretarial oversight and approval?

(3) What specific mechanism(s) should the Secretaries use to modify, disapprove, stay, or expressly affirm an emergency or temporary Board action (*i.e.*, what would be the form of the Secretary of the Interior’s action, and how would it best be communicated to the Board and public)?

(4) Would it be helpful and/or necessary for the Secretaries to make any conforming changes to the other regulations in 36 CFR part 242 and 50 CFR part 100, such as the regulation governing Board reconsideration of actions (36 CFR 242.20 and 50 CFR 100.20), if the ratification requirement is included in the final rule?

² *See also* U.S. Census Bureau, Percent American Indian and Alaska Native Alone or in Combination, Total Population by County: 2020, <https://public.tableau.com/shared/NMZXR84J?:showVizHome=n>

(showing the Alaska Native population makes up 96.9% of the Kusilvak Census Area, 88.5% of the Bethel Census Area, 88.1% of the Northwest Arctic Borough, 82.6% of the Nome Census Area, 79.9% of the Dillingham Census Area, and 77.2% of the Yukon-Koyukuk Census Area). https://www.adfg.alaska.gov/static/home/library/pdfs/subsistence/Trends_in_Population_Summary_2019.pdf.

Public Review Process—Comments

You may submit written comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you submit a comment via <https://www.regulations.gov>, your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, 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. We will post all hardcopy comments on <https://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <https://www.regulations.gov> at Docket No. FWS-R7-SM-2024-0017.

Tribal Consultation and Comment

As expressed in Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” the Federal officials that have been delegated authority by the Secretaries are committed to honoring the unique government-to-government political relationship that exists between the Federal Government and federally recognized Indian Tribes (Tribes) as listed in 82 FR 4915 (January 17, 2017). Consultation with Alaska Native corporations is based on Public Law 108–199, div. H, Sec. 161, Jan. 23, 2004, 118 Stat. 452, as amended by Public Law 108–447, div. H, title V, Sec. 518, Dec. 8, 2004, 118 Stat. 3267, which provides that: “The Director of the Office of Management and Budget and all Federal agencies shall hereafter consult with Alaska Native corporations on the same basis as Indian Tribes under Executive Order No. 13175.”

Because Tribal members are affected by subsistence regulations, the Secretaries will provide federally recognized Tribes of Alaska and Alaska Native corporations an opportunity to consult on this proposed rule.

As stated above, the Secretaries previously conducted consultations where the subject of Board membership was addressed. The Secretaries have directed that DOI and USDA representatives will hold joint consultations regarding this rulemaking effort. The Secretaries will engage in outreach efforts for this proposed rule, including a notification letter, to ensure that Tribes and Alaska Native corporations are advised of the mechanisms by which they can participate. The Secretaries will commit

to efficiently and adequately providing an opportunity to Tribes and Alaska Native corporations for consultation regarding this subsistence rulemaking.

The Secretaries will consider Tribes of Alaska and Alaska Native corporations’ information, input, and recommendations, and will address their concerns as much as practicable.

Compliance with Statutory and Regulatory Authorities

National Environmental Policy Act

A draft environmental impact statement that described four alternatives for developing a Federal Subsistence Management Program was distributed for public comment on October 7, 1991. The final environmental impact statement (FEIS) was published on February 28, 1992. The Record of Decision (ROD) on Subsistence Management for Federal Public Lands in Alaska was signed April 6, 1992. The selected alternative in the FEIS (alternative IV) defined the administrative framework of an annual regulatory cycle for subsistence regulations.

A 1997 environmental assessment dealt with the expansion of Federal jurisdiction over fisheries and is available by contacting: U.S. Fish and Wildlife Service, Office of Subsistence Management, 1011 E Tudor Road, MS 121, Anchorage, Alaska 99503–6199. The Secretary of the Interior, with concurrence of the Secretary of Agriculture, determined that expansion of Federal jurisdiction does not constitute a major Federal action significantly affecting the human environment and, therefore, signed a finding of no significant impact.

Similarly, this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. Further, a detailed statement under the National Environmental Policy Act of 1969 is not required because the rule is covered by a categorical exclusion under 43 CFR 46.210(i): “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” We have also determined that the proposed rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under the National Environmental Policy Act.

Section 810 of ANILCA

An ANILCA section 810 analysis was completed as part of the FEIS process on the Program. The intent of all Federal subsistence regulations is to accord subsistence uses of fish and wildlife on public lands a priority over the taking of fish and wildlife on such lands for other purposes, unless restrictions are necessary to conserve healthy fish and wildlife populations. The final section 810 analysis determination appeared in the April 6, 1992, ROD and concluded that the Federal Subsistence Management Program, under alternative IV with an annual process for setting subsistence regulations, may have some local impacts on subsistence uses, but will not restrict subsistence uses significantly.

During the subsequent environmental assessment process for extending fisheries jurisdiction, an evaluation of the effects of the subsistence program regulations was conducted in accordance with section 810. That evaluation also supported the Secretaries’ determination that the regulations will not reach the “may significantly restrict” threshold that would require notice and hearings under ANILCA section 810(a).

Paperwork Reduction Act of 1995 (PRA)

This proposed rule contains existing information collections. All information collections require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*). 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. OMB has reviewed and approved the information collection requirements associated with this rulemaking and assigned the OMB Control Number 1018–0075 (expires January 31, 2024, and, in accordance with 5 CFR 1320.10, an agency may continue to conduct or sponsor this collection of information while the submission is pending at OMB). This proposed rule makes no substantive changes to the currently approved information collections. We anticipate a minor increase in the estimated number of annual responses and annual burden hours associated with the currently approved FWS Form 3–2321, Membership Application. We estimate the total burden associated with this information collection to be 15,429 annual responses, 6,953 annual burden hours, and no non-hour cost burden.

Regulatory Planning and Review—Executive Orders 12866, 13563, and 14094

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. We have developed this proposed rule in a manner consistent with these requirements.

E.O. 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this proposed rulemaking action is not significant.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires preparation of flexibility analyses for rules that will have a significant economic impact on a substantial number of small entities, which include small businesses, organizations, or governmental jurisdictions. The revised Board composition put forward under this proposed rule would not result in effects to the economy. The Departments certify that this rulemaking will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

Congressional Review Act

Under the Congressional Review Act (5 U.S.C. 804 (2)), this proposed rule is not a major rule. It will not have an effect on the economy of \$100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Executive Order 12630

Title VIII of ANILCA requires the Secretaries to administer a subsistence priority on public lands. The scope of this program is limited by definition to certain public lands in Alaska. Likewise, these proposed regulations have no potential takings of private property implications as defined by Executive Order 12630.

Unfunded Mandates Reform Act

The Secretaries have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this proposed rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. The implementation of this proposed rule would be by Federal agencies, with no cost imposed on any State or local entities or Tribal governments.

Executive Order 12988

The Secretaries have determined that these proposed regulations meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988, regarding civil justice reform.

Executive Order 13132

In accordance with Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. Title VIII of ANILCA precludes the State from exercising subsistence management authority over fish and wildlife resources on Federal public lands unless it meets certain requirements.

Executive Order 13175

As described above under *Tribal Consultation and Comment*, the Secretaries will provide federally recognized Tribes of Alaska and Alaska Native corporations a variety of opportunities for consultation, commenting on proposed changes to the existing regulations, and providing input in person, by mail or email, at any time during the rulemaking process.

Executive Order 13211

This Executive order requires agencies to prepare statements of energy effects when undertaking certain actions. However, this proposed rule is not a significant regulatory action under E.O. 13211, affecting energy supply, distribution, or use, and no statement of energy effects is required.

List of Subjects

36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

Proposed Regulation Promulgation

For the reasons set out in the preamble, the Secretaries of the Interior and Agriculture propose to amend 36 CFR part 242 and 50 CFR part 100 as set forth below.

PART ____—SUBSISTENCE MANAGEMENT REGULATIONS FOR PUBLIC LANDS IN ALASKA

■ 1. The authority citation for 36 CFR part 242 and 50 CFR part 100 continues to read as follows:

Authority: 16 U.S.C. 3, 472, 551, 668dd, 3101–3126; 18 U.S.C. 3551–3586; 43 U.S.C. 1733.

Subpart B—Program Structure

■ 2. In subpart B of 36 CFR part 242 and 50 CFR part 100, amend § _____.10 by:

- a. Revising paragraphs (a), (b), and (d)(2); and
- b. Adding paragraphs (d)(11) through (13).

The revisions and additions read as follows:

§ _____.10 Federal Subsistence Board.

(a) *Authority.* The Secretary of the Interior and the Secretary of Agriculture hereby establish a Federal Subsistence Board and delegate to it the authority for administering the subsistence taking and uses of fish and wildlife on public lands and the related promulgation and signature authority for regulations of subparts C and D of this part. The Secretaries retain their existing authority to restrict or eliminate hunting, fishing, or trapping activities that occur on lands or waters in Alaska other than public lands when such activities interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority. The Secretaries also retain the ultimate responsibility for compliance with title VIII of ANILCA and other applicable laws and maintain oversight of the Board.

(b) *Membership.* (1) The voting members of the Board are: A Chair who possesses personal knowledge of and direct experience with subsistence uses in rural Alaska to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; five public members who possess personal knowledge of and direct experience with subsistence uses in rural Alaska, three of whom shall be nominated or recommended by federally recognized Tribal governments in Alaska and shall possess personal knowledge of and direct experience with subsistence uses in rural Alaska

(including Alaska Native subsistence uses), to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; the Alaska Regional Director, National Park Service; the Alaska Regional Forester, U.S. Forest Service; the Alaska State Director, Bureau of Land Management; and the Alaska Regional Director, Bureau of Indian Affairs. Each Federal agency member of the Board may appoint a designee.

(2) Public board members serve at the will of the Secretaries. The Secretaries maintain their authorities for replacement of Federal agency members, public board members, or any designees.

* * * * *

(d) * * *

(2) A quorum consists of six members.

* * * * *

(11) The Secretary of the Interior, or the Secretary of Agriculture with respect to a unit of the National Forest System, retains authority to (at any time) stay, modify, or disapprove any action taken by the Board.

(12) Temporary special actions of the Board are not effective unless ratified by the Secretary of the Interior or the Secretary of Agriculture with respect to a unit of the National Forest System. To allow an opportunity for the Secretaries to modify, disapprove, stay, or expressly ratify any temporary action taken by the Board, such Board actions will not become effective until at least 10 calendar days after the date of the action (or any longer period specified by the Board when taking the action). For emergency special actions, the Board action will likewise not become effective for 10 calendar days (or any longer period specified by the Board when taking the action) unless the Board determines that the emergency situation calls for responsive action within 24 hours to protect subsistence resources or public safety. If no action is taken by the Secretary to modify, disapprove, stay, or expressly ratify within 10 days (or the longer period specified by the Board), the emergency or temporary Board action will be deemed automatically ratified for purposes of this subpart. The Secretaries may revisit a prior ratification (express or automatic) of a Board action at any time. For other Board actions (*i.e.*, actions that follow the regular adoption process in § _____.18), the Secretaries retain, and will exercise when appropriate, their authority to modify or disapprove actions prior to publication

in the **Federal Register**, as is the current practice.

(13) The Secretaries may establish term limits for service of Board members in such circumstances as the Secretaries deem appropriate.

* * * * *

Joan Mooney,

Principal Deputy Assistant Secretary for Policy, Management, and Budget, Department of the Interior.

Homer L. Wilkes,

Under Secretary, Natural Resources and Environment U.S. Department of Agriculture.

[FR Doc. 2024–03604 Filed 2–23–24; 8:45 am]

BILLING CODE 3411–15–P; 4333–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA–HQ–OAR–2023–0401; FRL–9118–03–OAR]

RIN 2060–AV61

Clarifying the Scope of “Applicable Requirements” Under State Operating Permit Programs and the Federal Operating Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: On January 9, 2024, the Environmental Protection Agency (EPA) proposed a rule titled, “Clarifying the Scope of “Applicable Requirements” Under State Operating Permit Programs and the Federal Operating Permit Program.” The EPA has received requests for additional time to review and comment on the proposed rule revisions. The EPA is extending the comment period on the proposed rule that was scheduled to close on March 11, 2024, by an additional 30 days, until April 10, 2024.

DATES: The public comment period for the proposed rule published in the **Federal Register** on January 9, 2024 (89 FR 1150), is being extended by 30 days. Written comments must be received on or before April 10, 2024.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2023–0401, by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov> (our preferred method). Follow the online instructions for submitting comments.
- **Email:** a-and-r-docket@epa.gov. Include Docket ID No. EPA–HQ–OAR–2023–0401 in the subject line of the message.

- **Fax:** (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2023–0401.

• **Mail:** U.S. Environmental Protection Agency, EPA Docket Center, OAR Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

• **Hand Delivery or Courier:** EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center’s hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Matthew Spangler, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–05), Environmental Protection Agency, Research Triangle Park, NC; telephone number: (919) 541–0327; email address: spangler.matthew@epa.gov.

SUPPLEMENTARY INFORMATION: After considering the requests to extend the public comment period received from various parties, the EPA has decided to extend the public comment period for 30 days, until April 10, 2024. This extension will ensure that the public has additional time to review proposed rule.

Scott Mathias,

Director, Air Quality Policy Division, Office of Air Quality Planning and Standards.

[FR Doc. 2024–03781 Filed 2–23–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 15

[ET Docket No. 18–295 and GN Docket No. 17–183; FCC 23–86; FR ID 192755]

Unlicensed Use of the 6 GHz Band; and Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) explores additional steps it could take and rules it could modify to provide more utility for very low power (VLP) unlicensed devices. Specifically, the Commission seeks

comment on permitting higher power VLP devices under a two-tiered system where those higher powered devices would be permitted to operate only in locations where the potential for causing harmful interference to incumbent operations remains insignificant. The Commission's decision provides a balance between accommodating these new and novel devices to deliver innovative applications to the American public now and taking a judicious approach toward modifying the rules to provide even more robust use at most locations. The Commission also seeks comment on VLP device requirements and limits for operation in the U-NII-6 (6.425–6.525 GHz) and U-NII-8 (6.875–7.125 GHz) bands.

DATES: Comments are due on or before March 27, 2024 and reply comments are due on or before April 26, 2024.

ADDRESSES: You may submit comments, identified by ET Docket No. 13–115 and RM–11341, by any of the following methods:

Federal Communications Commission's Website: <https://www.fcc.gov/ecfs/>. Follow the instructions for submitting comments.

- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- *People with Disabilities:* Contact the Commission to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: FCC504@fcc.gov or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT:

Nicholas Oros of the Office of Engineering and Technology, at Nicholas.Oros@fcc.gov or 202–418–0636.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Further Notice of Proposed Rulemaking*, ET Docket No. 18–295 and GN Docket No. 17–183; FCC 23–86, adopted on October 19, 2023 and released on November 1, 2023. The full text of this document is available for public inspection and can be downloaded at:

<https://docs.fcc.gov/public/attachments/FCC-23-86A1.pdf>. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format) by sending an email to fcc504@fcc.gov or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Comment Period and Filing Procedures. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. For comments regarding the *Second Further Notice*, comments must be filed in ET Docket No. 13–115. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the 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. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

- 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.

Ex Parte Presentations. These proceedings shall be treated as “permit-but-disclose” proceedings 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.

Paperwork Reduction Act. This document may contain proposed 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 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, see 44 U.S.C. 3506(c)(4)), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Procedural Matters

Initial Regulatory Flexibility Analysis. The Commission has also prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the potential impact of the rule and policy changes contained in the *Second Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix D of the FCC document, <https://docs.fcc.gov/public/attachments/FCC-23-86A1.pdf>. Written public comments are requested on the IRFA. Comments must be filed by the deadlines for comments on the *Second Further Notice of Proposed Rulemaking*

indicated on the first page of this document and must have a separate and distinct heading designating them as responses to the IRFA.

Accessing Materials

Providing Accountability Through Transparency Act: The Providing Accountability Through Transparency Act requires each agency, in providing notice of a rulemaking, to post online a brief plain-language summary of the proposed rule. Accordingly, the Commission will publish the required summary of the Second Further Notice of Proposed Rulemaking at <https://www.fcc.gov/proposed-rulemakings>.

Synopsis

1. As discussed in greater detail below, the Commission seeks comment on how it can refine the very low power (VLP) device rules to provide VLP devices greater use of the 6 GHz band while continuing to protect licensed incumbents. The Commission's intent is to seek comment on specific rules aimed at providing additional power and flexibility for VLP devices. With the limited exception of seeking comments on some aspects of the VLP out-of-band emission limits, the Commission is not seeking comment on any of the rules adopted in the *Second Report and Order* (89 FR 874, January 8, 2024). Below, the Commission proposes to allow VLP devices to operate in the U-NII-5 (5.925–6.425 GHz) through U-NII-8 (6.875–7.125 GHz) bands (*i.e.*, a total of 1200 MHz of spectrum) at a PSD level greater than –5 dBm/MHz—up to 1 dBm/MHz EIRP PSD and 14 dBm EIRP—provided they operate under the control of a geofencing system that prevents devices from operating in close proximity to co-channel licensed incumbent services in these bands. VLP access points would obtain information from a geofencing system on locations where operation is prohibited on specific frequencies, and VLP client devices would operate only under the control of VLP access points. These geofenced VLP devices would be a new class of higher-power VLP devices in addition to those the Commission is permitting in the *Second Report and Order*. The Commission also seeks comment on whether it should relax the restrictions on mobile use of VLP devices (*e.g.*, on aircraft and oil platforms). In addition, the Commission seeks comment on whether it could allow VLP devices that operate without a geofencing system in the U-NII-6 (6.425–6.525 GHz) and U-NII-8 (6.875–7.125 GHz) bands in addition to the U-NII-5 and U-NII-7 bands where the *Second Report and Order* permits them

to operate. As the Commission stated in the *Policy Statement* (FCC 23–27), “[r]elevant information about services’ transmitter and receiver standards, guidelines, and operating characteristics is needed to promote effective spectrum management and efficient co-existence.” Thus, going forward, the Commission encourages representatives from the unlicensed device community and those representing the incumbent services to work collaboratively and provide relevant information on their systems to the Commission to allow us to continue to refine its rules for the 6 GHz band and to ensure that equipment designed for and used in the 6 GHz band can fully function within the spectral environment.

A. Power Limits for Geofenced VLP Devices in the U-NII-5 Through U-NII-8 Bands

2. As discussed in the *Second Report and Order*, the Commission is permitting VLP devices to operate at power levels up to –5 dBm/MHz EIRP PSD and up to 14 dBm EIRP. Apple, Broadcom, et al. request that the Commission permits a higher maximum level of 1 dBm/MHz EIRP PSD with the same maximum total power of 14 dBm EIRP, which they contend would enable important new VLP devices while protecting incumbent operations. This PSD level would permit VLP devices to operate at the maximum 14 dBm EIRP levels for any channel bandwidth greater than 20 megahertz, whereas under the rules the Commission is adopting in the *Second Report and Order* that maximum EIRP level can only be achieved for 80 megahertz and wider channel bandwidths. Based on the record and the Commission's analysis of that record, it declined to adopt rules permitting VLP devices to operate at this requested level of 1 dBm/MHz EIRP PSD in the *Second Report and Order*. However, the Commission believes that it can leverage the automated frequency coordination (AFC) systems used for 6 GHz band standard-power devices for use within a framework that combines higher power operation with geofencing to keep these higher powered VLP devices in locations where there have an insignificant potential to cause harmful interference to other users in the band. The Commission notes that these proposals are not intended to curtail the VLP use the Commission is adopting in the *Second Report and Order*. The Commission is fully satisfied that VLP devices operating at –5 dBm/MHz EIRP PSD in the U-NII-5 (5.925–6.425 GHz) and U-NII-7 (6.525–6.875 GHz) bands will protect incumbent operations and

the Commission does not seek comment on these existing rules. Rather, these proposals are designed to explore the possibility for providing more flexibility for higher power use at the expense of additional complexity to implement and use a geofencing capability so that additional use cases and applications can be brought to the American public.

1. In-Band Power Limits

3. The Commission believes that it could allow geofenced VLP devices to operate at the higher PSD level suggested by Apple, Broadcom, et al. if the Commission requires certain frequency and geographic area restrictions, specifically, that VLP devices with higher PSD be prohibited from operating co-channel and in close proximity to licensed incumbent services receive sites. Accordingly, the Commission proposes to allow VLP devices to operate in the U-NII-5 through U-NII-8 bands at a level greater than –5 dBm EIRP PSD and 14 dBm EIRP, specifically up to 1 dBm EIRP PSD and 14 dBm EIRP, provided they operate under the control of a geofencing system to minimize the likelihood of harmful interference to licensed incumbent services. Under this system, geofenced VLP devices would be required to incorporate a capability to ensure that they avoid transmitting on certain channels within certain geographic areas, *i.e.*, this is analogous to erecting a fence to prevent VLP devices from operating on certain channels within certain geographic areas, hence the descriptive term “geofencing system.” While a geofencing system is not identical to an AFC system that several parties requested be required for VLP device operation, it will provide similar protection to licensed incumbent operations.

4. The Commission seeks comment on these proposals. Should the Commission allow VLP devices to operate with up to 1 dBm EIRP PSD and 14 dBm EIRP, provided they are prevented from operating in areas where there is an elevated risk of harmful interference? What are the advantages and disadvantages of allowing a higher PSD limit? What additional VLP applications could be enabled by this proposed increase? Could the Commission allow a power limit higher than 14 dBm EIRP, *e.g.*, up to 21 dBm EIRP, as suggested by some commenters? What are the advantages and disadvantages of a higher power limit? Would higher power limits result in higher data usage and if so by how much? Would a higher power limit create new use cases for VLP? Would

even higher PSD and EIRP limits increase the risk of harmful interference to licensed incumbent services, and would the proposed geofencing system described below be sufficient to reduce this risk? What are the costs and benefits of requiring higher power VLP devices to operate under a geofencing system? How would the additional benefits of geofenced U-NII-6 and U-NII-8 operations compare to the benefits the Commission estimates for non-geofenced U-NII-5 and U-NII-7 operations in the Second Report and Order? Would the power level increase that the Commission proposes provide a sufficient incentive for equipment manufacturers to develop geofencing systems?

2. Transmit Power Control

5. Consistent with the rules the Commission adopts for VLP devices in the Second Report and Order, it proposes to require geofenced VLP devices operating within the U-NII-5 through U-NII-8 bands to employ a transmit power control mechanism that has the capability to operate at least 6 dB below the maximum EIRP the Commission permits for the bands (*e.g.*, 14 dBm or 21 dBm). Because geofenced VLP devices do not yet exist and the Commission does not know what specific transmit power control algorithm these devices may employ, the Commission does not propose any specific requirements in its rules as to how the transmit power control algorithm of the VLP devices will function. The Commission does not expect that adopting this transmit power control requirement will present an undue burden on geofenced VLP device manufacturers since these are expected to be battery-powered devices that are likely to employ transmit power control to conserve battery power. In the Second Report and Order, the Commission requires VLP devices to employ a transmit power control mechanism with the capability to operate at least 6 dB below the permitted power level. Because many VLP devices will be capable of both geofenced and non-geofenced operation, these devices will by necessity incorporate the ability to implement at least a 6 dB power reduction. Nevertheless, the Commission seeks comment on whether a different transmit power control requirement may be appropriate for geofenced VLP devices. Is there a need to specify any additional transmit power control requirements for geofenced VLP devices that the Commission proposes could operate at a higher power than VLP devices? For example, should the

Commission adopt a different requirement along the lines of the European requirement in the 5250–5350 MHz and 5470–5725 MHz bands? That requirement specifies that transmit power control shall provide, on average, a mitigation factor of at least 3 dB on the maximum permitted output power of the systems; or, if transmit power control is not in use, then the maximum permitted mean EIRP and the corresponding mean EIRP density limit shall be reduced by 3 dB. What information should manufacturers be required to include in their application for certification to show compliance with a transmit power control requirement, *e.g.*, an attestation of compliance, a detailed operational description, actual equipment test data? What are the advantages and disadvantages of requiring a transmit power control mechanism in terms of spectrum efficiency, costs, and complexity? Commenters who favor the European requirement should provide specific information regarding how such an requirement could be implemented, verified during the equipment certification process, and enforced. What ramifications, if any, would arise if there were differing transmit power control requirements for VLP devices and geofenced VLP devices?

3. Emission Mask

6. The Commission proposes to require emissions from geofenced VLP devices within the U-NII-5 through U-NII-8 bands to comply with the transmission emission mask adopted for standard power and LPI devices in the *6 GHz Order* (FCC 20–51, 33 FCC Rcd 10496) and for VLP devices in the Second Report and Order. That is, the power spectral density would have to be suppressed by 20 dB at one megahertz outside of an unlicensed device's channel edge, suppressed by 28 dB at one channel bandwidth from an unlicensed device's channel center, and suppressed by 40 dB at one and one-half times the channel bandwidth away from an unlicensed device's channel center. At frequencies between one megahertz outside an unlicensed device's channel edge and one channel bandwidth from the center of the channel, the limits would be linearly interpolated between the 20 dB and 28 dB suppression levels. At frequencies between one and one-half times an unlicensed device's channel bandwidth from the center of the channel, the limits would be linearly interpolated between the 28 dB and 40 dB suppression levels. Emissions removed from the channel center by more than one and one-half times the channel bandwidth, but within the U–

NII-5 and U-NII-8 bands, would have to be suppressed by at least 40 dB. Because geofenced VLP devices would operate in the same bands and on the same channels as VLP devices, LPI, and standard power 6 GHz devices and need to protect the same incumbent operations, the Commission believes that using the same emission mask for geofenced VLP devices as the Commission adopted for VLP devices, LPI, and standard power devices is appropriate. Using the same mask would ensure that licensed incumbent operations are fully protected from unlicensed adjacent channel operations. Moreover, by specifying the same emission requirements, the Commission anticipates that these requirements would act to reduce costs by permitting all devices throughout the VLP ecosystem to use the same filters and benefit from economies of scale for their acquisition.

4. Emission Limits Outside the U-NII-5 and U-NII-8 Bands

7. The Commission proposes emissions limits at the edge of the U-NII-5 and U-NII-8 bands for geofenced VLP devices that are identical to the emissions limits that the Commission adopted in the *6 GHz Order* and the Second Report and Order. Specifically, the Commission proposes a –27 dBm/MHz EIRP limit for 6 GHz VLP devices frequencies below the bottom of the U-NII-5 band (5.925 GHz) and above the upper edge of the U-NII-8 band (7.125 GHz), but proposes to not require it between the sub-bands, *i.e.*, between the U-NII-5 and U-NII-6, the U-NII-6 and U-NII-7, and the U-NII-7 and U-NII-8 bands; those emissions would be subject to the emission mask and OOB limits proposed above. These limits are intended to protect cellular vehicle-to-everything (C-V2X) operations below the 6 GHz band and federal operations above the 6 GHz band. The Commission previously determined that the –27 dBm/MHz limit will sufficiently protect C-V2X operations from harmful interference from U-NII devices operating in other bands. Because geofenced VLP devices could be mobile and potentially used near C-V2X operations, to help protect these services below the U-NII-5 band from harmful interference, the Commission proposes to require that geofenced VLP devices prioritize spectrum above 6105 MHz, as the Commission required in the Second Report and Order for VLP devices.

8. The Commission seeks comment on the proposed emission mask and the proposed emission limits outside the U-NII-5 and U-NII-8 bands. Are these

limits appropriate for geofenced VLP devices? Would they adequately protect licensed incumbent services, both within and outside of the U–NII bands? Would different emission limits be more appropriate? If so, what limits should the Commission requires and why? Is a requirement for geofenced VLP devices to prioritize spectrum use above 6105 MHz necessary? What are the costs and benefits of the proposed emission mask and limits? Would requiring the same emission limits for geofenced devices that the Commission requires for non-geofenced VLP devices reduce the cost of compliance with the emission mask?

B. Geofencing System for Geofenced VLP Devices in the U–NII–5 Through U–NII–8 Bands

9. The Commission proposes to allow VLP devices to operate at a PSD greater than -5 dBm/MHz EIRP PSD, up to a maximum of 1 dBm/MHz EIRP PSD, when they operate under the control of a geofencing system to minimize the likelihood of causing harmful interference to licensed incumbent services. The proposed geofencing system would ensure that geofenced VLP devices with greater than -5 dBm/MHz EIRP do not operate on the same channels as licensed incumbents inside of defined exclusion zones designed to minimize the potential for geofenced VLP devices to cause harmful interference. The Commission proposes requirements for geofencing systems and the criteria that would be used to calculate the exclusion zones as well as technical requirements for geofenced VLP devices. The Commission also proposes procedures for testing and approving geofencing systems to ensure that they would operate as intended and correctly restrict co-channel operation with licensed incumbents in the 6 GHz band at certain locations.

1. Requirement To Use Geofencing

10. *Background.* Standard power access points and fixed client devices must register with and be authorized by an AFC system prior to their initial service transmission by providing their geographic coordinates, antenna height above ground level, FCC identification number, and manufacturer's serial number. They may transmit only on frequencies and at power levels as indicated by an AFC system. After registration, they must contact an AFC system at least once per day to obtain the latest list of available frequencies and the maximum permissible power the device may use on each frequency at their location. As discussed in the Second Report and Order, the Commission is permitting VLP device

operation at levels up to -5 dBm/MHz PSD EIRP and 14 dBm EIRP maximum without the use of an AFC or other database system because the Commission determined that the risk of harmful interference to licensed incumbent services is insignificant at that power level.

11. *Discussion.* For VLP device operation at PSD levels higher than -5 dBm/MHz EIRP where the risk of harmful interference to incumbent services is elevated, the Commission proposes to require VLP access points to use a geofencing system to protect fixed microwave service, BAS, CARS, radio astronomy, and FSS receive sites in the 6 GHz band. The Commission believes that this would be an effective approach to protecting licensed incumbent services since it could be implemented using the same methodology that the Commission previously developed for standard power access points and fixed client devices to protect these services. A geofencing approach, as opposed to requiring VLP devices to access an AFC system, could help preserve VLP device battery life by not requiring each device to re-check a database every time it moves, as is the case for standard power access points. Similarly, a geofencing approach could help protect user privacy since devices would not be required to report their location to a centralized system. A geofencing system would enable VLP devices to operate at PSD levels greater than -5 dBm/MHz EIRP to enable a variety of uses while protecting licensed incumbent services in the 6 GHz band. The Commission previously required certain types of devices to operate pursuant to a geofencing system. It adopted similar requirements to ensure protection to fixed service receivers in the 5925–6425 MHz portion of this band when it granted Higher Ground a blanket earth station license to operate SatPaqs on a non-interference basis through an automated frequency coordination system basis to enable cellphones to communicate with FSS space stations. Additionally, the Commission permits unlicensed white space devices to operate in certain bands subject to their use of a geofencing system to protect licensed incumbent services.

12. The Commission proposes to protect licensed services in the 6 GHz band by prohibiting geofenced VLP access points with power levels greater than -5 dBm/MHz EIRP PSD from operating on certain channels within defined exclusion zones around the sites where licensed incumbent services operate. The geofencing system would prevent a VLP access point from operating on the frequencies within

these exclusion zones where there may be a higher risk of causing harmful interference. The Commission proposes that the exclusion zones be determined based on the operational frequency being used by the incumbent service licensee as well as the power of the geofenced VLP access point. A geofenced VLP access point located within an exclusion zone would be prohibited from operating only on the specific frequencies excluded within that zone and would be permitted to operate on any other frequencies that are available at its location at the maximum power level permitted. Depending on the number of incumbent licensees in an area and the size of the exclusion zones, a geofenced VLP access point could fall within multiple overlapping exclusion zones at a particular location. In such cases, the device would have to avoid all excluded frequencies for all the overlapping zones in which it is located. To provide manufacturers flexibility in developing geofencing systems, the Commission proposes that geofencing systems may also determine areas where particular frequencies are available throughout the entire area based on the same protection criteria used to calculate exclusion zones. Each approach may have advantages in terms of spectrum availability or device complexity, so permitting either approach would provide manufacturers with the ability to determine the most suitable implementation for a specific use case. The proposed methodology for calculating exclusion zones is described below.

13. The Commission seeks comment on these proposals. Is a geofencing system necessary to minimize the likelihood of harmful interference from VLP devices with a PSD greater than -5 dBm/MHz EIRP to licensed incumbent services in the 6 GHz band? Is the proposed method of using exclusion zones around licensed incumbent receive sites an appropriate way to protect these sites? Would the proposed alternative method allowing geofencing operators to calculate zones in which a channel is available over an entire zone provide the same protection to incumbent services as determining exclusion zones in which one or more channels are unavailable? Should the Commission permit use of either method, or is one method preferable to the other, and if so, why? How would the benefits of higher power VLP operations in the 6 GHz band vary with differences in exclusion zone design?

14. The Commission also seeks comment on whether an approach other than geofencing, such as requiring the

use of an AFC system for higher power VLP devices, would be more appropriate. What are the advantages and disadvantages of requiring a geofencing approach for protecting licensed services as opposed to other approaches? What are the benefits and costs of the various approaches for the public, unlicensed device manufacturers, and incumbent users of the 6 GHz band? Are there any other factors that the Commission should consider in determining whether to require use of a geofencing system for VLP devices with a PSD greater than -5 dBm EIRP? Commenters advocating for the proposed approach or any alternatives should provide details explaining why their desired approach is most beneficial for enabling these higher powered geofenced VLP devices.

2. Geofencing Architecture

15. *Definition of geofenced VLP devices.* The Commission proposes to define a geofenced VLP access point as an access point that operates in the 5.925–7.125 GHz band, has an integrated antenna, and uses a geofencing system to determine channel availability at its location. The Commission proposes that these devices could simultaneously operate as clients to other access points or telecommunications systems (e.g., low-power indoor access points, standard power access points, other U–NII band access points, commercial telecommunication carriers' networks, etc.) and very low power access points. The Commission believes that this definition adequately describes the types of VLP devices that could operate under a geofencing system, and the proposed requirement for an integrated antenna, which is consistent with the current rules for indoor access points and subordinate devices, will help ensure that geofenced VLP devices cannot be easily modified to increase their EIRP.

16. The Commission proposes to require that geofenced VLP access points obtain or calculate the exclusion zones—where some operational restrictions are required—that will protect licensed services, have the capability to determine their location, and intelligently choose their operating channel to avoid operating on a prohibited frequency within an exclusion zone. The Commission further proposes to require that client devices operating under the control of a geofenced VLP access point operate only on channels as determined by its connected geofenced VLP access point. Under these proposals, client devices would not be required to directly obtain

or calculate exclusion zone information as they would only be operating on channels already cleared through the geofenced VLP access point. The same client devices may also be capable of operating under the control of LPI access points and standard power access points, in which case the client devices must adjust their power levels depending on which type of access point they are connected to. That is, when connected to an LPI access point or standard power access point, the client device would have to follow the client device rules for those operations, which require those client devices to reduce their power at least 6 dB below the access point power level. Because geofenced VLP access points and client devices would operate at lower power levels than standard power and LPI devices, thus reducing the distance at which harmful interference may possibly occur, the Commission does not propose to require client devices to reduce their power below that of the access point and propose to limit both geofenced VLP access points and client devices operating under the control of a geofenced VLP access point to the same power levels.

17. The Commission seeks comment on these proposals. Is the proposed geofenced VLP two-tier model based on access points and client devices in which a geofenced VLP access point is required to obtain geofencing information, but the client device is not, appropriate? Is the proposed definition of VLP access point appropriate, or are different or additional definitions that better describe the types of permissible geofenced VLP devices necessary? Should all geofenced VLP devices be required to incorporate an integrated antenna? Should client devices be permitted to operate at a different power level than geofenced access points? Is there any need for a 6 dB power reduction for a client to a geofenced VLP device?

18. *System architecture.* The Commission proposes to allow geofencing systems for VLP devices operating at greater than -5 dBm/MHz flexibility in their design by permitting the use of either a distributed architecture or a centralized model. One possible architecture would have a centralized geofencing system calculate exclusion zones based on information obtained from Commission databases, e.g., the Universal Licensing System (ULS) and Cable Operations and Licensing System (COALS) databases, as well as the Commission's rules. A VLP access point would contact this centralized geofencing system to download the exclusion zones and then

manage its use of spectrum based on these areas. Another possible architecture would be for a VLP access point to regularly send its location to a centralized geofencing system, which would then inform the access point as to the channels it may use. Yet another possible architecture would be for the geofencing system to be integrated within a VLP access point. A VLP access point would download information about the licensed services to be protected from an external source. It would contain the data and software necessary to independently determine exclusion zones and manage its use of spectrum. The Commission is not proposing specific details for the geofencing system architecture for VLP devices because the Commission wants to provide manufacturers with the flexibility to design appropriate geofencing systems for different equipment use cases, many of which may not be known at this time.

19. The Commission seeks comment on these proposals. How much flexibility should the Commission provide in geofencing system architecture? Should the Commission provide flexibility for different geofencing system implementations or should a single approach be specified? What are the benefits and drawbacks of each approach? How would costs for users of a geofencing system vary between different approaches? Is there a need to specify the overall framework of geofencing systems in more detail, e.g., whether they are centralized or decentralized? Does the Commission need to provide more specific requirements for a geofencing system architecture and if so, what requirements should be specified? Does the Commission need to provide further details on the process that the Commission will use to approve geofencing systems, and if so, what additional details are necessary?

3. Protection of Incumbent Services

20. The Commission proposes requirements for geofenced VLP devices operating at greater than -5 dBm/MHz EIRP to protect licensed incumbent services in the 6 GHz band, specifically, fixed microwave services, BAS and CARS receive sites, as well as radio astronomy and FSS receive sites. Consistent with the requirements for standard power access points and fixed client devices, the Commission proposes that geofencing systems use data from Commission databases to protect fixed microwave services. The Commission proposes that BAS and CARS receive sites be protected using data provided by licensees, as described

below. The Commission further proposes that geofenced VLP devices protect certain radio astronomy sites and FSS receive sites as provided in the Commission's rules. Geofenced VLP operations, like all other unlicensed 6 GHz band operations, would have to comply with international agreements with Canada and Mexico.

21. *Fixed microwave services protection.* The Commission proposes to require geofencing systems to follow the same criteria for protecting fixed and temporary fixed microwave receive sites used for standard power access points and fixed client devices. Specifically, the Commission proposes that geofenced VLP device exclusion zones be calculated based on the -6 dB I/N interference protection criterion used in the *6 GHz Order*, where N (noise) represents the background noise level at the fixed microwave receiver, and I (interference) represents the co-channel signal from the VLP device at the fixed microwave service receiver. The Commission noted in the *6 GHz Order* that use of this metric is a conservative approach that will ensure that the potential for harmful interference to the fixed microwave services is minimized and that the important fixed microwave services in the 6 GHz band are protected.

22. The Commission also proposes to allow an assumption of 4 dB for body loss in the exclusion zone calculations because of its finding, discussed in the Second Report and Order, that due to the nature of VLP devices and how they will be used, an additional 4 dB attenuation for body loss is appropriate when analyzing the potential effect of their emissions. The Commission does not propose to consider aggregate interference from geofenced VLP devices since they will operate at a significantly lower power level than standard power access points and fixed client devices for which the Commission previously determined that an aggregate interference limit is not necessary.

23. The Commission seeks comment on these proposals. Are the proposed interference metric and body loss assumption appropriate? Would other values be more appropriate? Are there other parameters in addition to body loss that should be accounted for when determining exclusion zones (e.g., transmit power control)? Commenters who advocate for additional parameters should specify the parameters, appropriate values, and a detailed justification for why that parameter and value are appropriate. The Commission seeks estimates of the benefits and costs of different parameter proposals. The

Commission also seeks comment on whether there is a need for an aggregate interference limit. If so, what is the appropriate limit and why? How could the Commission enforce an aggregate interference limit using a geofencing system? Would a centralized system be required and if so, who would build and run such a system?

24. The Commission proposes to require geofencing systems to use the same propagation models that are used for standard power access points and fixed client devices to determine the VLP device exclusion zones. Specifically, the Commission proposes to require geofencing systems to use the free space path-loss model at separation distances of up to 30 meters, the Wireless World Initiative New Radio phase II (WINNER II) model at separation distances greater than 30 meters and up to and including 1 kilometer, and the Irregular Terrain Model (ITM) combined with the appropriate clutter model at separation distances greater than 1 kilometer. Where such data are available, the Commission proposes that the exclusion zone calculation use site-specific information, including buildings and terrain data, for determining the line-of-sight/non-line-of-sight path component in the WINNER II model. For evaluating paths where such data are not available, the Commission proposes that the calculation use a probabilistic model combining the line-of-sight path and non-line-of-sight path into a single path-loss as set forth in the requirements for AFC systems. The Commission believes that these propagation models are appropriate for determining exclusion zones for geofenced VLP access points for the same reasons that they are appropriate for determining channel availability for standard power devices described in the *6 GHz Order*. The Commission proposes that these propagation models be implemented to determine the exclusion zones consistent with the way that they are being used to determine standard power device exclusion zones and consistent with the consensus methodology WinnForum published for AFC systems, which permits certain allowances for feeder loss and antenna mismatch. Each of these models could be used at the antenna height above ground (1.5 meters) that the Commission assumed for VLP operation in the Second Report and Order.

25. The Commission seeks comment on these proposals. Are the proposed propagation models appropriate for calculating geofenced VLP device exclusion zones? Could the Commission allow the use of different propagation

models for calculating geofenced VLP device exclusion zones or simplify the methodology in some way? For example, could the Commission require use of a single propagation model, such as ITM, for all distances? If so, what is the appropriate propagation model? If the Commission specifies a different propagation model for determining exclusion zones, should the Commission make its use mandatory or should it be an optional alternative to the proposed propagation models? Parties should address how a different propagation model would ensure that incumbent services in the 6 GHz band are adequately protected. The Commission also seeks comment on the benefits and costs of requiring or allowing the use of different propagation models. Could this approach reduce the size of the exclusion zones where geofenced VLP devices are prohibited from operating on certain frequencies?

26. The Commission also seeks comment on whether there are land-use databases that could account, for example, for actual buildings and other structures, especially in cities and suburbs, that could allow a more accurate determination of where VLP devices can operate without causing harmful interference? If so, what databases are available for this purpose? If this information is not available, would it be possible for parties to develop it, either nationwide or for specific areas? Could the Commission allow modifications to any parameters used in the specified propagation models, and if so, which ones? If the Commission allows modifications to the method of determining spectrum availability for VLP devices, what criteria would the Commission have to specify in the rules? Would the Commission need to develop a process for modifying the locations where VLP devices can and cannot operate? Should a geofencing system operator be required to obtain prior permission from the Commission to use a modified methodology, or could the Commission adopt rules that do not require operators to obtain prior permission?

27. *Electronic news gathering central receive site protection.* The Commission proposes to require that geofencing systems protect BAS and CARS operations in the U-NII-6 and U-NII-8 bands, including low power auxiliary devices. Both the U-NII-6 and U-NII-8 bands are used by mobile broadcast auxiliary services, including outdoor electronic news gathering (ENG) trucks and low power short range devices, such as portable cameras and microphones. Low Power Auxiliary

Stations, which are licensed in portions of the U–NII–8 band, operate on an itinerant basis and transmit over distances of approximately 100 meters for uses such as wireless microphones, cue and control communications, and TV camera synchronization signals. ENG trucks transmit video programming, generally using telescoping directional antennas that are oriented toward a central receive site from remote sites, such as the location of news or sporting events, to a central receive site. According to the ITU, ENG collection sites are generally operated by TV networks in major city areas where the typical central collection site is located within the city center, on the roof of a high building (e.g., 150 m above the surrounding terrain) and that many TV networks also have alternative dedicated ENG collection sites mounted on their broadcast transmission towers. The ITU also states that these receive sites include both steerable antennas and fixed arrays that may have up to 360° of azimuthal coverage. The central receive sites, align with the locations of the ENG trucks. Hence, the communication link between the ENG truck and central receive site shares many of the characteristics of a fixed microwave link—i.e., they use directional antennas to send signals between two fixed locations that are located mostly above the local clutter—and can be protected by the geofencing system by creating exclusion zones to protect the receiver at the central receive site. Due to the steerable nature of the central receive antennas, would exclusion zones surrounding central receive sites need to be circular to ensure protection in all directions, or could they be only part of a circle, i.e., less than 360 degrees, if they only receive from specific directions and the directional pattern and range of orientations of the receive antenna are known?

28. Because links from ENG trucks to BAS and CARS receive sites are essentially temporary fixed point-to-point links, the Commission proposes the use of the same -6 dB I/N interference protection criterion and propagation models along with an additional 4 dB body loss consistent with the Commission's proposal for calculating geofenced VLP device exclusion zones for fixed microwave links. Since BAS and CARS operations are typically licensed for the entire band(s) in which they operate (i.e., U–NII–6, U–NII–8, or both), should geofenced VLP devices avoid operation across the entire band that a BAS/CARS site receives within the area where the

interference protection criterion is calculated to be greater than -6 dB I/N unless more information about actual operations are known? Should the exclusion zones be circular when the directivity of the BAS/CARS receive antenna is not known?

29. A full record of BAS and CARS central receive sites would be needed in the Commission's licensing databases to calculate the geofencing exclusion zones. The Wireless Telecommunications Bureau, the Media Bureau, and the Office of Engineering and Technology could collect information from BAS and CARS licensees regarding locations and associated information for existing central receive sites to ensure that the Commission's databases are complete and up-to-date. The Commission would not permit geofenced VLP unlicensed devices to operate in the U–NII–6 and U–NII–8 bands until after the Commission's databases are updated.

30. The Commission seeks comment on these proposals. Although the Commission is proposing to protect BAS/CARS using the -6 dB I/N ratio and 4 dB body loss assumption, the Commission seeks comment on whether a different metric or assumption is more appropriate? Are the propagation models the Commission proposes above to protect fixed microwave links also appropriate for BAS/CARS? Commenters should provide detailed technical justification and analysis. The Commission seeks comment on whether there are ways that it could reduce the size of the exclusion zones to protect BAS and CARS receive sites, limit the number of frequencies excluded within those zones, or limit receive site protection to only the specific times when they are in use. For example, should the Commission require BAS and CARS users to notify a geofencing system of their ENG operations, and for the geofencing systems to incorporate a push notification feature or similar functionality to provide information (e.g., actual operating locations and frequency usage, on a near real-time basis) to VLP devices so that the exclusion zones in the U–NII–6 and U–NII–8 bands can be tailored to actual usage rather than all possible usage areas? What specific requirements would the Commission need to specify for a push notification system? Would it be better for the Commission to simply require the geofencing system to provide updated exclusion zone information to devices within a defined time interval from the time it receives updated usage information, similar to the approach in the Citizens Broadband Radio Service, which requires devices to respond to

instructions within a specific time limit, and allow device manufacturers to determine the most appropriate way to comply with this requirement?

31. The Commission seeks comment on the benefits of obtaining more detailed information from BAS/CARS licensees and limiting protection to only the associated exclusion zones and times that these services actually operate. The Commission also seeks comment on how much spectrum ENG operations typically use. The *Policy Statement* (FCC 23–27) emphasized data-driven regulatory approaches to promote co-existence. In this regard, the Commission specifically noted that “[r]elevant information about services’ transmitter and receiver standards, guidelines, and operating characteristics is needed to promote effective spectrum management and efficient coexistence.” The Commission therefore proposes that BAS/CARS licensees be required to register their receive site information in Commission databases so that geofencing systems can use site-specific data to create appropriate exclusion zones for these sites. The Commission seeks comment on what information should be collected. Should it be limited to information currently collected by Commission databases, such as location, antenna height, antenna model, and azimuth, or are there other information fields that the Commission should collect? Is the current information in ULS and COALS appropriate for estimating the number of affected incumbents and their equipment? Could the Commission use past activity on ULS and COALS systems to extrapolate the future number of necessary updates? The Commission seeks comment on this proposal and whether the Commission should conduct an information collection for these sites. Assuming that the Commission does initiate an information collection, what is an appropriate time frame over which to require licensees to provide their information?

32. The Commission also seeks comment on whether multiple ENG operations at a location use the same or different receive sites. What is the number of ENG operations that typically occur at a news event, sporting event, or other event where such operations may be used? And what is the maximum that might be used at larger national events such as political conventions or large scale sporting events? How much time do ENG operations typically need to transmit for these events? Is continuous operation required before, during, and after an event or only within discrete timeframes? Are there ways to predict

when operation may be heaviest? Looking across these dimensions of time, location, and spectrum occupancy, how much additional spectrum, operating area, and time could this approach make available for VLP devices, as compared to assuming that ENG might always be operating within a circular or part of a circular area around an ENG receive site? How would this differ from a system where ENG operations simply preregistered their entire service areas and operating channels, but with no time limit to account for use at unscheduled breaking news events? If the specific location, antenna pattern, and look angle of an ENG receive antenna are known, is it necessary for the exclusion zone to be circular, or could the Commission considers non-circular exclusion zones, such as keyhole shaped zones or arcs, to protect ENG receive sites? If the Commission were to implement a registration requirement, should the ENG use be updated during in-use times or for non-real-time registration, or should the ENG use be updated on a regular basis? What is a reasonable time period for such updates? Can ENG operations be automated to inform a geofencing system when it is operating and on which channels and to which receive site it is broadcasting, or would registration have to be a manual process? What up-front and ongoing costs would be involved with setting up and using such a system and who would incur them?

33. Although the Commission proposes to allow either a distributed or centralized architecture model for VLP device geofencing systems, if the Commission were to adopt a push notification or similar approach to protect BAS/CARS based on actual usage, it appears that there would be a need for one or more centralized systems to register BAS/CARS usage and provide the information to geofencing systems. The Commission seeks comment on whether this would be necessary. If so, who would develop and operate these systems? How should any information be shared amongst geofencing systems? For example, in the white space rules, white space device operators are required to share registration information with all other database administrators. Would such a requirement be necessary here? If so, how would data sharing work to ensure that all geofencing systems, both centralized and decentralized, have up-to-date information to protect ENG operations at scheduled and unscheduled events? What information should licensees be required to file and

what procedure would they use to get their information to the system? Should licensees be required to file or update information within a specific timeframe? What would be the burden on licensees for filing this information? Could the filing process be automated? The Commission seeks comment on any other options for transmitting channel utilization information to geofencing operators. Are there any other factors that should be considered in this process? Finally, the Commission seeks comment on whether there should be any channels (e.g., one or two channels) set aside as a safe harbor for ENG operations in these bands where ENG could operate without risk of harmful interference from VLP devices at times when the operator could not register its parameters? If so, how much spectrum would need to be set aside for such operation? Would spectrum be needed in both U-NII-6 and U-NII-8? Are there particular places in the band that would be most useful; e.g., the top of the band, bottom of the band, middle of the band, or on the same spectrum permitted for satellite downlink operations? Would such safe harbor be needed nationwide or only in certain areas (e.g., around large cities)? Commenters advocating such an approach should provide detailed information regarding ENG requirements and fully support their position with technical information.

34. The Commission seeks comment, especially quantitative, on the benefits and costs of requiring a push notification system. Should any particular protocol or security measures be required? To what extent would a push notification system permit service continuity for geofenced VLP devices, as compared to how often such users would need to modify their channel usage to avoid exclusion zones when those areas are tailored to the specific situation rather than assuming that ENG might always be operating within a circular or part of a circular area around an ENG receive site? How would data rates be affected? What would be the potential costs associated with establishing, maintaining, and operating the push notification system? In particular, the Commission seeks comment on the costs for BAS and CARS licensees to report their location information to enable push notifications.

35. *Low-power short range mobile device protection.* The Commission proposes that low power short range BAS and CARS devices, such as portable cameras and microphones, and Low Power Auxiliary stations be protected from harmful interference by a combination of a required contention-

based protocol and low probability of a VLP device operating on the same channel in a nearby location. This proposal is consistent with the *6 GHz Order* in which the Commission required that all 6 GHz unlicensed LPI access points, subordinate devices, and client devices employ a contention-based protocol. Further, the *6 GHz Order* showed that the probability of channel overlap between 6 GHz unlicensed devices and incumbent station operations is low due to unlicensed devices having a full 1200 megahertz over which to operate.

36. The Commission believes that a similar approach for geofenced VLP devices will adequately reduce the risk that mobile service incumbents in the U-NII-6 and U-NII-8 bands will be subjected to harmful interference and keep that risk to an insignificant level. The Commission's reasoning is consistent with the *6 GHz Order*, i.e., the sensing function associated with the contention-based protocol, along with the low probability for co-channel operation, is sufficient to ensure that geofenced VLP devices detect nearby mobile BAS operations and avoid transmitting co-channel to protect those operations from harmful interference. While the Commission is not proposing a specific technology protocol or contention method, the Commission proposes to require geofenced VLP devices to use a contention-based protocol as the Commission requires for LPI devices. The Commission believes that this proposal has additional benefits as it provides multiple geofenced VLP devices as well as LPI devices equal access to the spectrum, while protecting mobile incumbents' services. The Commission also believes that the use of a contention-based protocol will limit the duty cycle of geofenced VLP devices as they will need to share the spectrum with other devices. Additionally, geofenced VLP devices would transmit at lower power levels than LPI devices, further reducing the risk of harmful interference to mobile services. Given all these reasons, the Commission believes that requiring use of a contention-based protocol by geofenced VLP devices would protect mobile service incumbents.

37. The Commission seeks comment on this proposal. Would requiring geofenced VLP devices to incorporate a contention-based protocol adequately protect mobile service incumbents? If not, what other protection measures could be used by geofenced VLP devices to protect mobile services? For example, could a registration system with a push notification provide near real-time information to geofenced VLP devices to

avoid transmitting near mobile BAS operations? Is there a need to provide greater specificity in the requirements for a contention-based protocol used by geofenced VLP devices? If so, what particular requirements should be specified and why? What are the costs and benefits of requiring the use of a contention-based protocol?

38. *Radio astronomy and fixed satellite protection.* The Commission proposes to require that geofencing systems implement the same exclusion zone rules for protecting radio astronomy sites in the 6650–6675.2 MHz band as standard power access points and fixed client devices, which are based on the distance to the radio horizon. The locations of the protected radio astronomy sites and the protection criteria for these sites are specified in the rules for standard power access points and fixed client devices. Additionally, the entire 6 GHz band is home to an FSS allocation (Earth-to-space), while the U–NII–8 band has a few space-to-Earth MSS feeder downlink earth stations operated by Globalstar. The only requirement the Commission adopted to protect the Fixed Satellite Service in the *6 GHz Order* was restricting standard power access point EIRP to 21 dBm above a 30 degree elevation angle. Because the Commission proposes to limit geofenced VLP devices to 14 dBm EIRP and seeks comment on a maximum EIRP of no greater than 21 dBm, the Commission proposes no additional restrictions to protect FSS Earth-to-space operations. The Commission seeks comment on these proposals.

39. Globalstar operates receiving earth stations for non-geostationary Mobile-Satellite Service feeder links at five locations. The Commission proposes to require that geofenced VLP access points protect Globalstar's earth stations using the same exclusion zone calculation methodology used to protect radio astronomy sites. The Commission proposes to require the geofencing system to implement these exclusion zones over 6875–7055 MHz at each of Globalstar's five feeder link earth station locations. As these exclusion zones are designed to protect extremely sensitive radio astronomy facilities, the Commission believes that they will provide more than adequate protection for Globalstar's earth stations.

40. The Commission seeks comment on this proposal. If different criteria are appropriate, what are the key parameters that must be considered to protect these earth stations? Are parameters such as minimum elevation angle from the earth station to the satellite, gain of earth station antenna,

and earth station receiver characteristics readily available? Are Commission databases, such as the International Communications Filing System (ICFS), able to collect the necessary parameters for calculating exclusion zones? If not, and given the limited number of these Earth stations in the U–NII–8 band, could exclusion zones around these Earth stations be determined based on generalized parameters? What should those parameter values be? Would earth station receivers require a different level of protection than the –6 dB I/N ratio used to protect other incumbents in the band? If so, what is the protection criterion? What would be the cost of implementing and maintaining necessary protections for space-to-Earth stations from geofenced VLP devices? The Commission also seeks information on the economic harm from interference that these protections would prevent. Commenters should provide technical analysis to support their positions.

41. *Adjacent channel protection.* The Commission proposes that exclusion zones for geofenced VLP access points account for only co-channel operations and not consider adjacent channel operations. The Commission believes that this proposal is appropriate due to the significantly lower power the Commission proposes for geofenced VLP devices as compared to standard power and fixed client devices. The out-of-band emission rules for 6 GHz unlicensed devices require such emissions to be suppressed by 20 dB at 1 megahertz outside of channel edge, by 28 dB at one channel bandwidth from the channel center, and by 40 dB at one-and-one-half times the channel bandwidth away from channel center. When compared to standard power devices that may operate at EIRP levels up to 23 dBm/MHz and must meet the same OOB mask, VLP adjacent channel emissions begin at least 22 dBm below those standard power device OOB levels. Thus, VLP OOB levels must begin at –19 dBm/MHz at 1 megahertz outside the channel edge and reduce from that level with spectral distance. Moreover, the Commission notes that adding 20 dB or more additional emission reduction represents at least a tenfold reduction (assuming free space propagation) in distance along any radial for determining adjacent channel protection as compared to standard power device adjacent channel geofenced distances. In the *6 GHz Order*, the Commission concluded that the risk of adjacent channel interference to microwave receivers was low and stated that it expects these adjacent channel zones will be small and not

significantly impact the amount of spectrum available to unlicensed devices at any given location, but included adjacent channel protection in the adopted rules for standard power devices as part of a conservative approach to protecting the incumbent receivers. Given the additional 22 dB in adjacent channel protection provided by geofenced VLP devices as compared to standard power devices, and the further reduction in protection areas size, the Commission concludes that the risk of adjacent channel interference is so low as to not require geofencing systems to account for them. The Commission seeks comment on this proposal.

42. *Geofencing update interval.* The Commission proposes to require a geofencing system to obtain the most recent public access file data from Commission databases (e.g., ULS and COALS) for registered fixed microwave links and BAS/CARS central receive sites at least once per day and to recalculate the exclusion zones, as necessary, to account for any new or updated information. The Commission believes that once per day would be an appropriate re-check interval because the ULS and COALS, which contain the data that will be used to determine the exclusion zones to protect fixed microwave services and BAS/CARS central receive sites, are generally updated on a daily basis, and a daily re-check requirement would also ensure that newly registered microwave receive sites and BAS/CARS central receive sites are promptly protected. The Commission seeks comment on this proposal. Is a daily update necessary, or recognizing that not many new stations get licensed on a daily basis and that there is often a lag between licensing and operation, could a longer interval be specified? If so, what update interval should be required? Conversely, as discussed above, could the Commission or should it establish a process to update BAS/CARS information in a much shorter timeframe to enable more efficient use of spectrum in areas near BAS and CARS receive sites? How would the benefits and costs change with differing interval lengths?

4. Other Geofencing Requirements

43. The Commission proposes additional requirements for geofencing systems and operators that are similar to certain requirements for 6 GHz AFC systems. Specifically, the Commission proposes that each geofencing system and operator thereof for centralized systems and the equipment certification responsible party for systems internal to the very low power device must: (1) ensure that a regularly updated

geofencing system database that contains the information required for geofencing systems by paragraphs (o) through (r) of proposed § 15.407, including incumbent's information and very low power access points authorization parameters, is maintained; (2) respond in a timely manner to verify, correct, or remove, as appropriate, data in the event that the Commission or a party presents a claim of inaccuracies in the geofencing system; (3) establish and follow protocols to comply with enforcement instructions from the Commission, including discontinuance of very low power access point operations on specified frequencies in designated geographic areas and predetermined exclusion zones; and (4) comply with instructions from the Commission to adjust exclusion zones to more accurately reflect the potential for harmful interference.

44. The Commission further proposes that for centralized geofencing systems, geofencing system operators must provide continuous service to all VLP devices for which it has been designated to provide service, and that if a geofencing system ceases operation, the operator must provide at least 30-days' notice to the Commission and a description of any arrangements made for those devices to continue to receive exclusion zone update information. In addition, the Commission proposes that a geofencing system operator may charge fees for providing service and that the Commission may, upon request, review the fees and can require changes to those fees if the Commission finds them to be unreasonable. The Commission also proposes that at the time that a VLP device receives equipment certification, the device must either have its geofencing system approved or specify an already approved geofencing system that it is using. The Commission further proposes that it may specify criteria for such approval, which could require test results to be submitted.

45. The Commission seeks comment on these proposals. Are all the proposed requirements appropriate and necessary? Should the Commission modify any of these proposed requirements or establish additional requirements for geofencing systems and operators? If so, what requirements are necessary? The Commission seeks quantitative analysis of the likely fee structure that would result under its proposal allowing fees. What would be the initial cost of developing a geofencing system and the ongoing cost of providing daily information to it? The Commission also seeks comment on how any fees would relate to usage or

other costs of operating the geofencing system.

46. Finally, in light of the proposals to base higher power VLP operation on using a geofencing system, the Commission seeks comment on whether there are alternative methods to achieve the same result. Are there other technical or operational approaches that would similarly permit more flexible VLP operation while protecting incumbent operations? Commenters advocating for alternative approaches should provide specific detail regarding any alternative approach along with descriptions and analysis of how such an approach would protect incumbent operations.

C. Client-to-Client Device Communications

47. In the 6 GHz Order, the Commission prohibited unlicensed client devices from operating as "mobile hotspots" because "[p]ermitting a client device operating under the control of an access point to authorize the operation of additional client devices could potentially increase the distance between these additional client devices and the access point and increase the potential for harmful interference to fixed service receivers or electronic news gathering operations." To avoid this situation, the Commission's rules prohibit 6 GHz unlicensed client devices from directly communicating with one another. The Commission proposes two limited exceptions to this rule for VLP devices that operate above the -5 dBm/MHz EIRP PSD level. First, the Commission proposes to permit higher powered VLP devices that are all operating under the control of the same LPI access point to directly communicate with each other. The Commission further proposes that these communications be limited to the LPI client device power spectral density level (*i.e.*, 6 dB below the LPI access point power level) and the VLP device 14 dBm EIRP limit. Because both VLP devices under this approach would also meet the LPI requirements, the Commission would have assurance that their operations are indoors and thus that their emissions are subject to the same building entry loss as LPI devices. With their lower power limit, these client devices will have even lower potential to cause harmful interference to incumbent operations than the insignificant level the Commission already determined exists for LPI devices. This proposed exception could provide increased flexibility to a limited class of devices, such as laptop computers, that generally do not incorporate GPS or other geolocation

technologies while protecting incumbent operations beyond levels that similar devices (*i.e.*, LPI devices) already provide.

48. Second, the Commission proposes to permit direct client-to-client communications between VLP client devices when they are both under the control of the same VLP access point and the geofencing system determines that they are operating outside of any geofencing restrictions; *i.e.*, there are channels available for VLP use that are not subject to geofencing requirements in the location where these devices are being used. The rules the Commission proposes for geofenced VLP devices would permit up to 1 dBm/MHz EIRP PSD and up to 14 dBm EIRP when operating on channels that are not within an exclusion zone. Thus, because each client device in this scenario would be permitted to operate at the maximum power permitted for VLP devices, there would be no increase in the potential for causing harmful interference to incumbent operations if the client devices being used are also able to communicate directly with each other. However, all VLP access points would still be subject to the applicable geofencing requirements including location and geofencing recheck intervals and switching channels or ceasing communications should they enter an exclusion zone and are currently using a channel that is prohibited within that area. In that case, client devices operating under the control of a VLP access point that switches channels would also be required to switch channels as directed by the VLP access point. This proposed limited exception, as with the first, could provide additional flexibility to implement novel VLP use cases without increasing the risk of harmful interference to incumbent operations.

49. The Commission seeks comment on these proposals. Are these proposed limited exceptions to the prohibition on client-to-client device communications appropriate? Would any other exceptions with respect to VLP devices be appropriate? Does the Commission need to specify any additional requirements or limitations on client-to-client device communications? How much and what kinds of additional usage would these proposals create in client-to-client operations? Would these proposals impose any additional costs to users of the associated spectrum?

D. Very Low Power Device Requirements

50. In the 6 GHz Order, the Commission established that an AFC system require a device's geographic coordinates—along with the accuracy of

those coordinates—and the device's antenna height above ground to determine which channels are available for use at the device's location. Standard power access points (APs) are required to contact an AFC system at least once per day, consistent with the frequency of the update to the ULS public access file, to obtain the latest lists of available channels at their locations. The daily update ensures that stationary unlicensed devices do not operate on a channel in proximity of a newly licensed fixed service receiver. Although VLP devices may be mobile or stationary, mobile VLP devices may move to different locations, potentially resulting in a changing available channel list. In lieu of an AFC system, the Commission proposes to require that geofenced VLP devices access a simpler geofencing system to prevent them from operating where there may be an elevated risk of causing harmful interference to licensed incumbent services in the 6 GHz band. Under this proposed geofencing system, geofenced VLP devices would have to incorporate provisions to ensure that they avoid transmitting on certain channels within certain geographic areas.

51. A mobile geofenced VLP device operating at a power level greater than -5 dBm/MHz EIRP PSD would have to consider exclusion zone(s) not only at its present location, but also at all areas that may be traversed by a mobile VLP device between the present time and a future location update. Naturally, the area traversed by the mobile VLP device is a function of the VLP device's speed and direction. For example, a mobile VLP device located in a vehicle traveling 35 miles per hour could cover approximately one kilometer within one minute. However, there are other mobile use cases in which a pedestrian using a VLP device will cover well under a hundred meters in the same one-minute time period. Accordingly, rather than proposing a set time period within which a mobile VLP device must update its location to check if it is in an area with different geofencing requirements than the previous area in which it checked, the Commission proposes a flexible approach with varying recheck times based on speed to better meet device usage requirements. Thus, the recheck interval can be tailored to require fewer rechecks when moving at slow speeds and thus ease processing requirements and save battery power.

52. *Incorporated geo-location.* Consistent with the requirements for standard power access points, the Commission proposes to require that geofenced VLP access points generally include a geo-location capability to

determine their geographic coordinates. The Commission proposes to require a geofenced VLP device's geo-location capability to determine its location uncertainty in meters, with a 95% confidence level, and that the applicant for certification of a VLP access point demonstrate the accuracy of the geo-location method used and the location uncertainty. The Commission further proposes to require that a geofenced VLP access point, using its geographic coordinates, take this location uncertainty into account when it determines whether the VLP access point is within an exclusion zone. The Commission seeks comment on this proposal. The Commission also seeks quantitative information on the benefits and costs of this proposal to VLP device users, manufacturers and the wider public.

53. *Location Update.* The Commission proposes to require that geofenced VLP access points have the capability to timely adjust their operating frequencies when moving into, out of, or between exclusion zones. The Commission proposes flexible requirements to enable device designers to optimize efficiency while still meeting the requirement to avoid operating on channels where -6 dB I/N interference protection criterion is not met. Specifically, the Commission proposes that the time interval for a geofenced device to re-check its location and adjust its frequency usage must decrease proportionally based on an increase in the mobile device's speed. Under this proposal, a geofenced VLP access point that is in a powered state must regularly re-check its location and speed and identify its position with respect to any exclusion zones that may exist within the vicinity of its current location. The Commission further proposes that this geolocation update be done frequently enough that, based on the geofenced VLP access point's position and speed, the device will not transmit on a channel that is unavailable within an exclusion zone. The Commission believes that this proposal provides flexibility to device designers to adjust how often the VLP access point must obtain geolocation information based on how fast the VLP access point is moving and how far it is from an exclusion zone where it would have to change its operating channel. As an additional safeguard, the Commission proposes to require the VLP access point to determine its location and speed at least once a minute. This one-minute update proposal is designed to provide additional assurance that the VLP access point avoids transmitting on frequencies

that are not permitted by the geofencing system. The Commission further proposes to require applicants for geofenced VLP access point certification to submit an attestation describing their algorithm for updating the device's location with an explanation describing how these requirements are met.

54. The Commission seeks comment on these proposals. Do they provide sufficient flexibility for mobile geofenced VLP devices? Is it necessary for us to specify more detailed requirements on how often a geofenced device must re-check its speed and its position with respect to exclusion zones? If so, what additional requirements should be specified and why? Is a requirement for devices to re-check their location and speed at least once per minute necessary? Is the proposed information that applicants for certification of geofenced VLP access points must submit appropriate, or should any additional information be required? If so, what information? The Commission seeks quantitative information on the benefits and costs to VLP device users, manufacturers and the wider public of its proposal and any proposed alternatives.

55. *Antenna Height.* The Commission proposes to require geofencing systems to use an assumed antenna height above ground level of 1.5 meters for geofenced VLP access points similar to the approach used in the Second Report and Order for interference modeling of VLP devices. The Commission seeks comment on this proposal. Is an assumed 1.5 meter antenna height appropriate, or should the Commission specify a different value? If so, what height should the Commission require for the exclusion zone calculations? The Commission also seeks quantitative information on the benefits and costs to VLP device users, manufacturers and the wider public of the Commission's proposed antennas height. Commenters proposing alternative values should quantify the benefits and costs of alternatives.

56. *Fixed Infrastructure.* Consistent with the Commission's actions in the Second Report and Order, the Commission proposes to prohibit geofenced VLP devices from operating as part of a fixed outdoor infrastructure as an additional measure to reduce the likelihood of interference to licensed incumbent services. The Commission seeks comment on this proposal. Is a prohibition on fixed outdoor infrastructure necessary when a geofencing system is used? The Commission seeks quantitative information on the benefits and costs to VLP device users, manufacturers and

the wider public of the Commission's proposal versus allowing operations as part of fixed outdoor infrastructure.

57. *Updates to exclusion zones.* The 6 GHz Order established a requirement that standard power access points must recheck the frequency availability with an AFC system once per day. Similarly, the Commission proposes to require geofencing systems to update the exclusion zones at least once per day using the data from Commission databases on the licensed microwave links and BAS/CARS central receive sites. The Commission also proposes to require geofenced VLP access points to obtain or calculate the updated exclusion zones from the geofencing system at least once per day. This proposal is designed to ensure that newly registered microwave receive sites and BAS/CARS central receive sites are promptly protected. Consistent with the rules for standard power access points and fixed client devices, the Commission also proposes that if a VLP device is unable to obtain the latest ULS or COALS data on a given day, it may continue operating until 11:59 p.m. of the following day at which time it must cease operation until it is able to obtain the latest geofencing data. The Commission seeks comment on these proposals. The Commission also seeks quantitative information on the benefits and costs to VLP device users, manufacturers and the wider public of the Commission's proposal and alternative update schedules and requirements.

58. *Security Issues.* Consistent with the Commission's requirements for standard power devices and AFC systems in the 6 GHz Order, the Commission proposes to require that geofenced VLP access points incorporate adequate security measures to: (1) prevent them from accessing geofencing systems and geofencing methods not approved by the Commission, (2) ensure that unauthorized parties cannot modify devices to operate in a manner inconsistent with the rules and licensed incumbent protection criteria, and (3) ensure that communications between VLP access points and geofencing systems are secure to prevent corruption or unauthorized interception of data. The Commission also proposes to require that geofencing systems, whether centralized or internal to a VLP device, must ensure that all communications and interactions between the geofencing system and VLP access points and/or all communications between the geofencing system and Commission databases are accurate and secure and

that unauthorized parties cannot access or alter the database, the exclusion zones, or the list of excluded or available frequencies. The Commission further proposes to require that a geofencing system incorporate security measures to protect against unauthorized data input or alteration of stored data, including establishing communications authentication procedures between client devices and VLP access points. These proposed requirements are intended to prevent a VLP device from using geofencing methods not approved by the Commission and to ensure that unauthorized parties cannot modify a device to operate in a manner inconsistent with the rules. The Commission seeks comment on these proposals. What would be the cost of implementing the Commission's security proposals versus alternatives? The Commission seeks quantitative information on the costs of geofenced VLP device security requirements.

59. *Device testing and approval.* As indicated above, the Commission proposes to require that VLP devices operating with greater than -5 dBm/MHz PSD EIRP incorporate a geofencing capability that prevents them from operating where there may be an elevated risk of causing harmful interference to licensed incumbents in the 6 GHz band. Under this proposal, geofenced systems in the 6 GHz band would determine exclusion zones within which specific channels are prohibited from use by geofenced VLP access points when a -6 dB I/N interference protection criterion is not met (e.g., areas around fixed microwave and BAS/CARS central receive sites), and each geofenced VLP access point would have to be able to connect to a geofencing system or have an integrated geofencing system capability.

60. Applicants seeking VLP device certifications would have to show in their applications how their device will comply with any geofencing requirements adopted in this proceeding. For example, applicants for geofenced VLP access point certification would have to demonstrate that the device operates only pursuant to a geofencing system and that the geofencing system prevents operation in areas where the -6 dB I/N metric is not met when calculated in accordance with the proposed methodology. They would also have to demonstrate that their devices could not operate on any channel that the geofencing system determines is prohibited at its location at a power level greater than -5 dBm/MHz EIRP PSD. Applicants would also be required to demonstrate that their

VLP access points comply with the proposed requirements to periodically check their location and comply with the database recheck intervals proposed above as well as adjust their operating channel if they move into an exclusion zone where that channel is not available. They would further have to demonstrate how geofenced VLP access points obtain exclusion zone data either from a geofencing system or through calculations based on data downloaded from Commission databases.

61. The Commission seeks comment on testing and certification issues for geofenced VLP access points and client devices. Are there any specific testing or certification issues that the Commission will need to address, either in a subsequent item in this proceeding or subsequent to adopting rules, e.g., through the KDB process? If so, what issues would need to be addressed? Would industry groups such as the Wi-Fi Alliance or WinnForum be likely to develop procedures for testing geofencing systems? The Commission seeks quantitative information on the benefits and costs to VLP device users, manufacturers and the wider public of geofenced VLP testing and certification requirements.

E. Spectrum Availability for Very Low Power Devices

62. The Commission seeks comment on any changes that it could make that would allow for increased spectrum availability for geofenced VLP devices without increasing the likelihood of harmful interference to incumbent services, i.e., more efficient spectrum use. Consistent with the Commission's recent *Policy Statement*, the Commission seeks additional data that can be used to assess geofenced VLP device operation and the potential impact on incumbent services. Are there any particular characteristics of geofenced VLP devices, e.g., size, operating location, specific applications, operating bandwidth, modulation types, data rates, duty cycle/activity factor, or mobility or lack thereof, that could be considered in enabling increased spectrum availability for these devices? Is there currently any operational or other data that would be helpful in this regard? How much additional spectrum could be made available for geofenced VLP devices? Would there be any significant increase in the areas where they could operate as compared to the rules proposed above? The Commission recognizes that actual operational data that may help us reach a decision on these issues may not yet be available. In this regard, the Commission encourages parties with additional data to approach

the Commission in the future when such data becomes available. The Commission also seeks information from incumbents regarding their systems, particularly with respect to the amount of fade margin incorporated into system design, statistics on when fades occur, their severity, and how long they last, and how systems are designed to cope with fading events using techniques such as adaptive modulation or adjusting their data streams to focus on more time-sensitive critical data over less critical data.

F. Restrictions on Very Low Power Device Mobile Operations

63. The Commission also seeks comment on whether to relax the restrictions on VLP device mobile operations (e.g., on aircraft, boats on the ocean, oil platforms, and terrestrial vehicles). In the *6 GHz Order*, the Commission prohibited standard power and LPI access points from operating on board aircraft, with the exception of LPI use in the U-NII-5 band on large passenger aircraft while flying above 10,000 feet. In the Second Report and Order, the Commission is largely adopting the same operational restriction for VLP devices, except the Commission is permitting them to operate on boats. Similar to the rules for standard power and LPI access points, the Commission is prohibiting VLP devices from operating on oil platforms. The restrictions on oil platforms is being put in place to protect incumbent EESS remote sensing operations, which, in this band are used *inter alia* for monitoring ocean temperature.

64. As noted, these decisions were made largely to provide consistency with the Commission's prior decision regarding standard power and LPI devices. However, given the inherent differences between those devices and VLP devices, the Commission seeks comment on whether these restrictions on mobile operations on aircraft and oil platforms can be relaxed for non-geofenced VLP devices, geofenced VLP devices, or both. First, emissions from both types of VLP devices will be lower than standard power and LPI devices; geofenced VLP access points and associated client devices are permitted to operate with no more than 1 dBm/MHz EIRP PSD and 14 dBm EIRP while standard power and LPI devices may operate at 23 dBm/MHz EIRP PSD and 36 dBm EIRP and 5 dBm/MHz EIRP PSD and 30 dBm EIRP, respectively. VLP devices operate at an even lower – 5 dBm/MHz EIRP PSD. Second, both types of VLP devices are mobile, generally operate close to the ground and in proximity to the body or other

objects, are likely to be battery powered, and either operate pursuant to a geolocation system or at or below – 5 dBm/MHz EIRP PSD.

65. Considering expected use cases and the minimal potential for VLP and geofenced VLP devices to cause harmful interference, the Commission proposes to permit mobile operation on commercial and general aviation aircraft more generally, but not on UAS. The Commission can speculate that several prominent use cases will occur on aircraft. The Commission seeks comment on permitting more general use of VLP and geofenced VLP devices onboard commercial and general aviation aircraft. For example, because FAA guidance specifies that aircraft operators, when operating aircraft that have been certified to meet portable electronic device tolerance standards, may permit certain portable electronic devices to operate in all phases of flight (i.e., from gate-to-gate), body-worn VLP and geofenced VLP devices could be used to monitor a person's health metrics or to stream a movie (e.g., from a smartphone to smart glasses). In such cases, operation is not likely to be near a fixed microwave, BAS, or CARS receive site and is likely to be low power, given the short transmission distance and the fact that emissions will be shielded by the aircraft fuselage and will be subject to clutter losses from nearby seats and passengers. In addition, the Commission notes that the worst case for harmful interference potential is likely to be on take-off or landing when the aircraft is lower to the ground and thus, potentially closer to an incumbent receiver. However, good engineering practice should prevent microwave links in locations where aircraft are likely to fly as their mere presence could cause link degradation. And even if an aircraft were to fly in an area where it may be seen by a microwave receive antenna main beam, the aircraft will be moving at significant speed and the time a VLP or geofenced VLP device's emission could be within an incumbent's receiver main beam will be fleeting and handled by forward error correction or other techniques. In addition, when operated on the ground, geofenced VLP access points and associated clients would operate under the control of a geofencing system, while non-geofenced VLP devices would operate at even lower power. As an initial matter, considering operation on aircraft, should the Commission consider permitting all VLP devices to operate across all phases of flight or just VLP devices that are not geofenced? Or should geofenced VLP devices be

limited to only operating when above 10,000 feet or not permitted to operate on aircraft at all? The Commission is already permitting non-geofenced VLP devices to operate on large aircraft above 10,000 feet and ask if there is a different metric that could be used for the specific case of aircraft. For example, noting the very fast take-off and landing speeds, could the Commission implement a rule stating that if a geofenced VLP access point is moving at an average speed over 100 mph, it would no longer need to check the geofencing system? Moving at or above this speed would imply operation on a very fast moving vehicle, such as an aircraft. If the Commission allows a minimum average speed metric for this purpose, should it apply only to devices operated on aircraft, or could it apply to other modes of transportation such as rail? Is there a different speed or metric that would work better in providing a demarcation between when the geofencing system must be used and when it is not necessary when considering use on aircraft? What other considerations need to be taken into account? For example, could there be issues that affect radio astronomy sites? If so, should certain channels be prohibited from use until an aircraft exceeds 10,000 feet? We seek comment on the Commission's proposal to permit any or all VLP devices to operate gate-to-gate while on aircraft.

66. The Commission continues to believe that any VLP operation when such devices are mounted on a UAS could pose more than an insignificant harmful interference risk, given the potential of UAS to fly almost anywhere and to have clear line of sight to an incumbent's receiver. In addition, because the geofencing system determines exclusion zones based on an assumed 1.5 meter antenna height, any exclusion zone associated with a UAS would be much larger than for general VLP device usage. Nevertheless, the Commission seeks comment on whether there are operational limitations or guidelines the Commission could adopt that could permit VLP devices to operate when mounted on a UAS. Are there applications that are specifically well-suited for use on a UAS? Are there methods using the geofencing system or otherwise that could be implemented to ensure that incumbent receivers are protected from harmful interference? If so, how complex and feasible would these methods be to implement? Would the costs associated with additional complexity outweigh any benefits that might be gained from permitting such operation?

67. In the Second Report and Order, the Commission maintained its prohibition on all types of 6 GHz device usage on oil platforms to protect EESS operations but did not prohibit the use of VLP devices on boats. The Commission now seeks comment on whether the prohibition on all types of 6 GHz device usage on oil platforms can be scaled back or lifted. For example, given the differences between VLP devices (both geofenced and non-geofenced) and standard power and LPI devices, does the use of VLP devices on oil platforms pose the same risk of harmful interference to EESS operations? Could standard power, LPI or either type of VLP devices be used on oil platforms without causing a risk to EESS ocean temperature monitoring operations? The Commission can foresee applications where a 6 GHz device could provide utility through augmented reality to a worker on an oil platform to provide relevant information, such as for safety, maintenance tasks, or general operating instructions. Is any restriction of VLP device use on boats appropriate to protect EESS operations? If such a restriction were adopted, could it be limited to boats located in the ocean, given that EESS is used for sensing over the ocean? How could the prohibition on use of VLP devices on oil platforms or a prohibition on use on boats, if adopted, be implemented for non-geofenced VLP devices?

68. Finally, the Commission seeks comment on whether there is additional flexibility that can be provided for terrestrial in-vehicle use (*e.g.*, cars, buses, and trucks). For example, are there devices that are designed to be used solely in vehicles, such as an in-car hotspot, that can only be used in a vehicle where due to the nature of use—within a vehicle cabin, generally in motion at high speeds—different requirements regarding power or exclusion zones could apply? If so, are there requirements that could provide assurance that a VLP device (geofenced or non-geofenced) is, in fact, in a vehicle, such as having a connection to Carplay or Android Auto?

69. The Commission invites commenters to address these issues and provide detailed information regarding whether the Commission can provide more flexibility to VLP devices, both geofenced and non-geofenced, for expanded use in aircraft, on boats, in vehicles, and in more places while still ensuring that incumbent operators' facilities are protected from harmful interference. The Commission seeks quantitative estimates of benefits or costs of its proposals for relaxing the

VLP prohibition in these locations and potential alternatives. How much and what kinds of additional VLP operations might occur? How much and what kind of costs would be incurred to accommodate these increased operations?

G. Expanding Very Low Power Operations to U-NII-6 and U-NII-8

70. In the Second Report and Order, the Commission adopted rules to permit VLP devices to operate in the U-NII-5 and U-NII-7 bands at power levels up to -5 dBm/MHz EIRP PSD and 14 dBm EIRP. The Commission determined that the risk of harmful interference to incumbent services in those bands, *e.g.*, fixed microwave links and radio astronomy, was insignificant for VLP devices operating at that power level. In this Second Notice of Proposed Rulemaking, the Commission proposes to permit VLP devices to also operate in the U-NII-6 and U-NII-8 bands without geofencing. Given that fixed microwave links in the U-NII-8 band have the same characteristics as those in U-NII-5 and U-NII-7, the Commission concludes that any risk of harmful interference from VLP devices to these microwave links is insignificant. The Commission seeks comment on whether allowing VLP devices on U-NII-6 and U-NII-8 band devices will yield comparable benefits to those that stem from allowing VLP devices in the U-NII-5 and U-NII-7 bands in the Second Report and Order. The Commission tentatively concludes that at a minimum the benefits would be in proportion to the amount of spectrum in U-NII-6 and U-NII-8 bands relative to the amount of spectrum in the U-NII-5 and U-NII-7 bands. The Commission anticipates that these benefit estimates are conservative, as making available the full 1200 MHz in the 6 GHz band could lead to larger channel sizes that could increase speed and decrease latency. The Commission seeks comment on this and alternate methods of estimating these benefits.

1. Protection of Mobile Services

71. As discussed above, both the U-NII-6 and U-NII-8 bands are used by mobile BAS and CARS, including outdoor electronic news gathering (ENG) trucks and low power short range devices, such as portable cameras and microphones. Low Power Auxiliary Stations, which are licensed in portions of the U-NII-8 band, operate on an itinerant basis and transmit over distances of approximately 100 meters for uses such as wireless microphones, cue and control communications, and TV camera synchronization signals. There are also BAS and CARS fixed

microwave links in these bands, which are used for such purposes as video links between studios and transmitters and to relay video signals between cities.

72. *Outdoor electronic news gathering central receive sites.* As described above, the communications link between ENG trucks and a central receive site shares many of the characteristics of a fixed microwave link—*i.e.*, they use directional antennas to send signals between two fixed locations that are mostly above the local clutter. The Commission proposes to permit VLP devices to also operate in the U-NII-6 and U-NII-8 bands and seek comment on whether VLP devices could operate at up to -5 dBm/MHz EIRP PSD and 14 dBm EIRP while keeping the risk of harmful interference to ENG central receive sites to an insignificant level. Would the same type of analysis discussed in the Second Report and Order showing an insignificant risk of harmful interference to fixed microwave receive sites be appropriate with respect to ENG receive sites? Are there inherent differences between BAS/CARS operations as compared to fixed point-to-point operations that must be considered when analyzing the harmful interference risk? For example, are there differences in antenna types, *e.g.*, beamwidth and gain, or in typical antenna heights or the locations of receive antennas? Commenters noting differences should provide detailed descriptions and information regarding how any difference could affect the potential for VLP devices to cause harmful interference? Are there specific VLP device characteristics that need to be considered in analyzing their interference potential to ENG operations and if so, what are they? The Commission seeks to provide uniform rules for operations across the full 6 GHz band, but recognizing that there could be differences in how VLP emissions may interact with different incumbent systems, the Commission also seeks comment on what effect a lower power limit for VLP devices might have regarding protecting ENG operations in the U-NII-6 and U-NII-8 bands. Commenters advocating for a lower power level should provide detailed analysis regarding their preferred power level and the incremental effect such a power level would have on the ability for VLP devices to access spectrum as well as to what extent ENG operations would have additional protection from harmful interference. Are there any other requirements that the Commission

could adopt for VLP devices to protect ENG operations?

73. Apple, Broadcom, and Meta submitted a Monte Carlo simulation addressing the potential for VLP devices operating at -5 dBm/MHz to exceed -6 dB I/N for two specific ENG receive sites. For the ENG receivers, the simulation used the same two ENG receive sites and technical parameters that were used in a Monte Carlo simulation previously submitted by NAB that examined the potential for 6 GHz band unlicensed access points to interfere with ENG receivers. As the ENG receive antennas are directional but generally are able to provide 360° azimuthal coverage, it is not practical to simulate every azimuth. Thus, Apple, Broadcom, and Meta limited their simulation to the same three antenna orientations that NAB simulated for the two ENG receive sites. For the VLP devices, the simulation used similar assumptions for body loss, transmit power control, and propagation models as the Apple, Broadcom et al. and Apple simulations discussed in the Second Report and Order that assessed the potential for VLP devices to exceed -6 dB I/N for microwave links in San Francisco and Houston. The Apple, Broadcom, and Meta Monte Carlo analysis found no instances where the VLP devices caused the signal received at the ENG receive sites to exceed -6 dB I/N. The Commission notes that NAB previously expressed skepticism about the accuracy of a similar Monte Carlo simulation provided by Apple, Broadcom, et al. that likewise found that the -6 dB I/N threshold was never exceeded for one of these ENG receive sites. The Commission seeks comment on the Apple, Broadcom, and Meta simulation. The Commission seeks comment on its conclusions that -6 dB I/N will not be exceeded or will only be exceeded in so few instances at ENG central receive sites that the Commission can conclude that the risk of harmful interference from VLP devices operating at -5 dB/MHz EIRP PSD is insignificant. Given that this simulation used two ENG receive sites that were chosen by NAB, can the Commission assume that they are representative of BAS and CARS receive sites in general? Are there particular scenarios that need further study?

74. *Outdoor electronic news gathering ENG trucks.* ENG trucks are generally situated near news or sporting events and receive signals from hand-held cameras or other portable news gathering devices. Based on a study previously submitted by NAB, the ENG truck receive antenna may be omnidirectional or sectoral with adjustable

height and location. Additionally, the ENG truck signals may use various bandwidths between 3 to 20 megahertz. For its study, NAB evaluated harmful interference based on free space path loss and on whether an unlicensed device would cause the I/N to exceed -10 dB.

75. Broadcom submitted a simulation showing a low probability ($<0.001\%$) that a VLP device operating at -5 dBm/MHz will cause the signal-to-interference-plus-noise ratio (SINR) at the ENG truck receiver to fall below 1 dB. Broadcom's 1 dB SINR threshold is based on a previously submitted Broadcom study showing that a 10 megahertz ENG channel with a 7/8 coding rate can maintain a signal with a bit-error-rate (BER) less than $1e-8$ in the presence of an RLAN signal operating with a 2% duty cycle. Charter, Comcast, Cox and CableLabs also previously submitted studies of the ENG truck signal SINR requirements in the presence of RLANs operating at various duty cycles. While these studies examined the impact of LPI transmissions, which operate at a higher power than is proposed for VLP, their findings with respect to SINR are also applicable to assessing VLP impact to BAS operations. CableLabs finds that a 10 dB SINR "provides an accurate view of system requirements for high-quality BAS video delivery".

76. The Commission proposes to permit non-geofenced VLP devices operate in the U-NII-6 and U-NII-8 bands and seeks comment on whether those devices could operate at up to -5 dBm/MHz EIRP PSD and 14 dBm EIRP while minimizing the risk of harmful interference to ENG truck receive sites. What is the appropriate metric for evaluating the harmful interference risk to a ENG truck receiver, which is fixed during operation but otherwise transportable, from a mobile or transient VLP transmission? Regarding potentially using SINR, because actual signal levels are not known prior to any transmission, what value or range of values should be used for the ENG signal level for any analysis? Commenters should provide insight and data regarding how any assumed signal level is consistent with the signal levels used for ENG operations. Previously submitted studies show that the required SINR will vary according to channel bandwidth and coding rate. What are the typical bandwidths and coding rates used by ENG truck receivers? If the Commission were to rely on evaluating SINR, what SINR threshold should be assumed to be necessary at the ENG truck receive site to maintain a high quality signal?

Broadcom's study predicted an impact when the VLP device was within 5 meters of the receiver. Under normal operating conditions, how close could a random user's VLP device actually come to an ENG truck receiver? Is assuming at least a 5 meter separation distance realistic? Or is that distance too short or too long? Will the itinerant nature of VLP devices help reduce the likelihood of a VLP device causing harmful interference? Are there any particular connections the Commission should make between its reliance on an I/N metric when evaluating ENG trucks connecting to a central receive site and potentially evaluating the harmful interference risk from portable devices to an ENG truck based on SINR? In evaluating analysis methodology and protection metrics, commenters should detail how such an approach supports permitting non-geofenced VLP operations at power levels up to -5 dBm/MHz EIRP PSD or indicates that a different power level may be appropriate.

77. *Low-power short range mobile devices.* The Commission proposes that low power short range BAS and CARS devices, such as portable cameras and microphones, and Low Power Auxiliary stations be protected from harmful interference by a combination of a required contention-based protocol and the low probability of a VLP device operating on the same channel in a nearby location. This proposal is consistent with the 6 GHz Order in which the Commission required that all 6 GHz unlicensed LPI access points, subordinate devices, and client devices employ a contention-based protocol as well as the Commission's proposal above with respect to geofenced VLP devices. Further, the 6 GHz Order showed that the probability of channel overlap between 6 GHz unlicensed devices and incumbent station operations is low due to unlicensed devices having a full 1200 megahertz over which to operate.

78. The Commission believes that a similar approach for VLP devices will adequately reduce the risk that mobile service incumbents in the U-NII-6 and U-NII-8 bands would be subjected to harmful interference and keep that risk to an insignificant level. The Commission's reasoning is consistent with the 6 GHz Order, i.e., the sensing function associated with the contention-based protocol, along with the low probability for co-channel operation, is sufficient to ensure that VLP devices detect nearby mobile BAS operations and avoid transmitting co-channel to protect those operations from harmful interference. While the Commission is

not proposing a specific technology protocol or contention method, the Commission proposes to require VLP devices to use a contention-based protocol as the Commission requires for LPI devices. The Commission believes that this proposal has additional benefits as it provides multiple VLP devices as well as LPI devices equal access to the spectrum, while protecting mobile incumbents' services. The Commission also believes that the use of a contention-based protocol will limit the duty cycle of VLP devices as they will need to share the spectrum with other devices. Additionally, VLP devices would transmit at lower power levels than LPI devices, further reducing the risk of harmful interference to mobile services. Given all these reasons, the Commission believes that requiring use of a contention-based protocol by VLP devices would protect mobile service incumbents.

79. The Commission seeks comment on this proposal. Would requiring VLP devices to incorporate a contention-based protocol adequately protect mobile service incumbents in the U–NII–6 and U–NII–8 bands? If not, are there any other protection measures that could be used by VLP devices to protect mobile services? Is there a need to provide greater specificity in the requirements for a contention-based protocol used by VLP devices? If so, what particular requirements should be specified and why? What are the costs and benefits of requiring the use of a contention-based protocol?

2. Fixed Satellite Services

80. The U–NII–7 and U–NII–8 bands contain Fixed Satellite Service (FSS) space-to-Earth allocations and are restricted to feeder links for Mobile-Satellite Service non-geostationary satellite systems. No such earth stations are currently licensed in the U–NII–7 band. The U–NII–8 space-to-Earth allocation is limited to use by Globalstar's non-geostationary Mobile-Satellite Service feeder links and earth stations receiving at locations within 300 m of coordinates in Brewster, WA, Clifton, TX, and Finca Pascual, PR. Globalstar also operates earth station receive sites at Naalehu, HI, Wasilla, AK, and Sebring, FL. These last two locations are authorized to operate on a co-primary basis for FSS feeder downlinks, except for the 7.025–7.055 GHz band, where they are authorized only on an unprotected basis. In the 6 GHz Order, the Commission determined that the probability of harmful interference to FSS space-to-Earth stations from LPI device operations in U–NII–8 is low, primarily due to the

restriction that LPI devices operate indoors and at EIRP power levels no greater than 30 dBm.

81. The Commission seeks comment on whether any restrictions on VLP device operation is necessary to protect space-to-Earth stations. Because VLP devices would operate at significantly lower PSD levels than geofenced VLP access points and associated client devices, how does this impact the analysis of the potential for harmful interference occurring? As VLP devices operate without the supervision of a geofencing system, how could such restrictions, if needed, be implemented? Would there be differences in the cost of protection for VLP devices compared to geofenced VLP access point and associated client devices? The Commission also seeks comment on how the earth station antenna sites themselves provide interference protection by creating a physical barrier (e.g., fencing) or using geographic features to keep members of the public that could be using a VLP device beyond some minimum distance from those earth stations. Commenters should provide technical analysis to support their positions.

H. Emission Limits Below the U–NII–5 Band

82. The 5.895–5.925 GHz band immediately below the U–NII–5 band is used by the Intelligent Transportation Service (ITS) which the Commission is requiring to transition to C–V2X-based technology. In the Second Report and Order, the Commission adopted the same –27 dBm/MHz out-of-band emission (OOBE) limit for VLP devices for emissions below the U–NII–5 band and above the U–NII–8 band as it had already required for standard power and low-power indoor 6 GHz devices. NTIA filed a technical exhibit into the record that includes a Department of Transportation study (*DoT Exhibit*) addressing C–V2X protection requirements in the 5.895–5.925 GHz band from 6 GHz VLP devices' and mobile access points' out-of-band emissions. Deployers plan to transmit basic safety messages for crash-avoidance applications that require low-latency, free-from-harmful-interference in the 5.895–5.925 GHz band. According to the *DoT Exhibit*, testing shows that VLP devices operating within a motor vehicle and that comply with the 27 dBm/MHz OOBE limit will decrease the operational range of C–V2X receivers in the same vehicle by more than 50%. While these tests are based on U–NII–4 (5.850–5.895 GHz) devices in the band immediately below the 5.895–5.925 GHz ITS band, the *DoT Exhibit* contends that

the results can be translated to assess the impact of VLP devices in the U–NII–5 band. The *DoT Exhibit* claims that implementing both parts of a two-part compromise submitted by several VLP proponents is necessary to protect C–V2X receivers. This compromise proposal would require VLP devices to prioritize their operations to frequencies above 6.105 GHz and limit VLP OOBE below 5.925 GHz to –37 dBm/MHz. The Alliance for Automotive Innovation, 5GAA, and ITS America similarly point to the compromise proposal and advocate that the Commission modifies the VLP OOBE limits. While the rules the Commission adopted for VLP devices implement the former requirement, the Commission adopted the same –27 dBm/MHz OOBE limit.

83. The Commission seeks additional information on the potential impact that VLP devices operating in motor vehicles could have on C–V2X performance when a VLP device is operating within the same motor vehicle as the C–V2X receiver. In seeking comment on this issue, the Commission notes that the *DoT Exhibit* is narrowly limited to VLP operation as an access point or as a client connected to a 6 GHz enabled mobile access point within motor vehicles and does not address any other 6 GHz device or VLP device operation outside of motor vehicles. In particular, the Commission seeks technical information, including studies, analyses, and measurements detailing the interaction between VLP devices operating under the Commission's rules and C–V2X receivers in the 5.895–5.925 GHz band when these devices are in close proximity such as in the same motor vehicle. What affect, if any, do VLP devices' OOBE have on C–V2X devices' ability to communicate at distances and with timing necessary to ensure a vehicle has sufficient reaction time to keep passengers safe in various situations? In undertaking studies to submit to the record, commenters should assess realistic scenarios for VLP device deployment, whether VLP devices are installed inside the vehicle or carried by a passenger from outside of the vehicle, as well as realistic scenarios for C–V2X devices as they pertain to device location within the vehicle, power level, OOBE level, antenna directivity, and activity factor. For example, are VLP devices expected to be mounted on dashboards, in headrests, etc. and are C–V2X antennas expected to be mounted inside or outside the vehicle, on the roof, in the grille, etc.? How do the various relative placements between VLP and C–V2X

devices affect performance? The Commission seeks comment on whether any adjustments are needed to its VLP device rules to adequately protect C-V2X operation in vehicles. Commenters advocating for adjustments should address whether they believe prioritization and a more stringent emission limit, such as -37 dBm/MHz below 5.925 GHz for VLP devices, is necessary as the *DoT Exhibit* advocates. Or whether either acting on its own provides the protection level being claimed as needed. Similarly, commenters advocating for prioritizing spectrum should address whether a single limit is needed, such as above 6.105 GHz, or whether a variable limit based on channel bandwidth can be implemented to provide more flexibility for VLP devices. For example, would one bandwidth buffer suffice such that 20-megahertz channels would not transmit on the lowest 20 megahertz of the band, 40-megahertz channels would not transmit on the lowest 40 megahertz of the band, etc.? Are there other alternative measures that VLP devices could use to safeguard C-V2X operations? Although, the Commission seeks comment on the narrow issue of in-vehicle VLP device use, the Commission asks how any change to the OOB limit might affect the entire VLP device market. Commenters should address whether permanently installed in-vehicle VLP devices should be treated differently than other VLP devices, such as those used as mobile access points or “hotspots,” or would all VLP devices need to comply with a more stringent OOB limit should the record indicate some adjustments to the Commission’s rules are necessary for in-vehicle VLP operation? Finally, the Commission seeks comment on whether or how any changes to its rules would affect device harmonization regarding the global VLP device market. The Alliance for Automotive Innovation, 5GAA, and ITS America state that dozens of countries have adopted a -37 dBm/MHz OOB limit to protect ITS services. They claim that the European Union (EU) as well as many non-EU member countries in the CEPT region, adopted a more stringent OOB limit of -45 dBm/MHz below 5935 MHz, which may be adjusted to -37 dBm/MHz in 2025 following additional protection studies. The Commission notes, however, that the EU OOB limit is designed to protect urban rail intelligent transport systems, including communication based train control systems, not C-V2X operations. Thus, the Commission seeks comment on the applicability of the EU adopted rule to

C-V2X operations. Do equipment manufacturers seeking to supply a global market plan to do so with a single device that meets the most stringent OOB limit or would they provide variants for different regions based on local rules? What are the costs and benefits of various approaches?

I. LPI Client-to-Client Communications

84. In this section, the Commission seeks comment on whether the Commission should permit direct communications between clients to LPI devices. The Commission also seeks comment on the requirements that it would have to specify to enable client-to-client communications without causing harmful interference to licensed incumbent operations in the 6 GHz band.

85. *Background.* Standard-power access points can operate in the U-NII-5 and U-NII-7 bands and require use of an AFC system for providing access to spectrum in the band. LPI access points can operate across the entire 6 GHz band but at lower power levels than standard power devices. Client devices operate under the control of either a standard-power or LPI access point and communicate using power levels that depend on the type of access point to which they are connected. To ensure that client devices not associated with standard power access points transmit indoors, the Commission required that these devices operate under the control of an indoor access point and prohibited 6 GHz U-NII client devices from directly communicating with one another. The Commission prohibited unlicensed client devices from acting as “mobile hotspots” because “[p]ermitting a client device operating under the control of an access point to authorize the operation of additional client devices could potentially increase the distance between these additional client devices and the access point and increase the potential for harmful interference to fixed service receivers or electronic news gathering operations.” To avoid this situation, the Commission’s rules prohibit 6 GHz U-NII client devices from directly communicating with one another. The Commission did not, however, consider whether a more limited approach to indoor client-to-client communications should be permissible, such as when a client is not acting as a mobile hotspot.

86. In response to suggestions by Apple, Broadcom et al. that client devices could be permitted to directly communicate with each other under certain conditions, OET released a public notice on January 11, 2021 seeking information regarding client-to-client device

communications in the 6 GHz band. The conditions that Apple, Broadcom et al. suggest for permitting client-to-client communications include requiring client devices to decode an enabling signal transmitted by an LPI device within the last four seconds, and requiring that an enabling signal be received at a signal strength of at least -99 dBm/MHz. These parties assert that these requirements would ensure each individual client participating in client-to-client communications is safely inside the area where a client device is authorized to communicate with an access point.

87. Fourteen parties filed comments and 12 parties filed reply comments in response to the OET public notice. Advocates of unlicensed operation support permitting client-to-client communications by LPI devices, arguing that they will enable new applications that benefit the public, such as AR/VR and digital education and training. Incumbent operators in the 6 GHz band (e.g., fixed microwave and broadcast) and in adjacent bands express concern about permitting client-to-client operations; specifically the potential for harmful interference and a lack of interference testing with devices operating under the current rules.

88. *Discussion.* The Commission invites comment on whether and under what circumstances LPI client devices could be permitted to directly communicate with each other in a limited manner while protecting incumbent licensed services. The Commission recognizes that OET previously sought comment on these issues. However, more than two years have passed since the Commission received responses to OET’s public notice. During that time, many LPI devices have been certified and put into operation. In addition, the approval process for AFC systems for standard power devices has advanced, and as discussed in the Second Report and Order, several parties have provided detailed analyses on the potential for interference from 6 GHz devices to incumbent services such as fixed microwave and broadcast services. Given that there is now more information available or that could become available in the near future concerning the interference potential of 6 GHz devices, the Commission believes it is now appropriate to refresh and further build the record on whether the Commission could permit LPI client-to-client operations.

89. Specifically, the Commission seeks comment on whether the Commission should permit 6 GHz client

devices to directly communicate when they are under the control of or have received an enabling signal from a LPI access point. Commenters should explain how to define an enabling signal (e.g., power level, modulation type, how often it should be broadcast if it is discrete from the regular data stream, etc.), what characteristics it should have, how it would be similar or different from signals, such as beacons, that access points already use to connect with client devices, and the degree to which an enabling signal would tether a client device not under the direct control of an access point to that access point. Commenters should also provide information on the types of applications that direct client-to-client communications would enable that cannot be accomplished by communications through an access point. In addition, commenters advocating for rule changes should address whether direct client-to-client communications should be under the current power limits or restricted to lower power limits to reduce the potential for harmful interference to incumbent operations.

90. The requirement that 6 GHz client devices operate under the control of either a standard-power or low-power indoor access point is intended to prevent client devices from causing harmful interference by limiting their operation either to outdoors in areas where an AFC system has determined that interference is unlikely to occur, or in the case of LPI devices to indoor locations where other factors such as building entry loss prevent harmful interference. It may be possible for a client device to receive an enabling signal from an access point even when the enabling signal is too weak to enable the client device to conduct communications with the access point. In such situations, the weak received signal level makes it more likely that the client device could be outdoors. By requiring that the enabling signal have a specific signal strength, this problem could be potentially avoided. If the Commission were to adopt rules permitting client-to-client communications, should it require the enabling signal from the low-power indoor access point to be received by the client device with a particular signal level, such as -99 dBm/MHz as suggested by Apple, Broadcom et al.? If not, what signal level would be appropriate? How can a specific signal level be correlated with the requirement that the client device be under the control of an access point? Should the enabling signal level be of sufficient

strength to effectively require that the signal levels between the access point and client device be sufficiently strong to permit bi-directional communications between the client devices and the access point, thereby ensuring that both client devices are close to the access point? How frequently should a client device be required to receive an enabling signal to continue transmitting to another client device?

The Commission also seeks comment on whether client devices should be limited to receiving an enabling signal from the same access point or whether client-to-client communications could be permitted so long as each client device receives an enabling signal from any authorized access point. Apple, Broadcom et al.'s suggestion would potentially permit two client devices to communicate even if they receive enabling signals from two different access points. For example, client devices in two different buildings receiving enabling signals from different low-power indoor access points could attempt to communicate with each other. Would permitting this situation to occur increase the potential for the client devices to cause harmful interference to licensed services? Should other configurations be permitted? For example, could a client device controlled by a standard power access point be permitted to communicate with a client device controlled by a low-power indoor access point? In such a case, should the client device power level be restricted to the standard power client device power level? Could client-to-client communications be permitted between devices when both clients are controlled by a standard power access point? If so, are any changes needed to the AFC systems? Must an enabling signal be received on the same channel for each device under any of the scenarios contemplated? Under any envisioned client-to-client communication scenario, commenters should provide detailed descriptions of how such communications can be enabled including how such communications fit under the current rules that limit client devices to operating only under the control of a standard power access point or a low-power indoor access point or whether, and which, rules would need to be modified. Commenters should provide detailed analysis of how any client-to-client communication configurations they prefer would protect incumbent operations from harmful interference. Finally, commenters should provide any other information relevant to evaluating whether direct

client-to-client communications should be permitted, including any alternative methods or necessary rule changes not directly discussed above.

E. Ordering Clauses

1. Accordingly, *it is ordered*, pursuant to sections 2, 4(i), 302, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 152, 154(i), 302a, and 303, this *Second Further Notice of Proposed Rulemaking* is hereby *adopted*.

2. *It is further ordered* that the Office of the Secretary, Reference Information Center, *shall send* a copy of the *Second Further 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 Part 15

Communications equipment, Radio, and Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene Dortch,
Secretary.

Proposed Rules

For the reasons discussed in the document, the Federal Communications Commission proposes to amend 47 CFR part 15 as follows:

PART 15—RADIO FREQUENCY DEVICES

- 1. The authority citation for part 15 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, 304, 307, 336, 544a, and 549.

- 2. Section 15.403 is amended by adding the definitions of “Geofenced very low power access point” and “Geofencing” in alphabetical order, to read as follows:

§ 15.403 Definitions.

* * * * *

Geofenced Very Low Power Access Point. For the purpose of this subpart, an access point that operates in the 5.925–7.125 GHz band, has an integrated antenna, and uses a geofencing system to determine channel availability at its location.

Geofencing. For the purposes of this subpart, a method of establishing exclusion zones within which very low power devices are not permitted to operate on frequencies specified by the geofencing system.

* * * * *

- 3. Amend § 15.407 by:

- A. Redesignating paragraphs (a)(7) and (8) as paragraphs (a)(8)(i) and (ii);

- B. Adding new paragraphs (a)(7) and (a)(8)(iii);
 - C. Redesignating paragraphs (a)(9) through (a)(12) as paragraphs (a)(10) through (a)(13);
 - D. Revising newly redesignated paragraph (a)(10);
 - E. Revising paragraphs (d)(3) and (d)(5);
 - F. Removing and reserving paragraph (d)(7);
 - G. Adding paragraphs (d)(8) through (10); and
 - H. Adding paragraphs (o) through (r).
- The revisions and additions read as follows:

§ 15.407 General technical requirements.

(a) * * *

(7) For a geofenced very low power access point operating in the 5.925–7.125 GHz band, the maximum power spectral density must not exceed 1 dBm e.i.r.p in any 1-megahertz band. In addition, the maximum e.i.r.p over the frequency band of operation must not exceed 14 dBm.

(8) * * *

(iii) For client devices operating under the control of a geofenced very low power access point in the 5.925–7.125 GHz bands, the maximum power spectral density must not exceed 1 dBm e.i.r.p in any 1-megahertz band, and the maximum e.i.r.p over the frequency band of operation must not exceed 14 dBm.

(10) Access points operating under the provisions of paragraphs (a)(5), (6), and (7) of this section must employ a permanently attached integrated antenna.

(d) * * *

(3) Transmitters operating under the provisions of paragraphs (a)(5), (6), and (8)(ii) of this section are limited to indoor locations.

(5)(i) In the 5.925–7.125 GHz band, client devices must operate under the control of a standard power access point, low-power indoor access point, subordinate device, or geofenced very low power access point; Subordinate devices must operate under the control of a low-power indoor access point.

(ii) Fixed client devices may only connect to a standard power access point.

(iii) In all cases, an exception exists such that a client device may transmit brief messages to an access point when attempting to join its network after detecting a signal that confirms that an access point is operating on a particular channel.

(iv) Client-to-client communications: Client devices are prohibited from connecting directly to another client device, except that client devices under the control of the same indoor access point or geofenced very low power access point may communicate directly with each other.

(v) Client devices under the control of indoor access point, that directly connect to another client, transmit power must not exceed –1 dBm e.i.r.p. in any 1-megahertz band, and the maximum e.i.r.p. over the frequency band of operation must not exceed 14 dBm.

* * * * *

(7) [Reserved]

(8) Geofenced very low power and very low power devices may not employ a fixed outdoor infrastructure. Such devices may not be mounted on outdoor structures, such as buildings or poles.

(9) Geofenced very low power and very low power devices must prioritize operations on frequencies above 6.105 GHz prior to operating on frequencies between 5.925 GHz and 6.105 GHz.

(10) Transmit power control (TPC). Geofenced very low power devices operating in the 5.925–7.125 GHz bands shall employ a TPC mechanism. A very low power device is required to have the capability to operate at least 6 dB below the maximum EIRP PSD value of –5 dBm/MHz.

* * * * *

(o) *Geofencing system.* (1) A geofencing system must obtain information on protected services within the 5.925–7.125 GHz band from Commission databases and use that information to determine frequency-specific exclusion zones where very low power access points and associated client devices may not operate on specified frequencies based on the propagation models and protection criteria specified in paragraph (p) of this section. The geofencing system must access the Commission's licensing databases and update the frequency-specific exclusion zones at least once per day to ensure that they are based on the most recent information in the Commission's databases.

(2) Geofencing systems may be implemented using a centralized database or may be integrated into geofenced very low power access point devices.

(3) A geofenced very low power access point operating under paragraph (a)(7) of this section must access a geofencing system to obtain frequency-specific exclusion zones for the area in which it is operating or intends to operate (e.g., within a specific point

radius or within specific geopolitical boundaries) prior to transmitting. If the geofenced very low power access point moves outside this area, it must obtain additional frequency-specific exclusion zones for the area and adjust its operating frequency, if necessary, prior to operating in this new area. The geofenced very low power access point must obtain updated frequency-specific exclusion zones from the geofencing system at least once per day. If the geofenced very low power access point fails to obtain the updated frequency specific exclusion zones on any given day, the geofenced very low power access point may continue to operate until 11:59 p.m. of the following day at which time it must cease operations until it can obtain updated frequency-specific exclusion zones.

(4) A geofenced very low power access point must determine its location and avoid transmitting on frequencies that are not available in accordance with the frequency specific exclusion zones. The geofenced very low power access point may not permit a client device operating under its control to transmit on frequencies that are not available in accordance with the frequency specific exclusion zones. The geofenced very low power access point must determine its location frequently enough that, based on its position and speed, it will not transmit on an unavailable frequency. The geofenced very low power access point must determine its location and speed at least once a minute.

(5) A geofenced very low power access point must incorporate adequate security measures to prevent it from accessing geofencing systems and geofencing methods not approved by the FCC and to ensure that unauthorized parties cannot modify the device to operate in a manner inconsistent with the rules and protection criteria set forth in this section and to ensure that communications between geofenced very low power access points and geofencing systems are secure to prevent corruption or unauthorized interception of data.

(6) A geofenced very low power access point must include an internal geo-location capability to automatically determine the geofenced very low power access point's geographic coordinates and location uncertainty (in meters), with a confidence level of 95%.

(i) The geofenced very low power access point must use such coordinates and location uncertainty when comparing the devices specific location to the exclusion zone boundaries.

(ii) The applicant for certification of a geofenced very low power access point

must demonstrate the accuracy of the geo-location method used and the location uncertainty.

(7)(i) For centralized geofencing systems, geofencing system operators must provide continuous service to all very low power devices for which it has been designated to provide service. If a geofencing system ceases operation, the operator must provide at least 30-days' notice to the Commission and a description of any arrangements made for those devices to continue to receive exclusion zone update information.

(ii) For geofencing systems internal to the geofenced very low power device, the equipment certification responsible party must ensure that the device continues to be capable of receiving Commission database updates as required by this section.

(iii) As required by paragraph (o)(3) of this section, devices that do not receive timely geofencing update information or timely Commission database updates necessary to calculate up-to-date exclusion zones must cease operating.

(8) The geofencing system whether centralized or internal to the geofenced very low power device must ensure that all communications and interactions between the geofencing system and the geofenced very low power access point and/or all communications between the geofencing system and Commission databases are accurate and secure and that unauthorized parties cannot access or alter the database, the exclusion zones, or the list of excluded or available frequencies. Additionally, the geofencing system must incorporate security measures to protect against unauthorized data input or alteration of stored data, including establishing communications authentication procedures between client devices and geofenced very low power access points.

(9) A geofencing system must implement the terms of international agreements with Mexico and Canada.

(10) At the time that the geofenced very low power device receives equipment certification, the device must either have its geofencing system approved or specify an already approved geofencing system that it is using. The Commission may specify criteria for such approval, which could require test results to be submitted.

(11) Each geofencing system and operator thereof for centralized systems and the equipment certification responsible party for systems internal to the geofenced very low power device must:

(i) Ensure that a regularly updated geofencing system database that contains the information described in this section, including incumbent's

information and geofenced very low power access points authorization parameters, is maintained.

(ii) Respond in a timely manner to verify, correct, or remove, as appropriate, data in the event that the Commission or a party presents a claim of inaccuracies in the geofencing system.

(iii) Establish and follow protocols to comply with enforcement instructions from the Commission, including discontinuance of geofenced very low power access point operations on specified frequencies in designated geographic areas and predetermined exclusion zones.

(iv) Comply with instructions from the Commission to adjust exclusion zones to more accurately reflect the potential for harmful interference.

(12) A geofencing system operator may charge fees for providing service. The Commission may, upon request, review the fees and can require changes to those fees if the Commission finds them to be unreasonable.

(p) *Incumbent protection by geofencing system.* A very low power access point or very low power client device must not cause harmful interference to fixed microwave services and Broadcast Auxiliary Service and Cable Television Relay Service receive sites authorized to operate in the 5.925–7.125 GHz bands. Based on the criteria set forth below, a geofencing system must establish location and frequency-based exclusion zones around fixed microwave receivers, fixed Broadcast Auxiliary Service receive sites, and fixed Cable Television Relay Service receive sites operating in the 5.925–7.125 GHz bands. Individual very low power access points and their associated client devices must not operate co-channel to the frequencies licensed for fixed microwave systems, fixed Broadcast Auxiliary Service receive sites, and fixed Cable Television Relay Service sites within an exclusion zone.

(1) Geofencing systems must use the following propagation models to determine exclusion zones for very low power access points. For a separation distance between geofenced very low power devices and fixed microwave receive sites, fixed Broadcast Auxiliary Service receive sites, or fixed Cable Television Relay Service receive sites.

(i) Up to 30 meters, the geofencing system must use the free space path-loss model.

(ii) More than 30 meters and up to and including one kilometer, the geofencing system must use the Wireless World Initiative New Radio phase II (WINNER II) model. The geofencing system must use site-specific

information, including buildings and terrain data, for determining the line-of-sight/non-line-of-sight path component in the WINNER II model, where such data are available. For evaluating paths where such data are not available, the geofencing system must use a probabilistic model combining the line-of-sight path and non-line-of-sight path into a single path-loss as follows:

Equation 3 to paragraph (p)(2)(ii)

$$\text{Path-loss (L)} = \sum_i P(i) * L_i = P_{\text{LOS}} * L_{\text{LOS}} + P_{\text{NLOS}} * L_{\text{NLOS}};$$

Where:

P_{LOS} is the probability of line-of-sight;

L_{LOS} is the line-of-sight path loss;

P_{NLOS} is the probability of non-line-of sight;

L_{NLOS} is the non-line-of-sight path loss; and

L is the combined path loss.

(iii) The WINNER II path loss models include a formula to determine P_{LOS} as a function of antenna heights and distance. P_{NLOS} is equal to $(1 - P_{\text{LOS}})$.

(iv) In all cases, the geofencing system will use the correct WINNER II parameters to match the morphology of the path between a very low power access point and a fixed microwave receiver, fixed Broadcast Auxiliary Service receiver, or fixed Cable Television Relay Service receiver (*i.e.*, Urban, Suburban, or Rural).

(v) More than one kilometer, the geofencing system must use Irregular Terrain Model (ITM) combined with the appropriate clutter model. To account for the effects of clutter, such as buildings and foliage, the geofencing system must combine the ITM with the ITU-R P.2108–0 (06/2017) clutter model for urban and suburban environments and the ITU-R P.452–16 (07/2015) clutter model for rural environments. The geofencing system should use the most appropriate clutter category for the local morphology when using ITU-R P.452–16. However, if detailed local information is not available, the “Village Centre” clutter category should be used. The geofencing system must use 1 arc-second digital elevation terrain data and, for locations where such data are not available, the most granular available digital elevation terrain data.

(vi) Geofencing systems may include up to 4 dB additional loss to account for losses due to scattering and absorption from a nearby body or object.

(vii) Geofencing systems may calculate exclusion zones based on a 1.5 meter very low power access point antenna height above ground level, regardless of the actual antenna height above ground level.

(2) The geofencing system must use –6 dB I/N as the interference protection criteria when calculating the exclusion zones where I (interference) is the co-

channel signal from the very low power access point at the fixed microwave service receiver, fixed Broadcast Auxiliary Service receiver, or fixed Cable Television Relay Service receiver and N (noise) is background noise level at the fixed microwave service receiver, fixed Broadcast Auxiliary Service receiver, or fixed Cable Television Relay Service receiver.

(q) *Incumbent Protection by Geofencing System: Radio Astronomy Services.* (1) The geofencing system must enforce exclusion zones to the following radio observatories that observe between 6650–6675.2 MHz: Arecibo Observatory, the Green Bank Observatory, the Very Large Array (VLA), the 10 Stations of the Very Long Baseline Array (VLBA), the Owens Valley Radio Observatory, and the Allen Telescope Array.

(2) The exclusion zone sizes are based on the radio line-of-sight and determined using 4/3 earth curvature and the following formula:

Equation 4 to paragraph (q)(2)

$$dkm\_los = 4.12 * (\sqrt{Htx} + \sqrt{Hrx})$$

Where:

Htx is the height of the very low power access point and is set at 1.5 meters above ground level; and

Hrx is the height of the radio astronomy antenna in meters above ground level.

(3) Coordinate locations of the radio observatories are listed in § 2.106(c)(131), (c)(385) of this part.

(r) *Incumbent Protection by Geofencing System: FSS (space-to-Earth) Earth Stations.* (1) The geofencing system must enforce exclusion zones to protect FSS earth stations that receive in the 6875–7055 MHz band at Clifton, TX, Cabo Rojo, PR, Wasilla, AK, Sebring, FL, and Naalehu, HI.

(2) The exclusion zone sizes are based on the radio line-of-sight and determined using 4/3 earth curvature and the following formula:

Equation 5 to Paragraph (r)(2)

$$dkm\_los = 4.12 * (\sqrt{Htx} + \sqrt{Hrx})$$

Where:

Htx is the height of the very low power access point and is set at 1.5 meters above ground level; and

Hrx is the height of the FSS antenna in meters above ground level.

Coordinate locations of the FSS sites are listed in the following table:

TABLE 1 TO PARAGRAPH (r)(2)

Location	Coordinates
Clifton, Texas	31°47'59.22" N, 97°36'46.71" W
Clifton, Texas	31°48'2.149" N, 97°36'44.37" W
Clifton, Texas	31°47'57.4" N, 97°36'47.9" W
Clifton, Texas	31°48'0.1" N, 97°36'48.9" W

TABLE 1 TO PARAGRAPH (r)(2)—
Continued

Location	Coordinates
Clifton, Texas	31°48'3" N, 97°36'49.2" W
Clifton, Texas	31°47'57.5" N, 97°36'44.7" W
Clifton, Texas	31°48'0.2" N, 97°36'44.3" W
Sebring, Florida	27°27'34.3" N, 81°21'26.6" W
Sebring, Florida	27°27'35.6" N, 81°21'26.8" W
Sebring, Florida	27°27'35.6" N, 81°21'28.4" W
Sebring, Florida	27°27'34.3" N, 81°21'28.3" W
Wasilla, Alaska ..	61°35'24.9" N, 149°29'9.6" W
Wasilla, Alaska ..	61°35'24.1" N, 149°29'6" W
Wasilla, Alaska ..	61°35'24.6" N, 149°29'2.4" W
Cabo Rojo, Puer- to Rico.	17°58'48" N, 67°8'15" W
Cabo Rojo, Puer- to Rico.	17°58'50" N, 67°8'13" W
Cabo Rojo, Puer- to Rico.	17°58'49" N, 67°8'14" W
Cabo Rojo, Puer- to Rico.	17°58'48" N, 67°8'12" W
Naalehu, Hawaii	19°0'51.99" N, 155°39'47" W
Naalehu, Hawaii	19°0'52.99" N, 155°39'48.99" W
Naalehu, Hawaii	19°0'51" N, 155°39'48.9" W

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 240220–0053]

RIN 0648–BM01

Pacific Island Fisheries; Catch and Retention Limits for Striped Marlin in the Western and Central Pacific Ocean North of the Equator

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes a catch limit of 457 metric tons (t) for Western and Central North Pacific Ocean (WCNPO) striped marlin caught by U.S. fishing vessels in the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Commission or WCPFC) Convention area north of the Equator and west of 150° W longitude (the action area) and a retention limit of 443 t for U.S. fishing vessels with Hawaii longline limited entry permits. If the retention limit is projected to be reached, NMFS will prohibit retention of striped marlin caught in the WCNPO by Hawaii longline vessels for the calendar year. Action is required under Magnuson-Stevens Fishery Conservation and Management Act Section 304(i) to

address U.S. fishing vessels' relative impact on this internationally managed stock, which is overfished and experiencing overfishing.

DATES: NMFS must receive comments by March 27, 2024.

ADDRESSES: You may submit comments on this proposed rule, identified by NOAA–NMFS–2022–0148, by either of the following methods:

- **Electronic Submission:** Submit all electronic comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov> and enter NOAA–NMFS–2022–0148 in the Search box, click the “Comment” icon, complete the required fields, and enter or attach your comments.

- **Mail:** Send written comments to Sarah Malloy, Acting Regional Administrator, NMFS Pacific Islands Regional Office (PIRO), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

Instructions: NMFS may not consider comments sent by any other method, to any other address or individual, or received after the end of the comment period. 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, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

The Western Pacific Fishery Management Council (Council) and NMFS prepared an environmental assessment (EA) that supports this proposed rule. The EA is available at <https://www.regulations.gov>, or from the Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, or <https://www.wpcouncil.org>.

FOR FURTHER INFORMATION CONTACT: Savannah Lewis, PIRO Sustainable Fisheries, 808–725–5144.

SUPPLEMENTARY INFORMATION: NMFS and the Council manage U.S. commercial fishing for Pelagic Management Unit Species (PMUS) under the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific Region (FEP) and implementing Federal regulations. Although the FEP indicates that PMUS have statutory exemptions from annual catch limits (ACL), the Magnuson-Stevens Act authorizes the Council to determine ACLs or other catch limits for PMUS if such actions are deemed appropriate and consistent with the Magnuson-Stevens Act and other statutory mandates. Magnuson-Stevens

Act § 304(i) provides that where a fishery is overfished or approaching a condition of being overfished due to excessive international fishing pressure for which there are no management measures nor an international agreement to end overfishing, the appropriate Council is to develop recommendations for domestic regulations to address the relative impact of U.S. fishing vessels on the stock.

Striped marlin (*Kajikia audax*) are an internationally managed, non-target species often caught in fisheries targeting tuna and retained due to their economic value. In a 2019 stock assessment, the Commission, of which the United States is a member, determined that WCNP striped marlin were overfished and experiencing overfishing.

To address the Council's obligations under Section 304(i) of the Magnuson-Stevens Act, the Council took action at their 195th meeting in December 2022. The Council recommended and NMFS proposes domestic regulations to implement a 457 t U.S. catch limit for WCNP striped marlin and a domestic retention limit of 443 t. The proposed 457 t domestic catch limit is consistent with the international catch limit for the United States based on the WCPFC Conservation and Management Measure (CMM) 2010–01, "Conservation and Management Measure for North Pacific Striped Marlin." Following the terms of the CMM, the U.S. catch limit was determined by calculating 20 percent of the highest annual U.S. catch of striped marlin reported from 2000–2003; the highest reported catch was 571 t, so a 20 percent reduction is 456.8 t, or 457 t.

Hawaii-based longline fisheries catch 97 percent or more of the total U.S. striped marlin landings and are monitored in-season. Other U.S. fisheries that catch striped marlin, including Hawaii-based troll and handline fisheries, catch less than 3 percent of the total annual U.S. catch and lack real-time monitoring during the fishing season. To ensure that the proposed catch limit is not exceeded, the Council recommended and NMFS proposes a retention limit of 443 t, or 97 percent of the catch limit, for any U.S. fishing vessel with a Hawaii longline limited entry permit issued under 50 CFR 665.801(b). This limit ensures that when troll and handline catches are finalized after the season ends, the total U.S. catch of WCNP striped marlin will not exceed the 457 t catch limit.

Under the proposed rule, striped marlin caught in the action area by a vessel holding a Hawaii limited entry

longline permit issued under 50 CFR 665.801(b), including vessels that also hold an American Samoa longline limited entry permit or other permit, would be counted toward the proposed catch and retention limits. Currently, WCNP striped marlin catch on the high seas (outside the 200 nautical miles (nm), or 370.4 km, exclusive economic zone adjacent to Hawaii) by fishing vessels with American Samoa longline limited entry permits are attributed to American Samoa.

With this proposed rule, all retained catch of WCNP striped marlin in the action area by vessels with both Hawaii longline limited entry permits and American Samoa limited entry permits would be counted toward the proposed domestic 457 t catch and 443 t retention limit. NMFS proposes this change to ensure that all U.S. catch of this stock is managed under the proposed domestic catch limit, as no separate limit for American Samoa currently exists. By itself, this limit is not expected to end overfishing, which is primarily the result of international fishing pressure. Additional international measures through the WCPFC will be necessary to end overfishing and rebuild the stock.

If NMFS projects, based on vessel logbook, landing and other available information, that the retention limit will be reached, the retention of striped marlin caught by U.S. longline vessels holding a Hawaii limited entry longline permit issued under 50 CFR 665.801(b) in the action area will be prohibited for the remainder of the calendar year. A retention prohibition would go into effect no earlier than 7 days after NMFS publishes a no-retention date notice in the **Federal Register**.

As indicated above, this rule alone is not expected to end overfishing on WCNP striped marlin, which must be addressed at the international level. To that end, Section 304(i) requires the Secretary of Commerce, in cooperation with the Secretary of State, to take immediate and appropriate action at the international level to end overfishing. The U.S. delegation has brought recommendations to the WCPFC and continues to pursue revised international measures. As these international negotiations continue, the U.S. domestic responsibility under Section 304(i) is to address the relative impact of U.S. fishing vessels on the stock.

Neither the Magnuson-Stevens Act nor its implementing regulations define relative impact. The regulations do, however, offer guidance on how to assess relative impacts in the international overfishing context.

Specifically, the National Standard 1 (Optimal Yield) guidelines provide that the agency may consider such factors as domestic measures already in place, estimates of a nation's landings, estimates of a nation's mortality contributions, and management history of a nation, although these factors are not exhaustive. In evaluating the relative impacts of U.S. vessels to the striped marlin stock here, we recognize that no single nation's management actions can end the overfished status of this stock. We have taken into account the National Standard 1 factors in assessing the level of catch by U.S. vessels relative to the historical catch of other nations landing striped marlin along with other existing management measures expected to decrease striped marlin catch (e.g., wire leader prohibition). Until the WCPFC adopts management measures that can meaningfully address the status of the striped marlin, we believe this proposed catch and retention limit are consistent with our obligations under the Magnuson-Stevens Act and WCPFC because they reflect the terms of CMM 2010–02 as applied to U.S. striped marlin catch.

International negotiations at the WCPFC have resulted in adoption of a rebuilding plan for this stock which requires rebuilding to 20 percent of unfished biomass with at least 60 percent probability by 2034. The rebuilding plan currently does not contain catch limits, although it acknowledges that catch reductions by all member nations are required to achieve the rebuilding target. Disagreement over international conservation measures and delayed stock assessments have hindered progress at the international level. Ahead of negotiations on catch limits at WCPFC, we recognize that any substantial changes to the catch limits of U.S. fishermen could create a conservation burden on U.S. fishermen that fishermen from other nations may not face. Therefore, the agency is proposing a catch limit that complies with existing international guidance without imposing additional burdens on U.S. fishing interests.

NMFS will consider public comments on this proposed rule and will announce the final rule in the **Federal Register**. NMFS must receive comments on this proposed action by the date provided in the **DATES** heading. NMFS may not consider comments postmarked or otherwise transmitted after that date. Regardless of the proposed rule, all other existing management measures would continue to apply in these fisheries.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the FEP, Magnuson-Stevens Act Section 304(i) and other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

Certification of Finding of No Significant Impact on Substantial Number of Small Entities

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the attached proposed rule, issued under the authority of the Magnuson-Stevens Act, will not have a significant economic impact on a substantial number of small entities.

The WCNPO striped marlin stock is overfished and experiencing overfishing due to excessive international fishing pressure. NMFS proposes to implement an annual catch limit of 457 t and retention limit of 443 t for striped marlin caught in the action area. The 457 t catch limit would apply to vessels with Hawaii longline limited entry permits as well as to Hawaii troll and handline vessels catching striped marlin in the action area. The retention limit would only apply to vessels with Hawaii longline limited entry permits wherein retention of striped marlin by these vessels would be prohibited if the 443 t retention limit were projected to be reached. The troll and handline fisheries historically catch less than 3 percent of the total U.S. striped marlin catch and have a delay in reporting that makes it impossible to monitor catch in-season, so the retention limit would not apply to these troll and handline vessels. The retention limit on Hawaii longline catch is intended to prevent the three fisheries combined from reaching the catch limit. The proposed action is needed to address the Magnuson-Stevens Act section 304(i) requirement to develop recommendations for domestic regulations to address the relative impact of fishing vessels of the United States on this internationally managed, overfished stock lacking effective international management measures to end overfishing.

The proposed action would apply to up to 164 vessels with Hawaii longline limited entry permits. In 2021, 146 vessels participated in the Hawaii deep-set longline fishery, with annual fleet revenue of \$108.5 million and average annual per-vessel revenues of \$743,150. In 2021, 17 vessels participated in the

Hawaii shallow-set fishery, with annual fleet revenue of \$4.7 million and average annual per-vessel revenues of \$276,470 (WPFMC, 2022). There are no anticipated upfront costs associated with the proposed action for Hawaii permitted longline fishery participants and no direct impacts to longline fisheries if longline catch of striped marlin does not reach the retention limit, as they would be able to retain their striped marlin catch. However, the proposed action may lead to a loss in revenue for these fishery participants if the retention limit is reached. The Hawaii-based longline fishery targets tuna (deep-set) and swordfish (shallow-set); striped marlin is a non-target species for this fishery. However, because striped marlin has market value, longline fishermen generally retain striped marlin catch. Using the 2021 average price per pound for striped marlin and average annual landings over the 2016–2020 time frame, NMFS expects that the value of striped marlin from the action area would be \$2 million annually. Between 2014 and 2020, the Hawaii longline fleet has exceeded the 443 t retention limit only once with a catch of 447 t in 2019. Had the retention limit been in place that year, at \$2.54 per pound, the associated revenue loss would be an estimated \$22,400 fleetwide. With 147 active vessels as of August 2022, the estimated expected loss per vessel would have been \$152 per vessel, which likely would have been less than 0.1 percent of annual landed value among most, if not all, vessels. For most years, NMFS anticipates that the longline fishery would not exceed the retention limit and therefore anticipates little to no economic impact from the proposed rule to this fishery overall. The proposed action would also apply to the hundreds of vessels that participate in the Hawaii handline and troll fisheries through the catch limit, but these fisheries would not be directly affected by the proposed action, as neither the retention limit nor retention prohibition would apply to them.

NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing, North American Industry Classification System (NAICS) code 11411, is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated

operations worldwide. Based on available information, NMFS has determined that all affected entities are small entities under the NMFS standard, as they are engaged in the business of fish harvesting, independently owned or operated, are not dominant in their field of operation, and have annual gross receipts not in excess of \$11 million. Even though this proposed action may apply to a substantial number of vessels, the implementation of this action would not result in significant adverse economic impact to individual vessels.

NMFS anticipates no change in fishing activity from the proposed action, independent of the retention limit being reached (*i.e.*, area fished, number of vessels and trips, number and depth of hooks, or deployment techniques) because striped marlin are not a target species. The proposed action does not duplicate, overlap, or conflict with other Federal rules and is not expected to have significant impact on small organizations or government jurisdictions. Furthermore, there would be little, if any, disproportionate adverse economic impacts from the proposed action based on gear type or relative vessel size. The proposed action also will not place a substantial number of small entities, or any segment of small entities, at a significant competitive disadvantage to large entities.

For the reasons above, NMFS does not expect the proposed action to have a significant economic impact on a substantial number of small entities. As such, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR 665

Fisheries, Fishing, Hawaii, Longline, Limited access permit, Pacific Islands, Western Pacific.

Dated: February 20, 2024.

Samuel D. Rauch, III,
Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 665 as follows:

PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 1. The authority citation for 50 CFR part 665 continues to read as follows:

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

■ 2. Amend § 665.800 by adding, in alphabetical order, the definition of “Non-retention date” to read as follows:

§ 665.800 Definitions.

* * * * *

Non-retention date means the date upon which the Regional Administrator projects that a retention limit will be exceeded; retention of a species identified under § 665.813 is prohibited as specified under § 665.802, until the end of the fishing year.

* * * * *

■ 3. Amend § 665.802 by adding paragraph (p) to read as follows:

§ 665.802 Prohibitions.

* * * * *

(p) Fail to immediately release any striped marlin captured after the non-retention date in the Pacific Ocean north of the Equator (0° lat.) and west of 150° W longitude by a vessel registered for use under a longline permit issued under § 665.801(b), in violation of § 665.813(k).

* * * * *

■ 4. Amend § 665.813 by redesignating paragraph (k) as paragraph (l) and adding a new paragraph (k) to read as follows:

§ 665.813 Western Pacific longline fishing restrictions.

* * * * *

(k) *Striped marlin retention limit.* (1) There is a catch limit of 457 metric tons of striped marlin each year from the Pacific Ocean north of the Equator (0° lat.) and west of 150° W longitude. There is a retention limit of 443 metric tons by vessels registered for use under a longline permit issued under § 665.801(b).

(2) NMFS will monitor striped marlin catch with respect to the limits established under paragraph (k)(1) of this section using longline landings, logbook, and other available information.

(3) When the retention limit is projected to be reached, based on analyses of available information in paragraph (k)(2) of this section, the Regional Administrator shall publish notification to that effect in the **Federal Register** that includes a specified non-retention date that is not earlier than 7

days after the **Federal Register** publication date until the end of the calendar year in which the retention limit was projected to be reached.

(4) Once a notification is made pursuant to paragraph (k)(3) of this section, a fishing vessel registered for use under a longline permit issued under § 665.801(b) may not retain on board, transship, or land striped marlin captured by longline gear in the Pacific Ocean north of the Equator (0° lat.) and west of 150° W longitude, except striped marlin retained prior to the non-retention date. Any striped marlin already on board upon the effective non-retention date may be retained on board, transshipped, and/or landed, to the extent authorized by applicable laws and regulations, provided that the striped marlin is landed within 14 days after the effective non-retention date.

* * * * *

[FR Doc. 2024-03778 Filed 2-23-24; 8:45 am]

BILLING CODE 3510-22-P

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to Office of Management and Budget (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; 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 March 27, 2024 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.

Rural Utilities Service

Title: RUS Specification for Quality Control and Inspection of Timber Products.

OMB Control Number: 0572–0076.

Summary of Collection: The Rural Utilities Service (RUS) is a credit agency of the U.S. Department of Agriculture (USDA) and is authorized to manage loan programs in accordance with the Rural Electrification Act (RE Act) of 1936, 7 U.S.C. 901 *et seq.*, as amended. It makes mortgage loans and loan guarantees to finance telecommunications, electric, and water and waste facilities in rural areas. To ensure the security of loan funds, adequate quality control of timber products is vital to loan security on electric power systems where hundreds of thousands of wood-poles and cross-arms are used. Prior to receiving loan funds, a RUS borrower must enter into a loan contract with RUS. In accordance with article V, section 5.14 of the loan contract, “the borrower shall use design standards, construction standards and lists of acceptable materials in conformance with RUS regulations.

Need and Use of the Information: The purchaser or treating company may obtain the services of an inspection agency or third-party oversight organization to perform certain inspection services to insure that the specifications for wood poles and cross-arms are being met. As required by 7 CFR 1728.202(i) copies of test reports on various preservatives must accompany each charge (a charge being a load of poles treated at the same time in a pressure cylinder). Test reports are needed so that the purchaser, the inspectors, and RUS will be able to spot-check the general accuracy of the tests. RUS will use the information in verifying acceptability of poles and cross-arms purchased by RUS borrowers.

Description of Respondents: Business or other for-profit; Not-for-profit institutions.

Number of Respondents: 25.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 20,333.

Rural Utilities Service

Title: 7 CFR part 1744, subpart B, Lien Accommodations and Subordination Policy.

OMB Control Number: 0572–0126.

Summary of Collection: The information collected in this information collection package is received from RUS telecommunications borrowers. The policy of considering Lien Accommodations will continue to facilitate funding from non-agency sources in order to meet the growing capital needs of rural Local Exchange Carriers (LECs). Depending on the purposes for which a lien accommodation is sought, RUS will utilize the information to provide an expedited approval for borrowers that meet the financial tests described in this rule. RUS believes that borrowers that are financially sound should be afforded more flexibility with regard to financial arrangements with outside lenders for the purpose of promoting rural telecommunications. The tests are designed to ensure that the financial strength of the borrower is more than sufficient to protect the government's loan security interests; hence, the lien accommodations will not adversely affect the government's financial interests.

Need and Use of the Information: In order to facilitate supplemental financing for telecommunications services projects, RUS provides fast track lien accommodations to private lenders who propose to lend to RUS borrowers who meet certain financial strength evaluations. Depending on the purposes for which a lien accommodation is sought, RUS will use the information to provide expedited approval for borrowers that meet the financial tests. The tests are designed to ensure that the financial strength of the borrower is more than sufficient to protect the government's loan security interests; hence, the lien accommodations will not adversely affect the government's financial interests.

Description of Respondents: Business or other for-profit.

Number of Respondents: 12.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 18.

Levi S. Harrell,

*Departmental Information Collection
Clearance Officer.*

[FR Doc. 2024-03839 Filed 2-23-24; 8:45 am]

BILLING CODE 3410-15-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 March 27, 2024 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.

Animal Plant and Health Inspection Service

Title: Black Stem Rust; Identification Requirements and Addition of Rust-Resistant Varieties.

OMB Control Number: 0579-0186.

Summary of Collection: Under the Plant Protection Act (7 U.S.C. 7701—*et seq.*), the Secretary of Agriculture is authorized to prohibit or restrict the importation, entry, or movement of plants and plant products to prevent the introduction of plant pests into the United States or their dissemination within the United States. Black stem rust is one of the most destructive plant diseases of small grains that are known to exist in the United States. The disease is caused by a fungus that reduces the quality and yield of infected wheat, oat, barley, and rye crops by robbing host plants of food and water. The fungus is spread from host to host by windborne spores.

Need and Use of the Information: APHIS will collect information to prevent the spread of black stem rust by providing for and requiring the accurate identification of rust-resistant varieties by inspectors. When a business request APHIS to add a variety to the list of rust-resistant barberries, it need to provide APHIS with a written description and color pictures that can be used by the State nursery inspectors to clearly identify the variety and distinguish it from other varieties. This action enables nurseries to move the species into and through protected areas and to propagate and sell the species in States or parts of States designated as protected areas.

Description of Respondents: Business or other for profit; State, Local, and Tribal Government.

Number of Respondents: 2.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 17.

Rachelle Ragland-Greene,

*Acting Departmental Information Collection
Clearance Officer.*

[FR Doc. 2024-03868 Filed 2-23-24; 8:45 am]

BILLING CODE 3410-34-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 approval under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and

assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments regarding these information collections are best assured of having their full effect if received by March 27, 2024.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Marketing Service

Title: Cotton Classification and Market News Service.

OMB Control Number: 0581-0009.

Summary of Collection: The Cotton Statistics and Estimates Act, 7 U.S. Code 471-476, authorizes the Secretary of Agriculture to collect and publish annually statistics or estimates concerning the grades and staple lengths of stocks of cotton. In addition, Agricultural Marketing Service (AMS) collects, authenticates, publishes, and distributes timely information of the market supply, demand, location, and market prices for cotton (7 U.S.C. 473B). This information is needed and used by all segments of the cotton industry.

Need and Use of the Information: AMS will collect information on the quality of cotton in the carryover stocks along with the size or volume of the carryover. Growers use this information in making decisions relative to marketing their present crop and planning for the next one; cotton merchants use the information in marketing decisions; and the mills that provide the data also use the combined data in planning their future purchase to cover their needs. Importers of U.S. cotton use the data in making their plans for purchases of U.S. cotton. AMS

and other government agencies are users of the compiled information.

Description of Respondents: Business or other for-profit.

Number of Respondents: 696.

Frequency of Responses: Reporting: On occasion; Weekly; Annually.

Total Burden Hours: 599.

Agricultural Marketing Service

Title: Reporting Forms Under Milk Marketing Order Programs.

OMB Control Number: 0581-0032.

Summary of Collection: Agricultural Marketing Service (AMS) oversees the administration of the Federal Milk Marketing Orders authorized by the Agricultural Marketing Agreement Act of 1937, as amended. The Act is designed to improve returns to producers while protecting the interests of consumers. The Federal Milk Marketing Order regulations require places certain requirements on the handling of milk in the area it covers. Currently, there are 11 milk marketing orders regulating the handling of milk in the respective marketing areas.

Need and Use of the Information: The information collected is needed to administer the classified pricing system and related requirements of each Federal Order. Forms are used for reporting purposes and to establish the quantity of milk received by handlers, the pooling status of the handler, and the class-use of the milk used by the handler and the butterfat content and amounts of other components of the milk. Without the monthly information, the market administrator would not have the information to compute each monthly price nor know if handlers were paying producers on dates prescribed in the order. Penalties are imposed for violation of the order, such as the failure to pay producers by the prescribed dates.

Description of Respondents: Business or other for-profit; Not-for-profit institutions; Individuals or households; Farms.

Number of Respondents: 745.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Quarterly; Monthly; Annually.

Total Burden Hours: 28,559.

Agricultural Marketing Service

Title: Specified Commodities Imported Into the United States Exempt From Import Requirements, 7 CFR part 944, 980, and 999.

OMB Control Number: 0581-0167.

Summary of Collection: Section 608e of the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601-674), requires that whenever the Secretary of

Agriculture issues grade, size, quality, or maturity regulations under domestic Federal marketing orders, the same or comparable regulations must be used for imported commodities. Import regulations apply only during those periods when domestic marketing order regulations are in effect. No person may import products for processing or other exempt purposes unless an executed Importers Exempt Commodity Form (SC-6) accompanies the shipment. Both the shipper and receiver are required to register in the Compliance and Enforcement Management System (CEMS) to electronically file an SC-6 certificate to notify the Marketing Order and Agreement Division (MOAD) of the exemption activity. MOAD provides information on its website about the commodities imported under section 8e of the Act and directions to the CEMS portal. The Civil Penalty Stipulation Agreement (SC-7) is a "volunteer" form that provides the Agricultural Marketing Service (AMS) with an additional tool to obtain resolution of certain cases without the cost of going to a hearing.

Need and Use of the Information: The importers wishing to import commodities will use the electronic or paper version of form SC-6, "Importer's Exempt Commodity." The information collected includes information on the imported product (type of product and lot identification), the importer's contact information, the U.S. Customs entry number, inspection date, and intended use (processing, charity, livestock/animal feed). In a situation where a party is alleged to have violated the importation regulations, AMS can use SC-7, "Civil Penalty Stipulation Agreement" form to settle the matter in exchange for the payment of a fine. AMS utilizes the information to ensure that imported goods destined for exempt outlets are given no less favorable treatment than afforded to domestic goods destined for such exempt outlets. If the information is not collected, AMS would have no way of maintaining a safe and legal import program for fruits, vegetables, and specialty crops, as this is the only method of securing compliance with section 8e of the Act.

Description of Respondents: Business or other for-profit; Not-for-profit institutions.

Number of Respondents: 79.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 581.

Agricultural Marketing Service

Title: Organic Handler Market Promotion Assessment Exemption Under Federal Marketing Orders.

OMB Control Number: 0581-0216.

Summary of Collection: Marketing order programs provide an opportunity for producers of fresh fruit, vegetables, and specialty crops in specified production areas to work together to solve marketing problems that cannot be solved individually. Under the Agricultural Marketing Agreement Act of 1937 as amended (7 U.S.C. 601-674), marketing orders may authorize production and marketing research, including paid advertising, to promote various commodities, which is paid for by assessments that are levied on the handlers who are regulated by the Orders.

Section 10004 of the 2014 Farm Bill expanded the organic assessment exemption originally established by the FAIR Act. The 2014 Farm Bill allows all organic handlers to apply for an exemption from assessments on products certified as "organic" or "100 percent organic," regardless of whether the handler also markets conventional or non-organic products. At the same time, the 2014 Farm bill reduced the per response time to complete the form from 30 minutes to 15 minutes.

Need and Use of the Information: Handlers submit the completed SC-649 form to the appropriate committee, board or council once a year to apply for an assessment exemption to a certain percentage. The information gathered on this form is necessary to assist the committees, boards and councils to determine an applicant's eligibility assessment exemption and to verify compliance.

Description of Respondents: Business or other for-profit; Farms.

Number of Respondents: 210.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Annually.

Total Burden Hours: 53.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2024-03854 Filed 2-23-24; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2024-0003]

Notice of Request for Approval of an Information Collection; Study To Understand Knowledge and Beliefs About Translocation of Wild Pigs

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: New information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request approval of a new information collection associated with a study to understand knowledge and beliefs about translocation and release of wild pigs.

DATES: We will consider all comments that we receive on or before April 26, 2024.

ADDRESSES: You may submit comments by either of the following methods:

- **Federal eRulemaking Portal:** Go to www.regulations.gov. Enter APHIS–2024–0003 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.

- **Postal Mail/Commercial Delivery:** Send your comment to Docket No. APHIS–2024–0003, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at regulations.gov or in our reading room, which is located in Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on this wild pig study, contact Dr. Keith Carlisle, Supervisory Social Scientist/Human Dimensions Unit Leader, National Wildlife Research Center, WS, APHIS, USDA, 4101 La Porte Ave, Fort Collins, CO 80521; (970) 266–6047; email: keith.m.carlisle@usda.gov. For more information on the information collection process, contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851–2533.

SUPPLEMENTARY INFORMATION:

Title: Study to Understand Knowledge and Beliefs about Translocation of Wild Pigs.

OMB Control Number: 0579–XXXX.

Type of Request: Approval of a new information collection.

Abstract: Under The Act of March 2, 1931 (7 U.S.C. 8351), the Secretary of Agriculture is authorized to conduct a program of wildlife services with respect to injurious animal species and take any action the Secretary considers necessary in conducting the program. Additionally, the Secretary of

Agriculture is authorized to conduct activities to control nuisance mammals and birds (except for urban rodent control) and those mammals and bird species that are reservoirs for zoonotic disease. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS) Wildlife Services (WS). Two responsibilities of the Deputy Administrator of WS are to assist Federal, State, local, and foreign agencies and individuals with regard to wildlife damage and control and conduct research to develop wildlife damage management methods (7 CFR 371.6).

As part of WS, the mission of the National Feral Swine Damage Management Program is to protect agricultural and natural resources, property, animal health, and human health and safety by managing damage caused by wild pigs (*Sus scrofa*), also known as feral swine, feral hogs, wild hogs, and wild boar, in the United States and its territories. Wild pigs are an invasive species in the United States and are present in at least 35 States. The control of wild pig populations has become a State and national priority due to their propensity to damage agricultural commodities and infrastructure, transmit disease, affect ecological processes, and compete with native wildlife for resources. However, each State varies in its policy and management approaches to control wild pig populations based on numerous considerations, including its resource appropriations and stakeholder interests. Most States have issued restrictions on transporting and releasing wild pigs, an activity that may be undertaken to establish new populations for sport hunting purposes and has contributed to the expansion of wild pig populations over the last several decades. However, resources for enforcement in many States may be limited, and it is unclear whether hunters and members of the public are aware of these restrictions. It is therefore uncertain whether State law restrictions on wild pig translocation are having the intended effect.

Through the APHIS WS National Wildlife Research Center, a Federal institution devoted to resolving human-wildlife conflict, APHIS would like to conduct an online survey of hunters and members of the public in five southeastern States that would measure knowledge and beliefs about the transportation and release of wild pigs. Current information on knowledge and beliefs about the transportation and release of wild pigs is critical to identify potential conflicts and barriers to future

management efforts of wild pig populations. APHIS anticipates that, among other things, results of the study may inform State efforts to provide targeted information where needed about State law restrictions on the translocation of wild pigs.

The information collection activity associated with the study consists of a multi-item questionnaire administered to both hunters and members of the public with primary residence in the State of Mississippi, Missouri, North Carolina, Oklahoma, or Tennessee.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

- (1) Evaluate 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;
- (2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 0.40 hours per response.

Respondents: Hunters and members of the public whose primary residence is in the State of Mississippi, Missouri, North Carolina, Oklahoma, or Tennessee.

Estimated annual number of respondents: 6,667.

Estimated annual number of responses per respondent: 1.0.

Estimated annual number of responses: 6,667.

Estimated total annual burden on respondents: 2,667 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 20th day of February 2024.

Michael Watson,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2024-03790 Filed 2-23-24; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2021-0075]

Notice of Decision To Authorize the Importation of Ugu Leaves (*Telfairia occidentalis* Hook.f.) From Nigeria Into the Continental United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our decision to authorize the importation of fresh Ugu leaves (*Telfairia occidentalis* Hook.f.) from Nigeria into the continental United States. Based on findings of a pest risk analysis, which we made available to the public for review and comment through a previous notice, we have determined that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of fresh Ugu leaves from Nigeria.

DATES: Imports may be authorized beginning February 26, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Gina Stiltner, Senior Regulatory Policy Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737-1231; (518) 760-2468; Gina.L.Stiltner@USDA.gov.

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in “Subpart L—Fruits and Vegetables” (7 CFR 319.56–1 through 319.56–12, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into or disseminated within the United States.

Section 319.56–4 contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis, can be safely

imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. Under that process, APHIS proposes to authorize the importation of a fruit or vegetable into the United States if, based on findings of a pest risk analysis, we determine that the measures can mitigate the plant pest risk associated with the importation of that fruit or vegetable. APHIS then publishes a notice in the **Federal Register** announcing the availability of the pest risk analysis that evaluates the risks associated with the importation of a particular fruit or vegetable. Following the close of the 60-day comment period, APHIS will issue a subsequent **Federal Register** notice announcing whether or not we will authorize the importation of the fruit or vegetable subject to the phytosanitary measures specified in the notice.

In accordance with that process, we published a notice¹ in the **Federal Register** on August 28, 2023 (88 FR 58542–58543, Docket No. APHIS-2021-0075) in which we announced the availability, for review and comment, of a pest risk analysis that evaluated the risks associated with the importation of fresh Ugu leaves (*Telfairia occidentalis* Hook.f.) from Nigeria into the continental United States. The pest risk analysis consisted of a risk assessment identifying pests of quarantine significance that could follow the pathway of the importation of fresh Ugu leaves (*Telfairia occidentalis* Hook.f.) from Nigeria into the continental United States and a risk management document (RMD) identifying phytosanitary measures to be applied to that commodity to mitigate the pest risk.

We solicited comments on the notice for 60 days, ending on October 27, 2023. We received no comments by that date.

Therefore, in accordance with § 319.56–4(c)(3)(iii), we are announcing our decision to authorize the importation into the continental United States of fresh Ugu leaves from Nigeria subject to the phytosanitary measures identified in the RMD that accompanied the initial notice.

These conditions will be listed in the USDA, APHIS Agricultural Commodity Import Requirements (ACIR) database (<https://acir.aphis.usda.gov/s/>).² In addition to these specific measures, each shipment must be subject to the general requirements listed in § 319.56–

3 that are applicable to the importation of all fruits and vegetables.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the recordkeeping and burden requirements associated with this action are included under the Office of Management and Budget control number 0579–0049.

E-Government Act Compliance

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

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, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 20th day of February 2024.

Michael Watson,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2024-03789 Filed 2-23-24; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

[Docket Number: RUS-23-Telecom-0022]

Amended Notice of Funding Opportunity for the Rural eConnectivity Program for Fiscal Year 2024; Extension of Submission Deadline

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice, extension of submission deadline.

SUMMARY: The Rural Utilities Service (RUS, Agency), a Rural Development (RD) agency of the United States Department of Agriculture (USDA), announced its acceptance of applications under the Rural eConnectivity (ReConnect) program for fiscal year (FY) 2024 in the **Federal Register** on February 21, 2024. This

¹ To view the notice and the supporting documents, go to www.regulations.gov. Enter APHIS-2021-0075 in the Search field.

² On September 30, 2022, the APHIS Fruits and Vegetables Import Requirements (FAVIR) database was replaced by the ACIR database.

notice is extending the date by which applications can be submitted.

DATES: The deadline for submissions regarding the Notice of Funding Opportunity (NOFO) published February 21, 2024 at 89 FR 13035 is extended from April 21, 2024, to May 21, 2024. The application window still opens March 22, 2024.

ADDRESSES: Applications must be submitted electronically through the RUS Application Intake System located at usda.gov/reconnect. A synopsis of this NOFO will be made available on grants.gov.

FOR FURTHER INFORMATION CONTACT:

Laurel Leverrier, Assistant Administrator, Telecommunications Program, Rural Utilities Service, U.S. Department of Agriculture (USDA), email: laurel.leverrier@usda.gov, telephone: (202) 720-9554.

SUPPLEMENTARY INFORMATION:

Background

The Agency is extending the deadline for submissions regarding the NOFO for Rural eConnectivity (ReConnect) program for fiscal year (FY) 2024 published in the **Federal Register** on February 21, 2024, from April 21, 2024, to May 21, 2024. The application window still opens March 22, 2024. This change is being made to allow Applicants a full 60 days to prepare their complete applications.

Andrew Berke,

Administrator, Rural Utilities Service, USDA Rural Development.

[FR Doc. 2024-03844 Filed 2-23-24; 8:45 am]

BILLING CODE 3410-15-P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meetings

AGENCY: Commission on the Social Status of Black Men and Boys (CSSBMB), U.S. Commission on Civil Rights.

ACTION: Notice of CSSBMB public business meeting.

DATES: Thursday, February 22 11:00 a.m.–12:00 p.m. EDT.

ADDRESSES: Meeting to take place virtually and is open to the public via livestream on the Commission's YouTube page: <https://youtube.com/live/oST5qtdwSI>.

FOR FURTHER INFORMATION CONTACT:

Diamond Newman, 202-339-2371, dnewman@usccr.gov.

SUPPLEMENTARY INFORMATION: In accordance with Public Law 116-156, 1134 Stat. 700 (2020), the Commission

on the Social Status of Black Men and Boys (CSSBMB) will hold its Second Quarter Business Meeting exploring CSSBMB business items, operations, and next steps. This business meeting is open to the public via livestream on the Commission on Civil Rights' YouTube page at <https://youtube.com/live/oST5qtdwSI>. (Streaming information subject to change.) Public participation is available for the event with view access, along with an audio option for listening. Computer assisted real-time transcription (CART) will be provided. The web link to access CART (in English) on February 22 is <http://upload.youtube.com/closedcaption?cid=faem-bz2w-gq0r-btyz-64jw>.

Please note that CART is text-only translation that occurs in real time during the meeting and is not an exact transcript.

* Date and meeting details are subject to change. For more information on the CSSBMB or the upcoming public briefing, please visit www.usccr.gov/CSSBMB and CSSBMB's Instagram, Facebook, and X.

*** Briefing Agenda**

- (1) Welcome and Call to Order (11:00 a.m.–11:03 a.m.)
- (2) Business Meeting (order of business) (11:03 a.m.–11:06 a.m.)
 - (a) Quorum: (11:06 a.m.–11:09 a.m.)
 - (b) Adoption of Agenda (11:09 a.m.–11:12 a.m.)
 - (c) New Order of Business (11:12 a.m.–11:50 a.m.)
- (3) Approval of Minutes
 - (i) ii. Chair's Report
 - a. Vision and goals
 - b. State of the Commission
 - c. Introduction of New Commissioners
 - (ii) Joesph Palm of HHS
 - (iii) Commission rules
 - (iv) Upcoming highlighted events
 - (v) White House Visit (February)
 - (vi) Ribbon Cutting (May)
 - (vii) Crime Prevention (April)
 - (viii) In-Person Business Mtg (May)
 - (ix) Caucus on the Commission—Upcoming Events
 - (x) Second Annual Act Now Summit (July)
 - (xi) Fatherhood and Father's Day (June)
 - (xii) Tentative FY Business meeting proposed dates
 - (xiii) May 21, 2024
 - (xiv) ii. August 20, 2024
 - (a) iii. Director's Report
 - a. Update Profile Information
 - b. Proposed/Current Initiatives
 - i. Finalizing Annual Report
 - ii. Social Media Campaign—Black History Month
 - iii. New Commissioner Press Release

- iv. Website Creation
- v. 2024 Planning
- vi. Education White Paper
- vii. Summit and Briefing
 - (xv) iv. Open Discussion
- (4) Chair Comments/Adjourn Meeting (11:50 a.m.–12:00 p.m.)

Dated: February 21, 2024.

Zakee Martin,

Deputy Director, Commission on the Social Status of Black Men & Boys, United States Commission on Civil Rights (USCCR).

[FR Doc. 2024-03939 Filed 2-22-24; 11:15 am]

BILLING CODE 6335-01-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S-233-2023]

Approval of Subzone Status; GMA Accessories DBA Capelli New York; Pittston, Pennsylvania

On December 8, 2023, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Eastern Distribution Center, Inc., grantee of FTZ 24, requesting subzone status subject to the existing activation limit of FTZ 24, on behalf of GMA Accessories DBA Capelli New York, in Pittston, Pennsylvania.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (88 FR 86623, December 14, 2023). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR 400.36(f)), the application to establish 24H was approved on February 21, 2024, subject to the FTZ Act and the Board's regulations, including section 400.13, and further subject to FTZ 24's 2,000-acre activation limit.

Dated: February 21, 2024.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2024-03865 Filed 2-23-24; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Meeting of the Civil Nuclear Trade Advisory Committee

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda for a meeting of the Civil Nuclear Trade Advisory Committee (CINTAC).

DATES: The meeting is scheduled for Thursday, March 14, 2024, from 10 a.m. to 4 p.m. eastern standard time (EST). The deadline for members of the public to register, including requests to make comments during the meeting and for auxiliary aids, or to submit written comments for dissemination prior to the meeting, is 5 p.m. EST on Monday, March 11, 2024.

ADDRESSES: The meeting will be in-person at the Department of Commerce Herbert C. Hoover Building (1401 Constitution Ave. NW, Washington, DC 20230). Registered participants will be emailed instructions on accessing the designated meeting space. Requests to register (including to speak or for auxiliary aids) and any written comments should be submitted to Mr. Jonathan Chesebro, Office of Energy & Environmental Industries, International Trade Administration, (email: jonathan.chesebro@trade.gov). Members of the public should submit registration requests and written comments via email to ensure timely receipt.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Chesebro, Office of Energy & Environmental Industries, International Trade Administration, Room 28018, 1401 Constitution Ave. NW, Washington, DC 20230. (Phone: 202–482–1297; email: jonathan.chesebro@trade.gov).

SUPPLEMENTARY INFORMATION:

Background: The CINTAC was established under the discretionary authority of the Secretary of Commerce and in accordance with the Federal Advisory Committee Act (5 U.S.C. 1001 *et seq.*), in response to an identified need for consensus advice from U.S. industry to the U.S. Government regarding the development and administration of programs to expand U.S. exports of civil nuclear goods and services in accordance with applicable U.S. laws and regulations, including advice on how U.S. civil nuclear goods and services export policies, programs, and activities affect the U.S. civil nuclear industry's competitiveness and ability to participate in the international market.

Topics to be considered: The agenda for the Thursday, March 14, 2024, CINTAC meeting will include discussions of CINTAC priorities for its 2022–2024 charter term and activities related to the U.S. Department of

Commerce's Civil Nuclear Trade Initiative.

Members of the public wishing to attend the meeting must notify Mr. Jonathan Chesebro at the contact information above by 5 p.m. EST on Monday, March 11, 2024, in order to pre-register. Please specify any requests for reasonable accommodation at least five business days in advance of the meeting.

A limited amount of time will be available for brief oral comments from members of the public attending the meeting. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of 20 minutes. Individuals wishing to reserve speaking time during the meeting must contact Mr. Jonathan Chesebro and submit a brief statement of the general nature of the comments and the name and address of the proposed participant by 5 p.m. EST on Monday, March 11, 2024. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, ITA may conduct a lottery to determine the speakers.

Any member of the public may submit written comments concerning the CINTAC's affairs at any time before and after the meeting. Comments may be submitted to Mr. Jonathan Chesebro in the International Trade Administration's Office of Energy & Environmental Industries. For consideration during the meeting, and to ensure transmission to the Committee prior to the meeting, comments must be received no later than 5 p.m. EST on Monday, March 11, 2024. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of CINTAC meeting minutes will be available within 90 days of the meeting.

Man K. Cho,

Deputy Director, Office of Energy and Environmental Industries.

[FR Doc. 2024–03837 Filed 2–23–24; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–164, A–549–849, A–552–839]

Certain Paper Plates From the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable February 14, 2024.

FOR FURTHER INFORMATION CONTACT:

Charles DeFilippo (the People's Republic of China (China)) at (202) 482–3979; Theodore Pearson (Thailand) at (202) 482–2631; and Bryan Hansen (the Socialist Republic of Vietnam (Vietnam)) at (202) 482–3683, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Petitions

On January 25, 2024, the U.S. Department of Commerce (Commerce) received antidumping duty (AD) petitions concerning imports of certain paper plates (paper plates) from China, Thailand, and Vietnam filed in proper form on behalf of the American Paper Plate Coalition (the petitioner).¹ These AD Petitions were accompanied by countervailing duty (CVD) petitions concerning imports of paper plates from China and Vietnam.²

Between January 29 and February 6, 2024, Commerce requested supplemental information pertaining to certain aspects of the Petitions in separate supplemental questionnaires.³ The petitioner filed responses to the

¹ See Petitioner's Letter, "Petitions for the Imposition of Antidumping and Countervailing Duties," dated January 25, 2024 (the Petitions). The members of the American Paper Plate Coalition are AJM Packaging Corporation, Aspen Products, Inc., Dart Container Corporation, Hoffmaster Group, Inc., Huhtamaki Americas, Inc., and Unique Industries, Inc.

² *Id.*

³ See Commerce's Letter, "Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Certain Paper Plates from the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Supplemental Questions," dated January 29, 2024 (General Issues Questionnaire); see also Country-Specific Supplemental Questionnaires: China Supplemental, Thailand Supplemental, and Vietnam Supplemental, dated January 29, 2024; and Memorandum, "Phone Call," dated February 6, 2024 (February 6 Memorandum).

supplemental questionnaires between January 31 and February 8, 2024.⁴

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the Act), the petitioner alleges that imports of paper plates from China, Thailand, and Vietnam are being, or are likely to be, sold in the United States at less than fair value (LTFV) within the meaning of section 731 of the Act, and that imports of such products are materially injuring, or threatening material injury to, the paper plates industry in the United States. Consistent with section 732(b)(1) of the Act, the Petitions were accompanied by information reasonably available to the petitioner supporting its allegations.

Commerce finds that the petitioner filed the Petitions on behalf of the domestic industry, because the petitioner is an interested party, as defined in section 771(9)(F) of the Act.⁵ Commerce also finds that the petitioner demonstrated sufficient industry support for the initiation of the requested LTFV investigations.⁶

Periods of Investigation

Because the Petitions were filed on January 25, 2024, pursuant to 19 CFR 351.204(b)(1), the period of investigation (POI) for the Thailand LTFV investigation is January 1, 2023, through December 31, 2023. Because China and Vietnam are non-market economy (NME) countries, pursuant to 19 CFR 351.204(b)(1), the POI for the China and Vietnam LTFV investigations is July 1, 2023, through December 31, 2023.

Scope of the Investigations

The products covered by these investigations are paper plates from China, Thailand, and Vietnam. For a full description of the scope of these investigations, *see* the appendix to this notice.

Comments on the Scope of the Investigations

On January 29 and February 6, 2024, Commerce requested information and

clarification from the petitioner regarding the proposed scope to ensure that the scope language in the Petitions is an accurate reflection of the products for which the domestic industry is seeking relief.⁷ On February 2 and 8, 2024, the petitioner provided clarifications and revised the scope.⁸ The description of merchandise covered by these investigations, as described in the appendix to this notice, reflects these clarifications.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for interested parties to raise issues regarding product coverage (*i.e.*, scope).⁹ Commerce will consider all scope comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information,¹⁰ all such factual information should be limited to public information. To facilitate preparation of its questionnaires, Commerce requests that scope comments be submitted by 5:00 p.m. Eastern Time (ET) on March 5, 2024, which is 20 calendar days from the signature date of this notice.¹¹ Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on March 15, 2024, which is 10 calendar days from the initial comment deadline.

Commerce requests that any factual information that parties consider relevant to the scope of these investigations be submitted during that period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigations may be relevant, the party must contact Commerce and request permission to submit the additional information. All scope comments must be filed simultaneously on the records of the concurrent LTFV and CVD investigations.

Filing Requirements

All submissions to Commerce must be filed electronically via Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.¹² An

electronically filed document must be received successfully in its entirety by the time and date it is due.

Comments on Product Characteristics

Commerce is providing interested parties an opportunity to comment on the appropriate physical characteristics of paper plates to be reported in response to Commerce's AD questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to report the relevant factors of production (FOP) or cost of production (COP) accurately, as well as to develop appropriate product comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: (1) general product characteristics; and (2) product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, although there may be some physical product characteristics utilized by manufacturers to describe paper plates, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in matching products. Generally, Commerce attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the AD questionnaires, all product characteristics comments must be filed by 5:00 p.m. ET on March 5, 2024, which is 20 calendar days from the signature date of this notice.¹³ Any rebuttal comments must be filed by 5:00 p.m. ET on March 15, 2024, which is 10 calendar days from the initial comment deadline. All comments and submissions to Commerce must be filed

Administrative Protective Order Procedures, 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance: Change of Electronic Filing System Name*, 79 FR 69046 (November 20, 2014) for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on using ACCESS can be found at <https://access.trade.gov/help.aspx> and a handbook can be found at https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.

¹³ See 19 CFR 351.303(b)(1).

⁴ See Petitioner's Letters, "Petitioner's Responses to Supplemental Questions—General Issues," dated February 2, 2024 (First General Issues Supplement); Country-Specific AD Supplemental Responses: First China AD Supplement, First Thailand AD Supplement, and First Vietnam AD Supplement, dated February 2, 2024; Country-Specific AD Supplemental Responses: Second China AD Supplement, Second Thailand AD Supplement, and Second Vietnam AD Supplement, dated February 8, 2024; and "Petitioner's Responses to Supplemental Questions—General Issues," dated February 8, 2024 (Second General Issues Supplement).

⁵ The members of the American Paper Plate Coalition are interested parties as defined under section 771(9)(C) of the Act.

⁶ See section on "Determination of Industry Support for the Petitions," *infra*.

⁷ See General Issues Questionnaire; *see also* February 6 Memorandum.

⁸ See First General Issues Supplement at 5–11; *see also* Second General Issues Supplement at 3–6.

⁹ See *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27323 (May 19, 1997) (*Preamble*); *see also* 19 CFR 351.312.

¹⁰ See 19 CFR 351.102(b)(21) (defining "factual information").

¹¹ See 19 CFR 351.303(b)(1).

¹² See *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures*;

electronically using ACCESS, as explained above, on the record of each of the LTFV investigations.

Determination of Industry Support for the Petitions

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the “industry.”

Section 771(4)(A) of the Act defines the “industry” as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether “the domestic industry” has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC apply the same statutory definition regarding the domestic like product,¹⁴ they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce’s determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.¹⁵

Section 771(10) of the Act defines the domestic like product as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an

investigation under this title.” Thus, the reference point from which the domestic-like product analysis begins is “the article subject to an investigation” (i.e., the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioner does not offer a definition of the domestic like product distinct from the scope of the investigations.¹⁶ Based on our analysis of the information submitted on the record, we have determined that paper plates, as defined in the scope, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.¹⁷

In determining whether the petitioner has standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the “Scope of the Investigations,” in the appendix to this notice. To establish industry support, the petitioner provided its own shipments of the domestic like product in 2023 and compared this to the estimated total 2023 shipments of the domestic like product for the entire domestic industry.¹⁸ Because total industry production data for the domestic like product for 2023 are not reasonably available to the petitioner, and the petitioner has established that shipments are a reasonable proxy for production data,¹⁹ we have relied on the data provided by the petitioner for purposes of measuring industry support.²⁰

Our review of the data provided in the Petitions, the First General Issues

Supplement, the Second General Issues Supplement, and other information readily available to Commerce indicates that the petitioner has established industry support for the Petitions.²¹ First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action in order to evaluate industry support (e.g., polling).²² Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.²³ Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions.²⁴ Accordingly, Commerce determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.²⁵

Allegations and Evidence of Material Injury and Causation

The petitioner alleges that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at LTFV. In addition, the petitioner alleges that subject imports from China and Vietnam exceed the negligibility threshold provided for under section 771(24)(A) of the Act.²⁶

With regard to Thailand, while the allegedly dumped imports do not exceed the statutory requirements for negligibility,²⁷ the petitioner alleges and provides supporting evidence that: (1)

¹⁶ See Petitions at Volume I (pages 11–13); see also First General Issues Supplement at 17–18.

¹⁷ For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, see Antidumping Duty Investigation Initiation Checklists: Certain Paper Plates from the People’s Republic of China, Thailand, and the Socialist Republic of Vietnam, dated concurrently with this notice (Country-Specific AD Initiation Checklists) at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Certain Paper Plates from the People’s Republic of China, Thailand, and the Socialist Republic of Vietnam (Attachment II). These checklists are dated concurrently with this notice and on file electronically via ACCESS.

¹⁸ See First General Issues Supplement at 12–14, 16, and Attachments 2–4; see also Second General Issues Supplement at 7–8 and Attachment 1.

¹⁹ See Petitions at Volume I (page 4 and Exhibit I–2); see also First General Issues Supplement at 12 and 14.

²⁰ See Petitions at Volume I (pages 3–4); see also First General Issues Supplement at 11–16 and Attachments 2–4; and Second General Issues Supplement at 7–8 and Attachment 1. For further discussion, see Attachment II of the Country-Specific AD Initiation Checklists.

²¹ See Petitions at Volume I (pages 3–4); see also First General Issues Supplement at 11–16 and Attachments 2–4; and Second General Issues Supplement at 6–8 and Attachments 1–3. For further discussion, see Attachment II of the Country-Specific AD Initiation Checklists.

²² See Attachment II of the Country-Specific AD Initiation Checklists; see also section 732(c)(4)(D) of the Act.

²³ See Attachment II of the Country-Specific AD Initiation Checklists.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Petitions at Volume I (pages 15–16 and Exhibit I–8).

²⁷ *Id.* at 16–17 and Exhibits I–8 through I–10, I–12, and I–13; see also First General Issues Supplement at 18–19.

¹⁴ See section 771(10) of the Act.

¹⁵ See *USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd. v. United States*, 688 F. Supp. 639, 644 (CIT 1988), *aff’d Algoma Steel Corp., Ltd. v. United States*, 865 F.2d 240 (Fed. Cir. 1989)).

there is a reasonable indication that data obtained in the ITC's investigation will establish that imports exceed the negligibility threshold;²⁸ and (2) there is the potential that imports from Thailand will imminently exceed the negligibility threshold and, therefore, are not negligible for purposes of a threat determination.²⁹ The petitioner's arguments regarding the limitations of publicly available import data and the collection of scope-specific import data in the ITC's investigations are consistent with the SAA. Furthermore, the petitioner's arguments regarding the potential for imports from Thailand to imminently exceed the negligibility threshold are consistent with the statutory criteria for "negligibility in threat analysis" under section 771(24)(A)(iv) of the Act, which provides that imports shall not be treated as negligible if there is a potential that subject imports from a country will imminently exceed the statutory requirements for negligibility.

The petitioner contends that the industry's injured condition is illustrated by the significant volume of subject imports; underselling and price depression and/or suppression; loss of market share; decrease in production volume and capacity utilization; and lost sales and revenues.³⁰ We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence, and meet the statutory requirements for initiation.³¹

Allegations of Sales at LTFV

The following is a description of the allegations of sales at LTFV upon which Commerce based its decision to initiate LTFV investigations of imports of paper plates from China, Thailand, and Vietnam. The sources of data for the deductions and adjustments relating to U.S. price and normal value (NV) are discussed in greater detail in the

Country-Specific AD Initiation Checklists.

U.S. Price

For China, Thailand, and Vietnam, the petitioner based export price (EP) on pricing information for sales, or offers for sale, of paper plates produced in and exported from each country.³² For each country, the petitioner made certain adjustments to U.S. price to calculate a net ex-factory U.S. price, where applicable.³³

Normal Value³⁴

For Thailand, the petitioner stated that it was unable to obtain home market or third country pricing information for paper plates to use as a basis for NV.³⁵ Therefore, for Thailand, the petitioner calculated NV based on constructed value (CV).³⁶ For further discussion of CV, see the section "Normal Value Based on Constructed Value," below.

Commerce considers China and Vietnam to be NME countries.³⁷ In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by Commerce. Therefore, we continue to treat China and Vietnam as NME countries for purposes of the initiation of these investigations. Accordingly, we base NV on FOPs valued in a surrogate market economy country in accordance with section 773(c) of the Act.

The petitioner claims that Malaysia is an appropriate surrogate country for China because it is a market economy that is at a level of economic development comparable to that of China and is a significant producer of

comparable merchandise.³⁸ The petitioner provided publicly available information from Malaysia to value all FOPs except labor.³⁹ Consistent with Commerce's recent practice in cases involving Malaysia as a surrogate country,⁴⁰ to value labor, the petitioner provided labor statistics from another surrogate country, Turkey.⁴¹ Based on the information provided by the petitioner, we believe it is appropriate to use Malaysia as a surrogate country for China to value all FOPs except labor and to value labor using labor statistics from Turkey for initiation purposes.

The petitioner claims that Indonesia is an appropriate surrogate country for Vietnam because it is a market economy that is at a level of economic development comparable to that of Vietnam and is a significant producer of comparable merchandise.⁴² The petitioner provided publicly available information from Indonesia to value all FOPs.⁴³ Based on the information provided by the petitioner, we believe it is appropriate to use Indonesia as a surrogate country for Vietnam to value all FOPs for initiation purposes.

Interested parties will have the opportunity to submit comments regarding surrogate country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value FOPs within 30 days before the scheduled date of the preliminary determination.

Factors of Production

Because information regarding the volume of inputs consumed by Chinese and Vietnamese producers/exporters was not reasonably available, the petitioner used product-specific consumption rates from a U.S. producer of paper plates as a surrogate to value Chinese and Vietnamese manufacturers' FOPs.⁴⁴ Additionally, the petitioner calculated factory overhead, selling, general, and administrative expenses (SG&A), and profit based on the experience of a Malaysian and an

²⁸ See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. 1 (1994) (SAA), at 857; see also Petitions at Volume I (pages 16-17 and Exhibits I-8 through I-10); and First General Issues Supplement at 18-19.

²⁹ See section 771(24)(A)(iv) of the Act; see also First General Issues Supplement at 19.

³⁰ See Petitions at Volume I (pages 15-39 and Exhibits I-2, I-3, and I-7 through I-35); see also First General Issues Supplement at 18-19.

³¹ See Country-Specific AD Initiation Checklists at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Certain Paper Plates from the People's Republic of China, Thailand, and the Socialist Republic of Vietnam.

³² See Country-Specific AD Initiation Checklists.

³³ *Id.*

³⁴ In accordance with section 773(b)(2) of the Act, for the Thailand investigation, Commerce will request information necessary to calculate the CV and COP to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that represent less than the COP of the product.

³⁵ See Thailand AD Initiation Checklist.

³⁶ *Id.*

³⁷ See, e.g., *Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances*, 88 FR 15372 (March 13, 2023), and accompanying Preliminary Decision Memorandum at 5, unchanged in *Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 88 FR 34485 (May 30, 2023); and *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Administrative Review; 2016-2017*, 84 FR 18007 (April 29, 2019).

³⁸ See China AD Initiation Checklist.

³⁹ *Id.*

⁴⁰ See, e.g., *Certain Collated Steel Staples from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; and Final Determination of No Shipments; 2021-2022*, 88 FR 85242 (December 7, 2023), and accompanying Issues and Decision Memorandum (IDM) at Comment 2; and *Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 88 FR 15671 (March 14, 2023), and accompanying IDM at Comment 2.

⁴¹ See China AD Initiation Checklist.

⁴² See Vietnam AD Initiation Checklist.

⁴³ *Id.*

⁴⁴ See China AD Initiation Checklist; see also Vietnam AD Initiation Checklist.

Indonesian producer of comparable merchandise for China and Vietnam, respectively.⁴⁵

Normal Value Based on Constructed Value

As noted above for Thailand, the petitioner stated that it was unable to obtain home market or third-country prices for paper plates to use as a basis for NV. Therefore, for Thailand, the petitioner calculated NV based on CV.⁴⁶

Pursuant to section 773(e) of the Act, the petitioner calculated CV as the sum of the cost of manufacturing, SG&A, financial expenses, and profit.⁴⁷ For Thailand, in calculating the cost of manufacturing, the petitioner relied on the production experience and input consumption rates of a U.S. producer of paper plates, valued using publicly available information applicable to Thailand.⁴⁸ In calculating SG&A, financial expenses, and profit ratios, the petitioner relied on the fiscal year 2022 financial statements of a producer of identical merchandise in Thailand.⁴⁹

Fair Value Comparisons

Based on the data provided by the petitioner, there is reason to believe that imports of paper plates from China, Thailand, and Vietnam are being, or are likely to be, sold in the United States at LTFV. Based on comparisons of EP to NV in accordance with sections 772 and 773 of the Act, the estimated dumping margins for paper plates for each of the countries covered by this initiation are as follows: (1) China—154.57 to 178.80 percent; (2) Thailand—61.03 to 73.17 percent; and (3) Vietnam—153.09 to 165.27 percent.⁵⁰

Initiation of LTFV Investigations

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 732 of the Act. Therefore, we are initiating LTFV investigations to determine whether imports of paper plates from China, Thailand, and Vietnam are being, or are likely to be, sold in the United States at LTFV. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 140 days after the date of these initiations.

Respondent Selection

Thailand

In the Petitions, the petitioner identified nine companies in Thailand as producers/exporters of paper plates.⁵¹ Following standard practice in LTFV investigations involving market economy countries, in the event Commerce determines that the number of companies is large, and it cannot individually examine each company based upon Commerce's resources, where appropriate, Commerce intends to select mandatory respondents based on U.S. Customs and Border Protection (CBP) data for imports under the appropriate Harmonized Tariff Schedule of the United States (HTSUS) subheading(s) listed in the "Scope of the Investigations," in the appendix.

On February 9, 2024, Commerce released CBP data on imports of paper plates from Thailand under administrative protective order (APO) to all parties with access to information protected by APO and indicated that interested parties wishing to comment on CBP data and/or respondent selection must do so within three business days of the publication date of the notice of initiation of these investigations.⁵² Comments must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. ET on the specified deadline. Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce's website at <https://www.trade.gov/administrative-protective-orders>.

China and Vietnam

In the Petitions, the petitioner named 149 companies in China and nine companies in Vietnam as producers and/or exporters of paper plates.⁵³ Our standard practice for respondent selection in AD investigations involving NME countries is to select respondents based on quantity and value (Q&V) questionnaires in cases where it has determined that the number of companies is large and it cannot

individually examine each company based upon its resources. Therefore, considering the number of producers and/or exporters identified in the Petitions, Commerce will solicit Q&V information that can serve as a basis for selecting exporters for individual examination in the event that Commerce determines that the number is large and decides to limit the number of respondents individually examined pursuant to section 777A(c)(2) of the Act. For Vietnam, because there are nine Vietnamese producers and/or exporters identified in the Petitions, Commerce has determined that it will issue Q&V questionnaires to each potential respondent for which the petitioner has provided a complete address. For China, because there are 149 Chinese producers and/or exporters identified in the Petitions, Commerce has determined that it will issue Q&V questionnaires to the largest producers and/or exporters in China that are identified in the CBP data for which there is complete address information on the record.⁵⁴

Commerce will post the Q&V questionnaires along with filing instructions on Commerce's website at <https://www.trade.gov/ec-adcvd-case-announcements>. Producers/exporters of paper plates from China and Vietnam that do not receive Q&V questionnaires may still submit a response to the Q&V questionnaire and can obtain a copy of the Q&V questionnaire from Commerce's website. Responses to the Q&V questionnaire must be submitted by the relevant Chinese and Vietnamese producers/exporters no later than 5:00 p.m. ET on February 28, 2024, which is two weeks from the signature date of this notice. All Q&V questionnaire responses must be filed electronically via ACCESS. An electronically filed document must be received successfully, in its entirety, by ACCESS no later than 5:00 p.m. ET on the deadline noted above.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). As stated above, instructions for filing such applications may be found on Commerce's website at <https://www.trade.gov/administrative-protective-orders>.

Separate Rates

In order to obtain separate rate status in an NME investigation, exporters and producers must submit a separate rate application. The specific requirements for submitting a separate rate

⁴⁵ See China AD Initiation Checklist; see also Vietnam AD Initiation Checklist. As noted above, for China, the petitioner calculated labor using information specific to Turkey. See China AD Initiation Checklist.

⁴⁶ See Thailand AD Initiation Checklist.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Country-Specific AD Initiation Checklists.

⁵¹ See Petitions at Volume I (page 9 and Exhibit I-5); see also First General Issues Supplement at 3 and Attachment 1.

⁵² See Memorandum, "Release of Data from U.S. Customs and Border Protection," dated February 9, 2024.

⁵³ See Petitions at Volume I (page 9 and Exhibit I-5); see also First General Issues Supplement at 3-4 and Attachment 1.

⁵⁴ See Memorandum, "Release of U.S. Customs and Border Protection Data," dated February 9, 2024.

application in an NME investigation are outlined in detail in the application itself, which is available on Commerce's website at <https://access.trade.gov/Resources/nme/nme-sep-rate.html>. The separate rate application will be due 30 days after publication of this initiation notice. Exporters and producers must file a timely separate rate application if they want to be considered for individual examination. Exporters and producers who submit a separate rate application and have been selected as mandatory respondents will be eligible for consideration for separate rate status only if they respond to all parts of Commerce's AD questionnaire as mandatory respondents. Commerce requires that companies from China and Vietnam submit a response both to the Q&V questionnaire and to the separate rate application by the respective deadlines to receive consideration for separate rate status. Companies not filing a timely Q&V questionnaire response will not receive separate rate consideration.

Use of Combination Rates

Commerce will calculate combination rates for certain respondents that are eligible for a separate rate in an NME investigation. The Separate Rates and Combination Rates Bulletin states:

{w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that {Commerce} will now assign in its NME investigation will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the {weighted average} of the individually calculated rates. This practice is referred to as the application of "combination rates" because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation.⁵⁵

Distribution of Copies of the Petitions

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the Petitions have been provided to the governments of China, Thailand,

and Vietnam via ACCESS. To the extent practicable, we will attempt to provide a copy of the public version of the Petitions to each exporter named in the Petitions, as provided under 19 CFR 351.203(c)(2).

ITC Notification

Commerce will notify the ITC of our initiation, as required by section 732(d) of the Act.

Preliminary Determinations by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petitions were filed, whether there is a reasonable indication that imports of paper plates from China, Thailand, and/or Vietnam are materially injuring, or threatening material injury to, a U.S. industry.⁵⁶ A negative ITC determination for any country will result in the investigation being terminated with respect to that country.⁵⁷ Otherwise, these LTFV investigations will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted⁵⁸ and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.⁵⁹ Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in these investigations.

Particular Market Situation Allegation

Section 773(e) of the Act addresses the concept of particular market

situation (PMS) for purposes of CV, stating that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology." When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act, nor 19 CFR 351.301(c)(2)(v), set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of a respondent's initial section D questionnaire response.

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301, or as otherwise specified by Commerce.⁶⁰ For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, we will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, standalone submission; under limited

⁵⁵ See Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, "Separate-Rates Practice and Application of Combination Rates in Antidumping Investigation Involving NME Countries," (April 5, 2005) at 6 (emphasis added), available on Commerce's website at <https://access.trade.gov/Resources/policy/bull05-1.pdf>.

⁵⁶ See section 733(a) of the Act.

⁵⁷ *Id.*

⁵⁸ See 19 CFR 351.301(b).

⁵⁹ See 19 CFR 351.301(b)(2).

⁶⁰ See 19 CFR 351.301; see also *Extension of Time Limits; Final Rule*, 78 FR 57790 (September 20, 2013) (*Time Limits Final Rule*), available at <https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm>.

circumstances we will grant untimely filed requests for the extension of time limits, where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review Commerce's regulations concerning the extension of time limits and the *Time Limits Final Rule* prior to submitting factual information in these investigations.⁶¹

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.⁶² Parties must use the certification formats provided in 19 CFR 351.303(g).⁶³ Commerce intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d) (e.g., by filing the required letter of appearance). Note that Commerce has modified certain of its requirements for serving documents containing business proprietary information and has made additional clarifications and corrections to its AD/CVD regulations.⁶⁴

This notice is issued and published pursuant to sections 732(c)(2) and 777(i) of the Act, and 19 CFR 351.203(c).

Dated: February 14, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Investigations

The merchandise subject to these investigations is certain paper plates. Paper plates subject to these investigations may be cut from rolls, sheets, or other pieces of paper and/or paper board. Paper plates subject to these investigations have a depth up to and

including two (2.0) inches, as measured vertically from the base to the top of the lip, or the edge if the plate has no lip. Paper plates subject to these investigations may be uncolored, white, colored, or printed. Printed paper plates subject to these investigations may have any type of surface finish, and may be printed by any means with images, text and/or colors on one or both surfaces. Colored paper plates subject to this investigation may be colored by any method, including but not limited to printing, beater-dyeing, and dip-dyeing. Paper plates subject to these investigations may be produced from paper of any type (including, but not limited to, bamboo, straws, bagasse, hemp, kenaf, jute, sisal, abaca, cotton inters and reeds, or from non-plant sources, such as synthetic resin (petroleum)-based resins), may have any caliper or basis weight, may have any shape or size, may have one or more than one section, may be embossed, may have foil or other substances adhered to their surface, and/or may be uncoated or coated with any type of coating.

The paper plates subject to these investigations remain covered by the scope of these investigations whether imported alone, or in any combination of subject and non-subject merchandise. When paper plates subject to these investigations are imported in combination with non-subject merchandise, only the paper plates subject to these investigations are subject merchandise.

The paper plates subject to these investigations include paper plates matching the above description that have been finished, packaged, or otherwise processed in a third country by performing finishing, packaging, or processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the country of manufacture of the paper plates. Examples of finishing, packaging, or other processing in a third country that would not otherwise remove the merchandise from the scope of the investigations if performed in the country of manufacture of the paper plates include, but are not limited to, printing, application of other surface treatments such as coatings, repackaging, embossing, and application of foil surface treatments.

Excluded from the scope of these investigations are paper plates molded or pressed directly from paper pulp (including but not limited to unfelted pulp), which are currently classifiable under subheading 4823.70.0020 of the Harmonized Tariff Schedule of the United States (HTSUS).

Also excluded from the scope of these investigations are articles that otherwise would be covered but which exhibit the following two physical characteristics: (a) depth (measured vertically from the base to the top of the lip, or edge if no lip) equal to or greater than 1.25 inches but less than two (2.0) inches, and (b) a base not exceeding five (5.0) inches in diameter if round, or not exceeding 20 square inches in area if any other shape.

Also excluded from the scope of these investigations are paper bowls, paper buckets, and paper food containers with closeable lids.

Paper plates subject to these investigations are currently classifiable under HTSUS

subheading 4823.69.0040. Paper plates subject to these investigations also may be classified under HTSUS subheading 4823.61.0040. If packaged with other articles, the paper plates subject to these investigations also may be classified under HTSUS subheadings 9505.90.4000 and 9505.90.6000. While the HTSUS subheading(s) are provided for convenience and customs purposes, the written description of the subject merchandise is dispositive.

[FR Doc. 2024–03863 Filed 2–23–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–501, C–489–502, A–489–822, C–489–823, A–489–816, C–489–817, A–489–833, C–489–834]

Circular Welded Carbon Steel Standard Pipe and Tube Products From the Republic of Turkey; Welded Line Pipe From the Republic of Turkey; Certain Oil Tubular Goods From the Republic of Turkey; and Large Diameter Welded Pipe From the Republic of Turkey: Notice of Initiation of Antidumping Duty and Countervailing Duty Changed Circumstances Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is initiating changed circumstances reviews (CCRs) to determine if Borusan Birleşik Boru Fabrikalari Sanayi ve Ticaret A.S. (Borusan Boru) is the successor-in-interest to Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (BMB) in the context of the antidumping duty (AD) and countervailing duty (CVD) orders on circular welded carbon steel standard pipe and tube products (standard pipe), welded line pipe (WLP), certain oil tubular goods (OCTG), and large diameter welded pipe (LDWP) from the Republic of Turkey (Turkey).

DATES: Applicable February 26, 2024.

FOR FURTHER INFORMATION CONTACT: Herawe Kebede, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4312.

SUPPLEMENTARY INFORMATION:

Background

On May 15, 1986, March 7, 1986, December 1, 2015, September 10, 2014, and May 2, 2019, respectively, Commerce published in the **Federal**

⁶¹ See 19 CFR 351.302; see also, e.g., *Time Limits Final Rule*.

⁶² See section 782(b) of the Act.

⁶³ See *Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings*, 78 FR 42678 (July 17, 2013) (*Final Rule*). Additional information regarding the *Final Rule* is available at <https://access.trade.gov/Resources/filing/index.html>.

⁶⁴ See *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069 (September 29, 2023).

Register AD and CVD orders on standard pipe, WLP, OCTG, and LDWP from Turkey.¹ On January 9, 2024, Borusan Boru requested that, pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), 19 CFR 351.216, and 19 CFR 351.221(c)(3), Commerce conduct expedited CCRs to determine that Borusan Boru is the successor-in-interest to BMB and accordingly to: (1) assign it the cash deposit rates currently applicable to BMB pursuant to *Standard Pipe AD Order*; *Standard Pipe CVD Order*; *Welded Line Pipe AD Order*; *Welded Line Pipe CVD Order*; and *OCTG AD Order*; *LDWP AD Order*; and *LDWP CVD Order*.² In its submission, Borusan Boru stated that in 2023 it changed its name from BMB pursuant to the termination of its partnership with Salzgitter Mannesmann GmbH.³

Scope of the Orders

The merchandise covered by these orders is standard pipe, WLP, OCTG, and LDWP from Turkey. For a complete description of the scope of each of these orders, see *Standard Pipe AD Order*; *Standard Pipe CVD Order*; *Welded Line*

Pipe AD Order; *Welded Line Pipe CVD Order*; *OCTG AD Order*; *OCTG CVD Order*; *LDWP AD Order*; and *LDWP CVD Order*.⁴

Initiation of CCRs

Pursuant to section 751(b)(1)(A) of the Act and 19 CFR 351.216(d), Commerce conducts a CCR upon receipt of information concerning, or a request from, an interested party for a review of an AD or CVD order which shows changed circumstances sufficient to warrant a review of the order. The information submitted by Borusan Boru regarding its claim that it is the successor-in-interest to BMB demonstrates changed circumstances sufficient to warrant the initiation of such reviews.⁵ Therefore, in accordance with section 751(b)(1)(A) of the Act and 19 CFR 351.216(d) and (e), we are initiating these CCRs.

In making a successor-in-interest determination, Commerce examines several factors, including, but not limited to, changes in the following: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base.⁶ While no single factor or combination of factors will necessarily provide a dispositive indication of a successor-in-interest relationship, generally, Commerce will consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor.⁷ Thus, if the record evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, Commerce may assign the new company the cash deposit rate of its predecessor.⁸

Pursuant to 19 CFR 351.221(c)(3)(ii), Commerce may combine the notices of initiation and preliminary results of a CCR into a single notice if it concludes that expedited action is warranted. We have determined that it is appropriate to further consider, and potentially seek additional information regarding, certain factors noted above that Commerce examines in a successor-in-interest determination. Therefore, we find that expedited action is not warranted. Commerce intends to make its preliminary determinations and to publish in the **Federal Register** a notice of the preliminary results of these CCRs, in accordance with 19 CFR 351.221(b)(4) and (c)(3)(i), which will set forth Commerce's preliminary factual and legal conclusions. Pursuant to 19 CFR 351.221(b)(4)(ii), interested parties will have an opportunity to comment on the preliminary results.

Unless extended, Commerce intends to issue the final results of this CCR within 270 days after the date of initiation, in accordance with 19 CFR 351.216(e).

Notification to Interested Parties

We are issuing this notice in accordance with sections 751(b)(1) and 777(i) of the Act and 19 CFR 351.216(b) and 351.221(b)(1).

Dated: February 20, 2024.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2024–03856 Filed 2–23–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–824]

Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Changed Circumstances Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily

18, 2010); and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Changed Circumstances Review*, 63 FR 14679 (March 26, 1998), unchanged in *Circular Welded Non-Alloy Steel Pipe from Korea: Final Results of Antidumping Duty Changed Circumstances Review*, 63 FR 20572 (April 27, 1998), in which Commerce found that a company which only changed its name and did not change its operations is a successor-in-interest to the company before it changed its name.

¹ See *Antidumping Duty Order; Welded Carbon Steel Standard Pipe and Tube Products from Turkey*, 51 FR 17784 (May 15, 1986) (*Standard Pipe AD Order*); *Countervailing Duty Order: Certain Welded Carbon Steel Pipe and Tube Products from Turkey*, 51 FR 7984 (March 7, 1986) (*Standard Pipe CVD Order*); *Welded Line Pipe from the Republic of Korea and the Republic of Turkey: Antidumping Duty Orders*, 80 FR 75056 (December 1, 2015) (*Welded Line Pipe AD Order*); *Welded Line Pipe from the Republic of Turkey: Countervailing Duty Order*, 80 FR 75054 (December 1, 2015) (*Welded Line Pipe CVD Order*); *Certain Oil Country Tubular Goods from India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders; and Certain Oil Country Tubular Goods from the Socialist Republic of Vietnam: Amended Final Determination of Sales at Less Than Fair Value*, 79 FR 53691, 53693 (September 10, 2014) (*OCTG AD Order*); *Certain Oil Country Tubular Goods from India and the Republic of Turkey: Countervailing Duty Orders and Amended Affirmative Final Countervailing Duty Determination for India*, 79 FR 53688 (September 10, 2014) (*OCTG CVD Order*); *Large Diameter Welded Pipe from the Republic of Turkey: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order*, 84 FR 18799 (May 2, 2019) (*LDWP AD Order*); and *Large Diameter Welded Pipe from the Republic of Turkey: Countervailing Duty Order*, 84 FR 18771 (May 2, 2019) (*LDWP CVD Order*).

² See Borusan Boru's Letter, "Notification of Company Name Change and Request for Changed Circumstances Review, If Deemed Necessary: Name Change of Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Mannesmann Pipe U.S.," dated January 8, 2024 (Borusan Boru's CCR Request). In Borusan Boru's CCR Request, Borusan Boru also requested that Commerce conduct a CCR to determine if Borusan Mannesmann Pipe U.S. is the successor-in-interest to Borusan Pipe U.S. Inc. However, because we do not assign cash deposit rates to U.S. companies, we do not intend to conduct this analysis.

³ *Id.*

⁴ See *Standard Pipe AD Order*, 51 FR at 17784; *Standard Pipe CVD Order*, 51 FR at 7984; *Welded Line Pipe AD Order*, 80 FR at 75056–57; *Welded Line Pipe CVD Order*, 80 FR at 75054; *OCTG AD Order*, 79 FR at 53691–92; *OCTG CVD Order*, 79 FR at 53689; *LDWP AD Order*, 84 FR at 18801; and *LDWP CVD Order*, 84 FR at 18773.

⁵ See Borusan Boru's CCR Request.

⁶ See, e.g., *Certain Frozen Warmwater Shrimp from India: Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review*, 81 FR 75376 (October 31, 2016) (*Shrimp from India Preliminary Results*), unchanged in *Certain Frozen Warmwater Shrimp from India: Notice of Final Results of Antidumping Duty Changed Circumstances Review*, 81 FR 90774 (December 15, 2016) (*Shrimp from India Final Results*).

⁷ See, e.g., *Shrimp from India Preliminary Results*, 81 FR at 75377, unchanged in *Shrimp from India Final Results*, 81 FR at 90774.

⁸ *Id.*; see also *Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber from Japan*, 67 FR 58, 59 (January 2, 2002); *Ball Bearings and Parts Thereof from France: Final Results of Changed-Circumstances Review*, 75 FR 34688, 34689 (June

determines that Garware Hi-Tech Films Limited (Garware Hi-Tech) is the successor-in-interest to Garware Polyester Limited (Garware Polyester) for purposes of the antidumping duty (AD) order on polyethylene terephthalate film, sheet, and strip (PET film) from India. Accordingly, Garware Hi-Tech is entitled to Garware Polyester's AD cash deposit rates with respect to entries of subject merchandise in the above referenced proceedings. Interested parties are invited to comment on these preliminary results.

DATES: Applicable February 26, 2024.

FOR FURTHER INFORMATION CONTACT:

Jacqueline Arrowsmith, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-5255.

SUPPLEMENTARY INFORMATION:

Background

On August 22, 2023, Commerce published the initiation of a changed circumstances review (CCR) on the AD order¹ of PET film from India for Garware Hi-Tech.² Commerce declined to combine the *Initiation Notice* with the preliminary results of the CCR, citing the need to issue a supplemental questionnaire to Garware Hi-Tech regarding its ownership and management structure.³ On September 12, 2023, Commerce issued a supplemental questionnaire to Garware Hi-Tech seeking clarification about ownership and management structure and its suppliers.⁴ On September 25, 2023, Garware Hi-Tech timely submitted its response to this questionnaire.⁵ No other interested party submitted comments or factual

information regarding Garware Hi-Tech's request.

Scope of the Order

The merchandise subject to the *Order* is PET film. The product is currently classifiable under subheading 3920.62.00.90 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS number is provided for convenience and for customs purposes, the full written product description, available in the Preliminary Decision Memorandum, remains dispositive.⁶

Legal Framework

In this CCR, pursuant to section 751(b) of the Tariff Act of 1930, as amended (the Act), Commerce conducted a successor-in-interest analysis. In determining whether one company is the successor-in-interest to another company as part of an AD proceeding, Commerce examines several factors including, but not limited to, changes in (1) management and ownership; (2) production facilities; (3) supplier relationships; and (4) customer base.⁷ Although no single, or even several, of these factors will necessarily provide a dispositive indication of succession, generally, Commerce will consider a company to be the successor-in-interest if its resulting operation is not materially dissimilar to that of its predecessor.⁸ Thus, if the "totality of circumstances" demonstrate that, with respect to the production and sale of the subject merchandise, the new company operates as essentially the same business entity as the prior company, Commerce will assign the successor-in-interest the cash deposit rate of its predecessor.⁹

Preliminary Results of Review

We preliminarily determine that Garware Hi-Tech is the successor-in-interest to Garware Polyester. Record evidence submitted by Garware Hi-Tech indicates that, based on the totality of the circumstances under Commerce's

successor-in-interest criteria, Garware Hi-Tech operates as materially the same business entity as Garware Polyester with respect to the production and sale of subject merchandise. For a complete discussion of the information that Garware Hi-Tech provided and the complete successor-in-interest analysis, see the Preliminary Decision Memorandum. A list of topics included in the Preliminary Decision Memorandum is included as an attachment to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than 30 days after the date of publication of this notice.¹⁰ Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.¹¹ Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.¹²

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.¹³ Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and

¹ See *Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 44175 (July 1, 2002) (*Order*).

² The notice of initiation of this CCR referred to this company as Garware Hi-Tech. We clarify that the full name of the company requesting this CCR is Garware Hi-Tech Films Limited, hereafter abbreviated as Garware Hi-Tech. See *Polyethylene Terephthalate Film, Sheet and Strip from India: Initiation of Antidumping Duty Changed Circumstances Review; Garware*, 88 FR 57090 (August 22, 2023) (*Initiation Notice*).

³ *Id.*

⁴ See Commerce's Letter, "Changed Circumstances Review of the Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet and Strip (PET Film) from India: Supplemental Questionnaire," dated September 12, 2023.

⁵ See Garware Hi-Tech's Letter, "Garware Hi-Tech Films Limited's request for a Changed Circumstances Review Response to 1st Supplemental Questionnaire," dated September 25, 2023.

⁶ See Memorandum, "Polyethylene Terephthalate Film, Sheet, and Strip from India: Preliminary Results of Changed Circumstances Review," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

⁷ See, e.g., *Ball Bearings and Parts Thereof from France: Final Results of Changed-Circumstances Review*, 75 FR 34688 (June 18, 2010), and accompanying Issues and Decision Memorandum at Comment 1.

⁸ See, e.g., *Fresh and Chilled Atlantic Salmon from Norway: Final Results of Changed Circumstances Antidumping Duty Administrative Review*, 64 FR 9979, 9979-80 (March 1, 1999).

⁹ *Id.*; see also *Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review*, 57 FR 20460 (May 13, 1992) at Comment 1.

¹⁰ Commerce is exercising its discretion under 19 CFR 351.309(c)(1)(i) to alter the time limit for the filing of case briefs.

¹¹ See 19 CFR 351.309(d); see also *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

¹² See 19 CFR 351.309(c)(2) and (d)(2).

¹³ We use the term "issue" here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

decision memorandum that will accompany the final results in this CCR. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).¹⁴

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS, within 30 days of publication of this notice. Requests should contain the following information: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. If a request for a hearing is made, Commerce will inform parties of the time and date for the hearing.

Final Results of Review

Consistent with 19 CFR 351.216(e), we intend to issue the final results of this CCR no later than 270 days after the date on which this review was initiated. If we continue to find that Garware Hi-Tech is the successor-in-interest to Garware Polyester, we will assign Garware Hi-Tech the cash deposit rate currently assigned to Garware Polyester (*i.e.*, 4.45 percent).¹⁵

Notification to Interested Parties

We are issuing and publishing these preliminary results in accordance with sections 751(b)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: February 20, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the 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. Successor-in-Interest Determination
- V. Recommendation

[FR Doc. 2024-03860 Filed 2-23-24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-084, C-570-085]

Certain Quartz Surface Products From the People's Republic of China: Expansion of the Period of Review and Supplemental Opportunity To Request Administrative Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is expanding the period of review (POR) for the current antidumping duty (AD) and countervailing duty (CVD) administrative reviews of certain quartz surface products (quartz surface products) from the People's Republic of China (China) to include entries suspended by the final scope ruling on Malaysian processed quartz slab prior to the current POR of the instant reviews. Additionally, Commerce is providing a supplemental opportunity for interested parties to request a review of certain companies currently ineligible for the scope certification process with suspended entries during the expanded POR solely for the purposes of examining their certification status.

DATES: Supplemental requests for review must be submitted no later than March 11, 2024.

FOR FURTHER INFORMATION CONTACT: Ajay K. Menon, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482-0208.

SUPPLEMENTARY INFORMATION:

Background

On October 21, 2022, Commerce published in the **Federal Register** the final scope ruling on Malaysian processed quartz slab, finding that imports of quartz slab manufactured in China and processed in Malaysia are covered by the AD and CVD orders on quartz surface products from China.¹ As part of this determination, Commerce implemented a certification requirement for all imports of quartz surface products from Malaysia, effective November 4, 2021, and also directed U.S. Customs and Border Protection (CBP) to suspend liquidation and

require cash deposit for entries subject to the scope inquiry retroactive to this same date.²

On July 3, 2023, Commerce notified interested parties of the opportunity to request administrative reviews of the AD and CVD orders on quartz surface products from China for the periods: (1) July 1, 2022, through June 30, 2023 for the AD administrative review; and (2) January 1, 2022, through December 31, 2022 for the CVD administrative review.³ On September 11, 2023, Commerce initiated administrative reviews of the AD and CVD orders on quartz surface products from China for these periods.⁴

Expanding the PORs of the AD and CVD Administrative Reviews

As noted above, in the *Malaysia Processed Final Scope Ruling* published on October 21, 2022, Commerce imposed a certification requirement and also directed CBP to suspend liquidation and require cash deposit for entries subject to the inquiry effective November 4, 2021.⁵ Therefore, consistent with 19 CFR 351.213(e)(1)–(2),⁶ to ensure that Commerce is examining all suspended entries which were not previously under review, we are expanding the ongoing AD and CVD administrative reviews to cover the following periods: (1) November 1, 2021, through June 30, 2023 for the AD administrative review; and (2) November 1, 2021, through December 31, 2022 for the CVD administrative review.

Supplemental Opportunity To Request Administrative Review

In the *Malaysia Processed Final Scope Ruling*, we determined that the following companies were ineligible from participating in the scope certification process because they did not fully participate in the proceeding: Bada Industries SDN BHD (Bada Industries); Ever Stone World SDN BHD (Ever Stone); Karina Stone; MSI Building Supply SDN (MSI); Principal Safwa (M) SDN (Principal Safwa); Resstone Manufacturing (Resstone);

² *Id.*

³ See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List*, 88 FR 42693 (July 3, 2023).

⁴ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 FR 62322 (September 11, 2023) (*Initiation Notice*).

⁵ See *Malaysia Processed Final Scope Ruling*, 87 FR at 64010.

⁶ See 19 CFR 351.213(e)(1)–(2), which provides that “[w]hile AD/CVD reviews normally are limited to 12 months or the calendar year, Commerce has the discretion to determine the period under review.”

¹⁴ See *APO and Final Service Rule*.

¹⁵ See *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Antidumping Duty Administrative Review; 2017–2018*, 85 FR 14883, 14884 (March 16, 2020), as amended by *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Antidumping Duty Administrative Review; 2017–2018; Correction*, 88 FR 87751 (December 19, 2023).

¹ See *Certain Quartz Surface Products from the People's Republic of China: Final Scope Ruling on Malaysian Processed Quartz Slab and Recission of the Circumvention Inquiry*, 87 FR 64009, 64010 (October 21, 2022) (*Malaysia Processed Final Scope Ruling*).

SCLM Services SDN BHD (SCLM); Unique Stone SDN BHD (Unique Stone); and Universal Quartz. We are conducting the ongoing AD and CVD administrative reviews to reconsider the eligibility of Bada Industries, Karina Stone, and Universal Quartz from the certification process.⁷

With this notice, in accordance with 19 CFR 351.213(b), we are affording interested parties, as defined by section 771(9) of the Tariff Act of 1930, as amended, with a supplemental opportunity to request in writing that the Secretary conduct an administrative review to review the certification eligibility of any of the following companies: Ever Stone; MSI; Principal Safwa; Resstone; SCLM; and Unique Stone. For both the AD and CVD administrative reviews, the requestor must specify for which of these companies it is requesting a review.

The deadline for parties to file a request for review of the certification status of these entities is not later than 14 days from the date of publication of this notice. If interested parties submit a request for review of any of these companies, Commerce's review will be limited to the company's eligibility to participate in the certification process. Moreover, Commerce will only include those companies in the AD and CVD administrative reviews which have suspended entries of subject merchandise during the expanded PORs (*i.e.*, November 1, 2021, through June 30, 2023 for the AD administrative review; and November 1, 2021, through December 31, 2022 for the CVD administrative review).

All review requests must be filed electronically in Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) at <https://access.trade.gov>.⁸ Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).⁹

Commerce intends to publish in the **Federal Register** a supplementary initiation notice for all timely filed

review requests which satisfy the requirements noted above.

Continued Suspension of Liquidation

Commerce previously issued instructions to CBP directing the assessment of antidumping or countervailing duties on entries not currently under review at a rate equal to the cash deposit of estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption. In the event that Commerce receives additional review requests for the companies listed above, Commerce intends to amend these instructions to direct CBP to continue to suspend liquidation of any unliquidated entries made by companies subsequently under review until the completion of these administrative reviews.

Dated: February 20, 2024.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2024-03857 Filed 2-23-24; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD711]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico

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

ACTION: Notice of issuance of Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, its implementing regulations, and NMFS' MMPA Regulations for Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico (GOM), notification is hereby given that a Letter of Authorization (LOA) has been issued to LLOG Exploration Company (LLOG) for the take of marine mammals incidental to geophysical survey activity in the GOM.

DATES: The LOA is effective from March 1, 2024 through April 19, 2026.

ADDRESSES: The LOA, LOA request, and supporting documentation are available

online at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-oil-and-gas-industry-geophysical-survey-activity-gulf-mexico>. In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Jenna Harlacher, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, sheltering, nursing, breeding, feeding, or sheltering (Level B harassment).

On January 19, 2021, we issued a final rule with regulations to govern the unintentional taking of marine mammals incidental to geophysical survey activities conducted by oil and gas industry operators, and those persons authorized to conduct activities on their behalf (collectively "industry

⁷ See *Initiation Notice*, 88 FR 62322.

⁸ See *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263 (July 6, 2011).

⁹ See *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule*, 88 FR 67069 (September 29, 2023).

operators’), in U.S. waters of the GOM over the course of 5 years (86 FR 5322, January 19, 2021). The rule was based on our findings that the total taking from the specified activities over the 5-year period will have a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of those species or stocks for subsistence uses. The rule became effective on April 19, 2021.

Our regulations at 50 CFR 217.180 *et seq.* allow for the issuance of LOAs to industry operators for the incidental take of marine mammals during geophysical survey activities and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat (often referred to as mitigation), as well as requirements pertaining to the monitoring and reporting of such taking. Under 50 CFR 217.186(e), issuance of an LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations and a determination that the amount of take authorized under the LOA is of no more than small numbers.

Summary of Request and Analysis

LLOG plans to conduct one of the following vertical seismic profile (VSP) survey types: Zero Offset, Offset, Walkaway, 3D, Salt Proximity Survey and/or Checkshot within Mississippi Canyon area Blocks 509, 629, and 589. The survey area has water depths of 914 to 1,981 meters (m). LLOG plans to use either a 12-element, 2,400 cubic inch (in³) airgun array, or a 6-element, 1,500 in³ airgun array. The survey is planned to occur for up to 5 days during March 1, 2024 through July 19, 2026. Please see LLOG’s application for additional detail.

Consistent with the preamble to the final rule, the survey effort proposed by LLOG in its LOA request was used to develop LOA-specific take estimates based on the acoustic exposure modeling results described in the preamble (86 FR 5322, January 19, 2021). In order to generate the appropriate take number for authorization, the following information was considered: (1) survey type; (2) location (by modeling zone¹); (3) number of days; and (4) season.² The acoustic exposure modeling performed

in support of the rule provides 24-hour exposure estimates for each species, specific to each modeled survey type in each zone and season.

No VSP surveys were included in the modeled survey types, and use of existing proxies (*i.e.*, 2D, 3D NAZ, 3D WAZ, Coil) is generally conservative for use in evaluation of VSP survey effort. Summary descriptions of these modeled survey geometries are available in the preamble to the proposed rule (83 FR 29212, June 22, 2018). Coil was selected as the best available proxy survey type because the spatial coverage of the planned survey is most similar to that associated with the coil survey pattern.

For the planned survey, the seismic source array will be deployed in one of the following forms: Zero Offset VSP—deployed from a drilling rig at or near the borehole, with the seismic receivers (*i.e.*, geophones) deployed in the borehole on wireline at specified depth intervals; Offset VSP—in a fixed position deployed from a supply vessel on an offset position; Walkaway VSP—attached to a line, or a series of lines, towed by a supply vessel; 3D VSP—source moves along a spiral or line swaths towed by a supply vessel; Salt-Proximity—consists typically of a combination of both Zero Offset VSP plus a fixed Offset VSP; or Checkshot—similar to Zero Offset VSP, typically hung from a platform and a sensor placed at a few depths in the well, where only the first energy arrival is recorded. The coil survey pattern in the model was assumed to cover approximately 144 kilometers squared (km²) per day (compared with approximately 795 km², 199 km², and 845 km² per day for the 2D, 3D NAZ, and 3D WAZ survey patterns, respectively). Among the different parameters of the modeled survey patterns (*e.g.*, area covered, line spacing, number of sources, shot interval, total simulated pulses), NMFS considers area covered per day to be most influential on daily modeled exposures exceeding Level B harassment criteria. Because LLOG’s planned survey is expected to cover no additional area as a stationary source, the coil proxy is most representative of the effort planned by LLOG in terms of predicted Level B harassment.

In addition, all available acoustic exposure modeling results assume use of a 72 element, 8,000 in³ array. Thus, estimated take numbers for this LOA are considered conservative due to the differences in both the airgun array (maximum 12 elements and 2,400 in³), and in daily survey area planned by LLOG (as mentioned above), as compared to those modeled for the rule.

The survey is planned to occur in Zone 5. The survey could take place in any season. Therefore, the take estimates for each species are based on the season that has the greater value for the species (*i.e.*, winter or summer).

Additionally, for some species, take estimates based solely on the modeling yielded results that are not realistically likely to occur when considered in light of other relevant information available during the rulemaking process regarding marine mammal occurrence in the GOM. The approach used in the acoustic exposure modeling, in which seven modeling zones were defined over the U.S. GOM, necessarily averages fine-scale information about marine mammal distribution over the large area of each modeling zone. This can result in unrealistic projections regarding the likelihood of encountering particularly rare species and/or species not expected to occur outside particular habitats. Thus, although the modeling conducted for the rule is a natural starting point for estimating take, our rule acknowledged that other information could be considered (see, *e.g.*, 86 FR 5322, (January 19, 2021), discussing the need to provide flexibility and make efficient use of previous public and agency review of other information and identifying that additional public review is not necessary unless the model or inputs used differ substantively from those that were previously reviewed by NMFS and the public). For this survey, NMFS has other relevant information reviewed during the rulemaking that indicates use of the acoustic exposure modeling to generate a take estimate for Rice’s whales and killer whales produces results inconsistent with what is known regarding their occurrence in the GOM. Accordingly, we have adjusted the calculated take estimates for those species as described below.

NMFS’ final rule described a “core habitat area” for Rice’s whales (formerly known as GOM Bryde’s whales)³ located in the northeastern GOM in waters between 100–400 m depth along the continental shelf break (Rosel *et al.*, 2016). However, whaling records suggest that Rice’s whales historically had a broader distribution within similar habitat parameters throughout the GOM (Reeves *et al.*, 2011; Rosel and Wilcox, 2014). In addition, habitat-based density modeling identified similar habitat (*i.e.*, approximately 100–400 m water depths along the

¹ For purposes of acoustic exposure modeling, the GOM was divided into seven zones. Zone 1 is not included in the geographic scope of the rule.

² For purposes of acoustic exposure modeling, seasons included Winter (December–March) and Summer (April–November).

³ The final rule refers to the GOM Bryde’s whale (*Balaenoptera edeni*). These whales were subsequently described as a new species, Rice’s whale (*Balaenoptera ricei*) (Rosel *et al.*, 2021).

continental shelf break) as being potential Rice's whale habitat (Roberts *et al.*, 2016), although the core habitat area contained approximately 92 percent of the predicted abundance of Rice's whales. See discussion provided at, e.g., 83 FR 29228, 83 FR 29280 (June 22, 2018); 86 FR 5418 (January 19, 2021).

Although Rice's whales may occur outside of the core habitat area, we expect that any such occurrence would be limited to the narrow band of suitable habitat described above (*i.e.*, 100–400 m) and that, based on the few available records, these occurrences would be rare. LLOG's planned activities will occur in water depths of approximately 914 to 1,981 m in the central GOM. Thus, NMFS does not expect there to be the reasonable potential for take of Rice's whale in association with this survey and, accordingly, does not authorize take of Rice's whale through the LOA.

Killer whales are the most rarely encountered species in the GOM, typically in deep waters of the central GOM (Roberts *et al.*, 2015; Maze-Foley and Mullin, 2006). As discussed in the final rule, the density models produced by Roberts *et al.* (2016) provide the best available scientific information regarding predicted density patterns of cetaceans in the U.S. GOM. The predictions represent the output of models derived from multi-year observations and associated environmental parameters that incorporate corrections for detection bias. However, in the case of killer whales, the model is informed by few data, as indicated by the coefficient of variation associated with the abundance predicted by the model (0.41, the second-highest of any GOM species model; Roberts *et al.*, 2016). The model's authors noted the expected non-uniform distribution of this rarely-encountered species (as discussed above) and expressed that, due to the limited data available to inform the model, it “should be viewed cautiously” (Roberts *et al.*, 2015).

NOAA surveys in the GOM from 1992–2009 reported only 16 sightings of killer whales, with an additional 3 encounters during more recent survey effort from 2017–2018 (Waring *et al.*, 2013; <https://www.boem.gov/gommapps>). Two other species were also observed on fewer than 20 occasions during the 1992–2009 NOAA surveys (Fraser's dolphin and false killer whale⁴). However, observational

data collected by protected species observers (PSOs) on industry geophysical survey vessels from 2002–2015 distinguish the killer whale in terms of rarity. During this period, killer whales were encountered on only 10 occasions, whereas the next most rarely encountered species (Fraser's dolphin) was recorded on 69 occasions (Barkaszi and Kelly, 2019). The false killer whale and pygmy killer whale were the next most rarely encountered species, with 110 records each. The killer whale was the species with the lowest detection frequency during each period over which PSO data were synthesized (2002–2008 and 2009–2015). This information qualitatively informed our rulemaking process, as discussed at 86 FR 5322, 86 FR 5334 (January 19, 2021), and similarly informs our analysis here.

The rarity of encounter during seismic surveys is not likely to be the product of high bias on the probability of detection. Unlike certain cryptic species with high detection bias, such as *Kogia* spp. or beaked whales, or deep-diving species with high availability bias, such as beaked whales or sperm whales, killer whales are typically available for detection when present and are easily observed. Roberts *et al.* (2015) stated that availability is not a major factor affecting detectability of killer whales from shipboard surveys, as they are not a particularly long-diving species. Baird *et al.* (2005) reported that mean dive durations for 41 fish-eating killer whales for dives greater than or equal to 1 minute in duration was 2.3–2.4 minutes, and Hooker *et al.* (2012) reported that killer whales spent 78 percent of their time at depths between 0–10 m. Similarly, Kvadsheim *et al.* (2012) reported data from a study of 4 killer whales, noting that the whales performed 20 times as many dives 1–30 m in depth than to deeper waters, with an average depth during those most common dives of approximately 3 m.

In summary, killer whales are the most rarely encountered species in the GOM and typically occur only in particularly deep water. This survey would take place in deep waters that would overlap with depths in which killer whales typically occur. While this information is reflected through the density model informing the acoustic exposure modeling results, there is relatively high uncertainty associated with the model for this species, and the acoustic exposure modeling applies mean distribution data over areas where the species is in fact less likely to occur. In addition, as noted above in relation to the general take estimation methodology, the assumed proxy source (72-element, 8,000-in³ array) results in a

significant overestimate of the actual potential for take to occur. NMFS' determination in reflection of the information discussed above, which informed the final rule, is that use of the generic acoustic exposure modeling results for killer whales will generally result in estimated take numbers that are inconsistent with the assumptions made in the rule regarding expected killer whale take (86 FR 5322, 86 FR 5403, January 19, 2021). In this case, use of the acoustic exposure modeling produces an estimate of two killer whale exposures. Given the foregoing, it is unlikely that any killer whales would be encountered during this at most 5-day survey, and accordingly no take of killer whales is authorized through this LOA.

In addition, in this case, use of the exposure modeling produces results that are smaller than average GOM group sizes for one species (Maze-Foley and Mullin, 2006). NMFS' typical practice in such a situation is to increase exposure estimates to the assumed average group size for a species in order to ensure that, if the species is encountered, exposures will not exceed the authorized take number. However, other relevant considerations here lead to a determination that increasing the estimated exposures to the average group size would likely lead to an overestimate of actual potential take. In this circumstance, the very short survey duration (maximum of 5 days) and relatively small Level B harassment isopleths produced through use of the (at most) 12-element, 2,400-in³ airgun array (compared with the modeled 72-element, 8,000 in³ array) mean that it is unlikely that certain species would be encountered at all, much less that the encounter would result in exposure of a greater number of individuals than is estimated through use of the exposure modeling results. As a result, in this case NMFS has not increased the estimated exposure values to assumed average group size for this species in authorizing take. See table 1 for more information.

Based on the results of our analysis, NMFS has determined that the level of taking expected for this survey and authorized through the LOA is consistent with the findings made for the total taking allowable under the regulations for the affected species or stocks of marine mammals. See table 1 in this notice and table 9 of the rule (86 FR 5322, January 19, 2021).

Small Numbers Determination

Under the GOM rule, NMFS may not authorize incidental take of marine mammals in an LOA if it will exceed “small numbers.” In short, when an

⁴ However, note that these species have been observed over a greater range of water depths in the GOM than have killer whales.

acceptable estimate of the individual marine mammals taken is available, if the estimated number of individual animals taken is up to, but not greater than, one-third of the best available abundance estimate, NMFS will determine that the numbers of marine mammals taken of a species or stock are small. For more information please see NMFS' discussion of the MMPA's small numbers requirement provided in the final rule (86 FR 5322, 86 FR 5438, January 19, 2021).

The take numbers for authorization, which are determined as described

above, are used by NMFS in making the necessary small numbers determinations through comparison with the best available abundance estimates (see discussion at 86 FR 5322, 86 FR 5391, January 19, 2021). For this comparison, NMFS' approach is to use the maximum theoretical population, determined through review of current stock assessment reports (SAR; <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>) and model-predicted abundance information

(<https://seamap.env.duke.edu/models/Duke/GOM/>). For the latter, for taxa where a density surface model could be produced, we use the maximum mean seasonal (*i.e.*, 3-month) abundance prediction for purposes of comparison as a precautionary smoothing of month-to-month fluctuations and in consideration of a corresponding lack of data in the literature regarding seasonal distribution of marine mammals in the GOM. Information supporting the small numbers determinations is provided in table 1.

TABLE 1—TAKE ANALYSIS

Species	Authorized take ¹	Abundance ²	Percent abundance
Rice's whale	0	51	n/a
Sperm whale	132	2,207	6.0
<i>Kogia</i> spp	³ 50	4,373	1.1
Beaked whales	580	3,768	15.4
Rough-toothed dolphin	100	4,853	2.1
Bottlenose dolphin	473	176,108	0.3
Clymene dolphin	281	11,895	2.4
Atlantic spotted dolphin	189	74,785	0.3
Pantropical spotted dolphin	1,274	102,361	1.2
Spinner dolphin	341	25,114	1.4
Striped dolphin	110	5,229	2.1
Fraser's dolphin	⁴ 32	1,665	1.9
Risso's dolphin	83	3,764	2.2
Melon-headed whale	185	7,003	2.6
Pygmy killer whale	43	2,126	2.0
False killer whale	69	3,204	2.2
Killer whale	0	267	n/a
Short-finned pilot whale	53	1,981	2.7

¹ Scalar ratios were not applied in this case due to brief survey duration.

² Best abundance estimate. For most taxa, the best abundance estimate for purposes of comparison with take estimates is considered here to be the model-predicted abundance (Roberts *et al.*, 2016). For those taxa where a density surface model predicting abundance by month was produced, the maximum mean seasonal abundance was used. For those taxa where abundance is not predicted by month, only mean annual abundance is available. For Rice's whale and killer whale, the larger estimated SAR abundance estimate is used.

³ Includes 3 take by Level A harassment and 47 takes by Level B harassment.

⁴ Modeled exposure estimate less than assumed average group size (Maze-Foley and Mullin, 2006).

Based on the analysis contained herein of LLOG's planned survey activity described in its LOA application and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the affected species or stock sizes (*i.e.*, less than one-third of the best available abundance estimate) and therefore the taking is of no more than small numbers.

Authorization

NMFS has determined that the level of taking for this LOA request is consistent with the findings made for the total taking allowable under the incidental take regulations and that the amount of take authorized under the LOA is of no more than small numbers. Accordingly, we have issued an LOA to LLOG authorizing the take of marine mammals incidental to its geophysical survey activity, as described above.

Dated: February 20, 2024.

Kimberly Damon-Randall,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

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DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket No. 240216-0052]

RIN 0660-XC060

Dual Use Foundation Artificial Intelligence Models With Widely Available Model Weights

AGENCY: National Telecommunications and Information Administration, Department of Commerce.

ACTION: Notice; request for comment.

SUMMARY: On October 30, 2023, President Biden issued an Executive order on “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,” which directed the Secretary of Commerce, acting through the Assistant Secretary of Commerce for Communications and Information, and in consultation with the Secretary of State, to conduct a public consultation process and issue a report on the potential risks, benefits, other implications, and appropriate policy and regulatory approaches to dual-use foundation models for which the model weights are widely available. Pursuant to that Executive order, the National Telecommunications and Information Administration (NTIA) hereby issues this Request for Comment on these issues. Responses received will be used to submit a report to the President on the potential benefits, risks, and implications of dual-use foundation

models for which the model weights are widely available, as well as policy and regulatory recommendations pertaining to those models.

DATES: Written comments must be received on or before March 27, 2024.

ADDRESSES: All electronic public comments on this action, identified by *Regulations.gov* docket number NTIA–2023–0009, may be submitted through the Federal e-Rulemaking Portal at <https://www.regulations.gov>. The docket established for this request for comment can be found at www.Regulations.gov, NTIA–2023–0009. To make a submission, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

Additional instructions can be found in the “Instructions” section below, after **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

Please direct questions regarding this Request for Comment to Travis Hall at thall@ntia.gov with “Openness in AI Request for Comment” in the subject line. If submitting comments by U.S. mail, please address questions to Bertram Lee, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230. Questions submitted via telephone should be directed to (202) 482–3522. Please direct media inquiries to NTIA’s Office of Public Affairs, telephone: (202) 482–7002; email: press@ntia.gov.

SUPPLEMENTARY INFORMATION:

Background and Authority

Artificial intelligence (AI) ¹ has had, and will have, a significant effect on society, the economy, and scientific progress. Many of the most prominent models, including the model that powers ChatGPT, are “fully closed” or “highly restricted,” with limited or no public access to their inner workings.

¹ Artificial Intelligence (AI) “has the meaning set forth in 15 U.S.C. 9401(3): a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.” *see* Executive Office of the President, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 FR 75191 (November 1, 2023) <https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence>. “AI Model” means “a component of an information system that implements AI technology and uses computational, statistical, or machine-learning techniques to produce outputs from a given set of inputs.” *see* Id.

The recent introduction of large, publicly-available models, such as those from Google, Meta, Stability AI, Mistral, the Allen Institute for AI, and EleutherAI, however, has fostered an ecosystem of increasingly “open” advanced AI models, allowing developers and others to fine-tune models using widely available computing.²

Dual use foundation models with widely available weights (referred to here as open foundation models) could play a key role in fostering growth among less resourced actors, helping to widely share access to AI’s benefits.³ Small businesses, academic institutions, underfunded entrepreneurs, and even legacy businesses have used these models to further innovate, advance scientific knowledge, and gain potential competitive advantages in the marketplace. The concentration of access to foundation models into a small subset of organizations poses the risk of hindering such innovation and advancements, a concern that could be lessened by availability of open foundation models. Open foundation models can be readily adapted and fine-tuned to specific tasks and possibly make it easier for system developers to scrutinize the role foundation models play in larger AI systems, which is important for rights- and safety-impacting AI systems (e.g. healthcare, education, housing, criminal justice, online platforms etc.).⁴ These open foundation models have the potential to help scientists make new medical discoveries or even make mundane, time-consuming activities more efficient.⁵

² *See e.g.*, Zoe Brammer, How Does Access Impact Risk? Assessing AI Foundation Model Risk Along a Gradient of Access, The Institute for Security and Technology (December 2023) <https://securityandtechnology.org/wp-content/uploads/2023/12/How-Does-Access-Impact-Risk-Assessing-AI-Foundation-Model-Risk-Along-A-Gradient-of-Access-Dec-2023.pdf>; Irene Solaiman, The Gradient of Generative AI Release: Methods and Considerations, arXiv:2302.04844v1 (February 5, 2023); <https://arxiv.org/pdf/2302.04844.pdf>.

³ *See e.g.*, Elizabeth Seger et al., Open-Sourcing Highly Capable Foundation Models, Centre for the Governance of AI (2023) https://cdn.governance.ai/Open-Sourcing_Highly_Capable_Foundation_Models_2023_GovAI.pdf.

⁴ *See e.g.*, Executive Office of the President: Office of Management and Budget, Proposed Memorandum For the Heads of Executive Departments and Agencies (November 3, 2023) <https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf>; Cui Beilei et al., Surgical-DINO: Adapter Learning of Foundation Model for Depth Estimation in Endoscopic Surgery, arXiv:2401.06013v1 (January 11, 2024) <https://arxiv.org/pdf/2401.06013.pdf> (Using low-ranked adaptation, or LoRA, in a foundation model to help with surgical depth estimation for endoscopic surgeries).

⁵ *See e.g.*, Shaoting Zhang, On the Challenges and Perspectives of Foundation Models for Medical

Open foundation models have the potential to transform research, both within computer science⁶ and through supporting other disciplines such as medicine, pharmaceutical, and scientific research.⁷ Historically, widely available programming libraries have given researchers the ability to simultaneously run and understand algorithms created by other programmers. Researchers and journals have supported the movement towards open science,⁸ which includes sharing research artifacts like the data and code required to reproduce results.

Open foundation models can allow for more transparency and enable broader access to allow greater oversight by technical experts, researchers, academics, and those from the security community.⁹ Foundation models with widely available model weights could also promote competition in downstream markets for which AI models are a critical input, allowing smaller players to add value by adjusting models originally produced by the large developers.¹⁰ The accessibility

Image Analysis, arXiv:2306.05705v2 (November 23, 2023), <https://arxiv.org/pdf/2306.05705.pdf>.

⁶ *See e.g.*, David Noever, Can Large Language Models Find And Fix Vulnerable Software?, arXiv 2308.10345 (August 20, 2023) <https://arxiv.org/abs/2308.10345>; ⁶ Andreas Stöckl, Evaluating a Synthetic Image Dataset Generated with Stable Diffusion, Proceedings of Eighth International Congress on Information and Communication Technology Vol. 693 (July 25, 2023) https://link.springer.com/chapter/10.1007/978-981-99-3243-6_64.

⁷ *See e.g.*, Kun-Hsing Yu et al., Artificial intelligence in healthcare, Nature Biomedical Engineering Vol. 2 719–731 (October 10, 2018) <https://www.nature.com/articles/s41551-018-0305-z#citeas>; Kevin Maik Jablonka et al., 14 examples of how LLMs can transform materials science and chemistry: a reflection on a large language model hackathon, Digital Discovery 2 (August 8, 2023) <https://pubs.rsc.org/en/content/articlehtml/2023/dd/d3dd00113j>.

⁸ *See e.g.*, Harvey V. Fineberg et al., Consensus Study Report: Reproducibility and Replicability in Science, National Academies of Sciences (May 2019) <https://nap.nationalacademies.org/resource/25303/R&R.pdf>; Nature, Reporting standards and availability of data, materials, code and protocols, <https://www.nature.com/nature-portfolio/editorial-policies/reporting-standards>; Science, Science Journals: Editorial Policies, <https://www.science.org/content/page/science-journals-editorial-policies#data-and-code-deposition>; Edward Miguel, Evidence on Research Transparency in Economics, Journal of Economic Perspectives Vol. 35 No. 3 (2021) <https://www.aeaweb.org/articles?id=10.1257/jep.35.3.193>.

⁹ *See e.g.*, Rishi Bommasani et al., Considerations for Governing Open Foundation Models, Stanford University Human-Centered Artificial Intelligence (December 2023) <https://hai.stanford.edu/sites/default/files/2023-12/Governing-Open-Foundation-Models.pdf>.

¹⁰ *See e.g.*, Jai Vipra and Anton Korinek, Market concentration implications of foundation models: The Invisible Hand of ChatGPT, Brookings Inst. (2023) <https://www.brookings.edu/articles/market-concentration-implications-of-foundation-models-the-invisible-hand-of-chatgpt/>.

of open foundation models also provides tools for individuals and civil society groups to resist authoritarian regimes, furthering democratic values and U.S. foreign policy goals.

While open foundation models potentially offer significant benefits, they may pose risks as well. Foundation models with widely-available model weights could engender substantial harms, such as risks to security, equity, civil rights, or other harms due to, for instance,¹¹ affirmative misuse, failures of effective oversight, or lack of clear accountability mechanisms.¹² Others argue that these open foundation models enable development of attacks against proprietary models due to similarities in the data sets used to train them.¹³ The wide availability of dual use foundation models with widely available model weights and the continually shrinking amount of compute necessary to fine-tune these models together create opportunities for malicious actors to use such models to engage in harm.¹⁴ The lack of monitoring of open foundation models may worsen existing challenges, for example, by easing creation of synthetic non-consensual intimate images or enabling mass disinformation campaigns.¹⁵

On October 30, 2023, President Biden signed the Executive order on “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.”¹⁶ Noting the importance of maximizing the benefits of open foundation models while managing and mitigating the attendant risks, section 4.6 the

Executive order tasked the Secretary of Commerce, acting through NTIA and in consultation with the Secretary of State, with soliciting feedback “from the private sector, academia, civil society, and other stakeholders through a public consultation process on the potential risks, benefits, other implications, and appropriate policy and regulatory approaches related to dual-use foundation models for which the model weights are widely available.”¹⁷ As required by the Executive order, the Secretary of Commerce, through NTIA, and in consultation with the Secretary of State, will author a report to the President on the “potential benefits, risks, and implications of dual-use foundation models for which the model weights are widely available, as well as policy and regulatory recommendations pertaining to those models.”¹⁸

In particular, the Executive order asks NTIA to consider risks and benefits of dual-use foundation models with weights that are “widely available.”¹⁹ Likewise, “openness” or “wide availability” of model weights are also terms without clear definition or consensus. There are gradients of “openness,” ranging from fully “closed” to fully “open.”²⁰ There is also more information needed to detail the relationship between openness and the wide availability of both model weights and open foundation models more generally. This could include, for example, information about what types of licenses and distribution methods are available or could be available for open foundation models, and how such licenses and distribution methods fit within an understanding of openness and wide availability.²¹

NTIA also requests input on any potential regulatory models, either voluntary or mandatory, that could maintain and potentially increase the benefits and/or mitigate the risks of dual use foundation models with widely available model weights. We seek input as to different kinds of regulatory structures that could deal with not only the large scale of these foundation models, but also the declining level of

computing resources needed to fine-tune and retrain them.

Definitions

This Request for Comment uses the terms defined in sec. 3 of the Executive order. In addition, we use broader terms interchangeably for both ease of understanding and clarity, as set forth below. “Artificial intelligence” or “AI” refer to a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions, influencing real or virtual environments.²² Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments, abstract such perceptions into models through analysis in an automated manner, and use model inference to formulate options for information or action.

Foundation models are typically defined as, “powerful models that can be fine-tuned and used for multiple purposes.”²³ Under the Executive order, a “dual-use foundation model” is “an AI model that is trained on broad data; generally uses self-supervision, contains at least tens of billions of parameters; is applicable across a wide range of contexts; and that exhibits, or could be easily modified to exhibit, high levels of performance at tasks that pose a serious risk to security, national economic security, national public health or safety, or any combination of those matters”²⁴ Both definitions of “foundation model” and of “dual-use foundation model”—highlight the key trait of these models, that they can be used in a number of ways.²⁵

“Generative AI can be understood as a form of AI model specifically intended to produce new digital material as an output (including text, images, audio, video, software code), including when such AI models are used in applications and their user interfaces.”²⁶ The term “generative AI” refers to a class of AI models built on foundation models

¹¹ Id.

¹² Id.

¹³ For example, researchers have found ways to get both black box large language models as well as more open models to produce objectionable content through adversarial attacks. See e.g., Andy Zou et al., Universal and Transferable Adversarial Attacks on Aligned Language Models, arXiv:2307.15043 (July 27, 2023). <https://arxiv.org/abs/2307.15043> (“Surprisingly, we find that the adversarial prompts generated by our approach are quite transferable, including to black-box, publicly released LLMs When doing so, the resulting attack suffix is able to induce objectionable content in the public interfaces to ChatGPT, Bard, and Claude, as well as open source LLMs such as LLaMA-2-Chat, Pythia, Falcon, and others.”).

¹⁴ See e.g., Zoe Brammer, How Does Access Impact Risk? Assessing AI Foundation Model Risk Along a Gradient of Access, The Institute for Security and Technology (December 2023) <https://securityandtechnology.org/wp-content/uploads/2023/12/How-Does-Access-Impact-Risk-Assessing-AI-Foundation-Model-Risk-Along-A-Gradient-of-Access-Dec-2023.pdf>.

¹⁵ Id and see e.g. Pranshu Verma, The rise of AI fake news is creating a ‘misinformation superspreader’, Washington Post (December 17, 2023) <https://www.washingtonpost.com/technology/2023/12/17/ai-fake-news-misinformation/>.

¹⁶ E.O. 14110, 88 FR 75191 (November 1, 2023).

¹⁷ Id.

¹⁸ Id.

¹⁹ E.O. 14110, 88 FR 75191 (November 1, 2023).

²⁰ See, e.g., Irene Solaiman, The Gradient of Generative AI Release: Methods and Considerations, arXiv:2302.04844v1 (February 5, 2023) <https://arxiv.org/pdf/2302.04844.pdf>; Bommasani et al., *supra* note 9.

²¹ See, e.g., Carlos Munoz Ferrandis, OpenRAIL: Towards open and responsible AI licensing frameworks, Hugging Face Blog (August 31, 2022) https://huggingface.co/blog/open_rail; Danish Contractor et al., Behavioral Use Licensing for Responsible AI, arXiv:2011.03116v2 (October 20, 2022) <https://arxiv.org/pdf/2011.03116.pdf>.

²² E.O. 14110, 88 FR 75191 (November 1, 2023).

²³ See, e.g., “A foundation model is any model that is trained on broad data (generally using self-supervision at scale) that can be adapted (e.g., fine-tuned) to a wide range of downstream tasks[.]” Rishi Bommasani et al., On the Opportunities and Risks of Foundation Models, arXiv:2108.07258v3 (July 12, 2022). <https://arxiv.org/pdf/2108.07258.pdf>.

²⁴ E.O. 14110, 88 FR 75191 (November 1, 2023).

²⁵ Id.

²⁶ G7 Hiroshima Process on Generative Artificial Intelligence (AI) Towards a G7 Common Understanding on Generative AI, Organisation for Economic Co-operation and Development (OECD) (September 7, 2023) <https://www.oecd-ilibrary.org/docserver/bf3c0c60-en.pdf?expires=1705032283&id=id&accname=guest&checksum=85A1D78C60AC6D8BBFBF2514CB7F2A5D>.

“that emulate the structure and characteristics of input data in order to generate derived synthetic content.”²⁷ Chatbots like ChatGPT, large language models like BLOOM, and image generators like Midjourney are all examples of generative AI.

This Request for Comment is particularly focused on the wide availability, such as being publicly posted online, of foundation model weights. “Model weights” are “numerical parameter[s] within an AI model that help [. . .] determine the model’s output in response to inputs.”²⁸ In addition to model weights, there are other “components” of an AI model, including training data, code, or other elements, which are involved in its development or use, and may or may not be made widely available.

The Executive order directs NTIA to focus on dual-use foundation models that were trained on broad data; generally use self-supervision; contain at least tens of billions of parameters; are applicable across a wide range of contexts; and exhibit, or could be easily modified to exhibit, high levels of performance at tasks that pose a serious risk to security, national economic security, national public health or safety, or any combination of those matter.²⁹ NTIA also remains interested in the discussion of models that fall outside of the scope of this Request for Comments in order to better understand the current landscape and potential impact of regulatory or policy actions.

Instructions for Commenters

Through this Request for Comment, we hope to gather information on the following questions. These are not exhaustive, and commenters are invited to provide input on relevant questions not asked below. Commenters are not required to respond to all questions. 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 welcome to provide specific actionable proposals, rationales, and relevant facts.

Please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. All comments received are a part of the public record and will generally be posted to *Regulations.gov* without change. All personal identifying

information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible.

Questions

1. How should NTIA define “open” or “widely available” when thinking about foundation models and model weights?

a. Is there evidence or historical examples suggesting that weights of models similar to currently-closed AI systems will, or will not, likely become widely available? If so, what are they?

b. Is it possible to generally estimate the timeframe between the deployment of a closed model and the deployment of an open foundation model of similar performance on relevant tasks? How do you expect that timeframe to change? Based on what variables? How do you expect those variables to change in the coming months and years?

c. Should “wide availability” of model weights be defined by level of distribution? If so, at what level of distribution (e.g., 10,000 entities; 1 million entities; open publication; etc.) should model weights be presumed to be “widely available”? If not, how should NTIA define “wide availability”?

d. Do certain forms of access to an open foundation model (web applications, Application Programming Interfaces (API), local hosting, edge deployment) provide more or less benefit or more or less risk than others? Are these risks dependent on other details of the system or application enabling access?

i. Are there promising *prospective* forms or modes of access that could strike a more favorable benefit-risk balance? If so, what are they?

2. How do the risks associated with making model weights widely available compare to the risks associated with non-public model weights?

a. What, if any, are the risks associated with widely available model weights? How do these risks change, if at all, when the training data or source code associated with fine tuning, pretraining, or deploying a model is simultaneously widely available?

b. Could open foundation models reduce equity in rights and safety-impacting AI systems (e.g., healthcare, education, criminal justice, housing, online platforms, etc.)?

c. What, if any, risks related to privacy could result from the wide availability of model weights?

d. Are there novel ways that state or non-state actors could use widely available model weights to create or exacerbate security risks, including but not limited to threats to infrastructure,

public health, human and civil rights, democracy, defense, and the economy?

i. How do these risks compare to those associated with closed models?

ii. How do these risks compare to those associated with other types of software systems and information resources?

e. What, if any, risks could result from differences in access to widely available models across different jurisdictions?

f. Which are the most severe, and which the most likely risks described in answering the questions above? How do these set of risks relate to each other, if at all?

3. What are the benefits of foundation models with model weights that are widely available as compared to fully closed models?

a. What benefits do open model weights offer for competition and innovation, both in the AI marketplace and in other areas of the economy? In what ways can open dual-use foundation models enable or enhance scientific research, as well as education/training in computer science and related fields?

b. How can making model weights widely available improve the safety, security, and trustworthiness of AI and the robustness of public preparedness against potential AI risks?

c. Could open model weights, and in particular the ability to retrain models, help advance equity in rights and safety-impacting AI systems (e.g., healthcare, education, criminal justice, housing, online platforms etc.)?

d. How can the diffusion of AI models with widely available weights support the United States’ national security interests? How could it interfere with, or further the enjoyment and protection of human rights within and outside of the United States?

e. How do these benefits change, if at all, when the training data or the associated source code of the model is simultaneously widely available?

4. Are there other relevant components of open foundation models that, if simultaneously widely available, would change the risks or benefits presented by widely available model weights? If so, please list them and explain their impact.

5. What are the safety-related or broader technical issues involved in managing risks and amplifying benefits of dual-use foundation models with widely available model weights?

a. What model evaluations, if any, can help determine the risks or benefits associated with making weights of a foundation model widely available?

b. Are there effective ways to create safeguards around foundation models,

²⁷ E.O. 14110, 88 FR 75191 (November 1, 2023).

²⁸ Id.

²⁹ Id.

either to ensure that model weights do not become available, or to protect system integrity or human well-being (including privacy) and reduce security risks in those cases where weights are widely available?

c. What are the prospects for developing effective safeguards in the future?

d. Are there ways to regain control over and/or restrict access to and/or limit use of weights of an open foundation model that, either inadvertently or purposely, have already become widely available? What are the approximate costs of these methods today? How reliable are they?

e. What if any secure storage techniques or practices could be considered necessary to prevent unintentional distribution of model weights?

f. Which components of a foundation model need to be available, and to whom, in order to analyze, evaluate, certify, or red-team the model? To the extent possible, please identify specific evaluations or types of evaluations and the component(s) that need to be available for each.

g. Are there means by which to test or verify model weights? What methodology or methodologies exist to audit model weights and/or foundation models?

6. What are the legal or business issues or effects related to open foundation models?

a. In which ways is open-source software policy analogous (or not) to the availability of model weights? Are there lessons we can learn from the history and ecosystem of open-source software, open data, and other “open” initiatives for open foundation models, particularly the availability of model weights?

b. How, if at all, does the wide availability of model weights change the competition dynamics in the broader economy, specifically looking at industries such as but not limited to healthcare, marketing, and education?

c. How, if at all, do intellectual property-related issues—such as the license terms under which foundation model weights are made publicly available—influence competition, benefits, and risks? Which licenses are most prominent in the context of making model weights widely available? What are the tradeoffs associated with each of these licenses?

d. Are there concerns about potential barriers to interoperability stemming from different incompatible “open” licenses, e.g., licenses with conflicting requirements, applied to AI components? Would standardizing

license terms specifically for foundation model weights be beneficial? Are there particular examples in existence that could be useful?

7. What are current or potential voluntary, domestic regulatory, and international mechanisms to manage the risks and maximize the benefits of foundation models with widely available weights? What kind of entities should take a leadership role across which features of governance?

a. What security, legal, or other measures can reasonably be employed to reliably prevent wide availability of access to a foundation model’s weights, or limit their end use?

b. How might the wide availability of open foundation model weights facilitate, or else frustrate, government action in AI regulation?

c. When, if ever, should entities deploying AI disclose to users or the general public that they are using open foundation models either with or without widely available weights?

d. What role, if any, should the U.S. government take in setting metrics for risk, creating standards for best practices, and/or supporting or restricting the availability of foundation model weights?

i. Should other government or non-government bodies, currently existing or not, support the government in this role? Should this vary by sector?

e. What should the role of model hosting services (e.g., HuggingFace, GitHub, etc.) be in making dual-use models with open weights more or less available? Should hosting services host models that do not meet certain safety standards? By whom should those standards be prescribed?

f. Should there be different standards for government as opposed to private industry when it comes to sharing model weights of open foundation models or contracting with companies who use them?

g. What should the U.S. prioritize in working with other countries on this topic, and which countries are most important to work with?

h. What insights from other countries or other societal systems are most useful to consider?

i. Are there effective mechanisms or procedures that can be used by the government or companies to make decisions regarding an appropriate degree of availability of model weights in a dual-use foundation model or the dual-use foundation model ecosystem? Are there methods for making effective decisions about open AI deployment that balance both benefits and risks? This may include responsible capability

scaling policies, preparedness frameworks, et cetera.

j. Are there particular individuals/entities who should or should not have access to open-weight foundation models? If so, why and under what circumstances?

8. In the face of continually changing technology, and given unforeseen risks and benefits, how can governments, companies, and individuals make decisions or plans today about open foundation models that will be useful in the future?

a. How should these potentially competing interests of innovation, competition, and security be addressed or balanced?

b. Noting that E.O. 14110 grants the Secretary of Commerce the capacity to adapt the threshold, is the amount of computational resources required to build a model, such as the cutoff of 10^{26} integer or floating-point operations used in the Executive order, a useful metric for thresholds to mitigate risk in the long-term, particularly for risks associated with wide availability of model weights?

c. Are there more robust risk metrics for foundation models with widely available weights that will stand the test of time? Should we look at models that fall outside of the dual-use foundation model definition?

9. What other issues, topics, or adjacent technological advancements should we consider when analyzing risks and benefits of dual-use foundation models with widely available model weights?

Dated: February 20, 2024.

Stephanie Weiner,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2024–03763 Filed 2–23–24; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket No. 2024–0006; OMB Control No. 0750–0004]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Assessing Contractor Implementation of Cybersecurity Requirements

AGENCY: Defense Acquisition Regulations System; Department of Defense (DOD).

ACTION: Notice and request for comments regarding a proposed

extension of an approved information collection requirement.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; the accuracy of DoD's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection for use under Control Number 0750-0004 through June 30, 2024. DoD proposes that OMB approve an extension of the information collection requirement, to expire three years after the approval date.

DATES: DoD will consider all comments received by April 26, 2024.

ADDRESSES: You may submit comments, identified by OMB Control Number 0750-0004, using either of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* osd.dfars@mail.mil. Include OMB Control Number 0750-0004 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Heather Kitchens, at 571-296-7152.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS); Part 204 and Related Clauses, Assessing Contractor Implementation of Cybersecurity Requirements, OMB Control Number 0750-0004.

Affected Public: Businesses and other for-profit entities.

Respondent's Obligation: Required to obtain or retain benefits.

Reporting Frequency: At least annually.

Number of Respondents: 11,686.

Responses Per Respondent: 1.02, approximately

Annual Responses: 11,977.

Average Burden per Response: 4.92 hours

Annual Burden Hours: 58,885.

Needs and Uses: The collection of information is necessary for DoD to assess where vulnerabilities exist in its supply chain and take steps to correct such deficiencies. In addition, the collection of information is necessary to ensure Defense Industrial Base (DIB) contractors that have not fully implemented the National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171 security requirements pursuant to the clause at DFARS 252.204-7012 begin correcting these deficiencies immediately.

This requirement supports implementation of section 1648 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92). Section 1648(c)(2) directs the Secretary of Defense to develop a risk-based cybersecurity framework for the DIB sector as the basis for a mandatory DoD standard.

This requirement is implemented in the Defense Federal Acquisition Regulation Supplement (DFARS) through the solicitation provision at 252.204-7019, Notice of NIST SP 800-171 DoD Assessment Requirement, and the contract clause at 252.204-7020, NIST SP 800-171 DoD Assessment Requirements.

This clearance covers the following requirements:

- DFARS 252.204-7019, Notice of NIST SP 800-171 DoD Assessment Requirement, is prescribed for use in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services, except for solicitations solely for the acquisition of commercially available off-the-shelf (COTS) items. Per the provision, if an offeror is required to have implemented NIST SP 800-171 per DFARS clause 252.204-7012, then the offeror shall have a current assessment for each covered contractor information system that is relevant to the offer, contract, task order, or delivery order in order to be considered for award.

- DFARS 252.204-7020, NIST SP 800-171 DoD Assessment Requirements, is prescribed for use in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, except for solicitations and contracts solely for the acquisition of COTS items. The clause requires the contractor to provide the Government access to its facilities, systems, and personnel in order to conduct a Medium Assessment or High Assessment, if necessary. Medium Assessments are

assumed to be conducted by DoD Components, primarily by program management office cybersecurity personnel, in coordination with the Defense Contract Management Agency's DCMA's Defense Industrial Base Cybersecurity Assessment Center (DIBCAC), as part of a separately scheduled visit (*e.g.*, for a critical design review). High Assessments will be conducted by, or in conjunction with, DCMA's DIBCAC. DoD may choose to conduct a Medium Assessment or High Assessment when warranted based on the criticality of the program(s)/technology(ies) associated with the contracted effort(s). For example, a Medium Assessment may be initiated by a program office who has determined that the risk associated with their programs warrants going beyond the Basic self-assessment. The results of that Medium Assessment may satisfy the program office or may indicate the need for a High Assessment.

Jennifer Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2024-03809 Filed 2-23-24; 8:45 am]

BILLING CODE 6001-FR-P

DEPARTMENT OF EDUCATION

[Docket No.: ED-2023-SCC-0217]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Comprehensive Literacy Program Evaluation; Comprehensive Literacy State Development (CLSD) Program Evaluation

AGENCY: Institute of Education Sciences, Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before March 27, 2024.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link www.reginfo.gov/public/do/PRAMain to access the site. Find this information collection request (ICR) by selecting "Department of Education" under "Currently Under Review," then

check the “Only Show ICR for Public Comment” checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the “View Information Collection (IC) List” link. Supporting statements and other supporting documentation may be found by clicking on the “View Supporting Statement and Other Documents” link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Tracy Rimdzius, 202–453–7403.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Comprehensive Literacy Program Evaluation: Comprehensive Literacy State Development (CLSD) Program Evaluation

OMB Control Number: 1850–0945.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: Individuals and Households; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 612.

Total Estimated Number of Annual Burden Hours: 331.

Abstract: The Institute of Education Sciences within the U.S. Department of Education requests an extension of the Comprehensive Literacy Program Evaluation: Comprehensive Literacy State Development Grant Program (1850–0945, approved on February 26, 2021). The extension is to complete the collection of state administrative data. The extension is needed because the state administrative data for the 2022–23 school year will not be ready to collect prior to the February 29, 2024 expiration date in all 13 CLSD grantee states. No material change in the collection instrument, instructions, frequency of collection, or use of information is being requested.

The Comprehensive Literacy State Development (CLSD) Program

Evaluation was mandated by Congress. The CLSD evaluation includes an examination of implementation, a randomized trial to estimate the impact of CLSD funding on teacher and student outcomes, and a longitudinal comparison of trends in achievement in CLSD and similar, non-CLSD schools. With the exception of the state administrative data collection—for which this extension is being requested—all other data collection for the study previously approved (including state interviews, district, school leader, and teacher surveys) have been completed.

Dated: February 21, 2024.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–03852 Filed 2–23–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

President’s Council of Advisors on Science and Technology (PCAST)

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of a partially-closed virtual meeting.

SUMMARY: This notice announces a partially-closed virtual meeting of the President’s Council of Advisors on Science and Technology (PCAST). The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**.

DATES:

Thursday, March 14, 2024; 9:10 a.m. to 10:25 a.m. EST

Friday, March 15, 2024; 9:10 a.m. to 10:50 a.m. EST

ADDRESSES: Information for viewing the livestream of the meeting can be found on the PCAST website closer to the meeting at: www.whitehouse.gov/PCAST/meetings.

FOR FURTHER INFORMATION CONTACT: Dr. Melissa A. Edwards, Designated Federal Officer, PCAST, email: PCAST@ostp.eop.gov; telephone: 202–881–9018.

SUPPLEMENTARY INFORMATION: PCAST is an advisory group of the nation’s leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from the White House, cabinet departments, and other Federal agencies. See the Executive Order at whitehouse.gov. PCAST is consulted on

and provides analyses and recommendations concerning a wide range of issues were understanding of science, technology, and innovation may bear on the policy choices before the President. The Designated Federal Officer is Dr. Melissa A. Edwards. Information about PCAST can be found at: www.whitehouse.gov/PCAST.

Tentative Agenda

Open portion: In one session PCAST will discuss and vote on the approval of a report on reducing diet-related diseases and food insecurity through advancing nutrition science. The second session will be a collaborative joint session including the United Kingdom’s Prime Minister’s Council for Science and Technology (CST) to discuss global challenges. Additional information and the meeting agenda, including any changes that arise, will be posted on the PCAST website at:

www.whitehouse.gov/PCAST/meetings.

Closed portion: PCAST may hold a closed meeting of approximately one hour with the President and/or senior administration officials on March 14th or 15th, which must take place at the scheduling convenience of the President and to maintain Secret Service protection. This session will be closed to the public because the session is likely to disclose matters that are to be kept secret in the interest of national defense or foreign policy under 5 U.S.C. 552b(c)(1).

Public Participation: The open sessions are open to the public. The meeting will be held virtually for members of the public. It is the policy of the PCAST to accept written public comments no longer than 10 pages and to accommodate oral public comments whenever possible. The PCAST expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

The public comment period for this meeting will take place on March 14, 2024, at times specified in the meeting agenda. This public comment period is designed only for substantive commentary on PCAST’s work, not for business marketing purposes.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak at PCAST@ostp.eop.gov, no later than 12 p.m. eastern time on March 7, 2024. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of up to 10 minutes. If more speakers register than there is space available on the agenda, PCAST

will select speakers on a first-come, first-served basis from those who registered. Those not able to present oral comments may file written comments with the council.

Written Comments: Although written comments are accepted continuously, written comments should be submitted to PCAST@ostp.eop.gov no later than 12:00 p.m. Eastern Time on March 7, 2024, so that the comments can be made available to the PCAST members for their consideration prior to this meeting.

PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST website at: www.whitehouse.gov/PCAST/meetings.

Minutes: Minutes will be available within 45 days at: www.whitehouse.gov/PCAST/meetings.

Signing Authority

This document of the Department of Energy was signed on February 21, 2024, by David Borak Deputy Committee Management Officer, 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 February 21, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024-03827 Filed 2-23-24; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Savannah River Site

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act requires that public notice of this

meeting be announced in the **Federal Register**.

DATES: Monday, March 25, 2024; 1 p.m.–4:30 p.m. EDT.

ADDRESSES: Center for African American History, Art, & Culture, 120 York Street NE, Aiken, South Carolina 29801.

The meeting will also be streamed on YouTube, no registration is necessary; links for the livestream can be found on the following website: <https://cab.srs.gov/srs-cab.html>.

FOR FURTHER INFORMATION CONTACT: Amy Boyette, Office of External Affairs, U.S. Department of Energy (DOE), Savannah River Operations Office, P.O. Box A, Aiken, SC, 29802; Phone: (803) 952-6120; or Email: amy.boyette@srs.gov.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda:

Chair Update
Agency Updates
Subcommittee Updates
Program Presentations
Public Comments
Board Business and Voting

Public Participation: The meeting is open to the public. To register for in-person attendance, please send an email to srscitizensadvisoryboard@srs.gov no later than 4:00 p.m. EDT on Thursday, March 21, 2024. The EM SSAB, Savannah River Site, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Amy Boyette at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board via email either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should submit their request to srscitizensadvisoryboard@srs.gov. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. Comments will be accepted after the meeting, by no later than 4:00 p.m. EDT on Tuesday,

April 2, 2024. Please submit comments to srscitizensadvisoryboard@srs.gov. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make oral public comments will be provided a maximum of five minutes to present their comments. Individuals wishing to submit written public comments should email them as directed above.

Minutes: Minutes will be available by emailing or calling Amy Boyette at the email address or telephone number listed above. Minutes will also be available at the following website: <https://cab.srs.gov/srs-cab.html>.

Signing Authority: This document of the Department of Energy was signed on February 20, 2024, by David Borak, Deputy Committee Management Officer, 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 February 21, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024-03796 Filed 2-23-24; 8:45 am]

BILLING CODE 6450-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-ORD-2015-0765; FRL-11743-01-ORD]

Board of Scientific Counselors (BOSC) Climate Change and Social and Community Sciences Subcommittee Meeting—March 2024

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: The Environmental Protection Agency (EPA), Office of Research and Development (ORD), gives notice of a virtual meeting of the Board of Scientific Counselors' (BOSC) Climate Change (CC) and Social and Community Sciences (SCS) subcommittees to finalize their draft report.

DATES: The meeting will be held via videoconference on Thursday, March 7, 2024, from 2 p.m. to 5 p.m. All times noted are Eastern Time and approximate. The meeting may adjourn early if all business is finished. Attendees should register by March 1, 2024. Requests for making oral presentations at the meeting will be accepted through March 4, 2024. Written comments may be submitted through March 4, 2024.

ADDRESSES: Instructions on how to connect to the videoconference will be provided upon registration at: <https://epa-bosc-CC-SCS-meeting.eventbrite.com>. Submit your comments to Docket ID No. EPA-HQ-ORD-2015-0765 by one of the following methods:

- **www.regulations.gov:** Follow the online instructions for submitting comments.
- **Email:** Send comments by electronic mail (email) to: ORD.Docket@epa.gov, Attention Docket ID No. EPA-HQ-ORD-2015-0765.
- **Fax:** Fax comments to: (202) 566-0224, Attention Docket ID No. EPA-HQ-ORD-2015-0765.
- **Mail:** Send comments by mail to: Board of Scientific Counselors (BOSC) Executive Committee Docket, Mail Code: 2822T, 1301 Constitution Ave. NW, Washington, DC 20004, Attention Docket ID No. EPA-HQ-ORD-2015-0765.
- **Hand Delivery or Courier:** Deliver comments to: EPA Docket Center (EPA/DC), Room 3334, William Jefferson Clinton West Building, 1301 Constitution Ave. NW, Washington, DC, Attention Docket ID No. EPA-HQ-ORD-2015-0765. *Note:* This is not a mailing address. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or email. The www.regulations.gov website is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an

email comment directly to the EPA without going through www.regulations.gov, your email address will be captured and included as part of the comment that is in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer (DFO), Tom Tracy, via phone/voicemail at: 919-541-4334; or via email at: tracy.tom@epa.gov.

SUPPLEMENTARY INFORMATION:

General Information: This meeting is open to the public. Any member of the public interested in accessing the meeting agenda and materials, attending the meeting, or making a presentation at the meeting may visit the BOSC website at <https://www.epa.gov/bosc>. Individuals making an oral presentation will be limited to a total of three minutes. Proposed agenda items for the meeting include but are not limited to subcommittee deliberation on and finalization of their report.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Tom Tracy at (919) 541-4334 or tracy.tom@epa.gov. To request accommodation of a disability, please contact Tom Tracy, preferably at least ten days prior to the meeting, to give the EPA as much time as possible to process your request.

Mary Ross,

Director, Office of Science Advisor, Policy, and Engagement.

[FR Doc. 2024-03767 Filed 2-23-24; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPPT-2003-0004; FRL-11755-01-OCSPF]

Access to Confidential Business Information by Avanti Corporation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor Avanti Corporation (Avanti) of Alexandria, VA, to access information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data will occur no sooner than March 4, 2024.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPPT-2003-0004, through the *Federal eRulemaking Portal* at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Colby Lintner/Adam Schwoerer, Program Management and Operations Division (7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-8182; email address: lintner.colby@epa.gov or schwoerer.adam@epa.gov.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to all who manufacture, process, or distribute industrial chemicals. Since other entities may also be interested, the Agency has not

attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA-HQ-OPPT-2003-0004 is available at <https://www.regulations.gov> or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280. Please review the visitor instructions and additional information about the docket available at <https://www.epa.gov/dockets>.

II. What action is the Agency taking?

Under contract number 47QRAA20D002D, task order number 68HERC24F0042, contractor Avanti of 5695 King Center Drive, Suite 301; Alexandria, VA 22301 will assist the Office of Pollution Prevention and Toxics (OPPT) by providing administrative and technical support to the TSCA New Chemicals Program utilizing EPA CBI databases and software to create documents, databases, attend meetings, previewing CBI claims, transferring sanitized documents from the CBI LAN to ADMIN and transfer non-CBI files to the CBI LAN for special projects.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 47QRAA20D002D, task order number 68HERC21F0042, Avanti will require access to CBI submitted under all sections of TSCA. EPA has determined that Avanti will need access to TSCA CBI submitted to EPA under Sections 5, 8 and 12 of TSCA to perform successfully the duties specified under the contract. Avanti's personnel will be given access to information claimed or determined to be CBI information submitted to EPA under all sections of TSCA.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA will provide Avanti access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters, in accordance with EPA's *TSCA CBI Protection Manual*.

Access to TSCA data, including CBI, will continue until October 31, 2026. If the contract is extended, this access will also continue for the duration of the extended contract without further notice.

Avanti's personnel will be required to sign nondisclosure agreements and will be briefed on specific security procedures for TSCA CBI.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: February 20, 2024.

Pamela Myrick,

Director, Project Management and Operations Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2024-03812 Filed 2-23-24; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

TIME AND DATE: Thursday, February 29, 2024, at 10:00 a.m.

PLACE: Hybrid meeting: 1050 First Street NE, Washington, DC (12th floor) and virtual.

Note: For those attending the meeting in person, current COVID-19 safety protocols for visitors, which are based on the CDC COVID-19 hospital admission level in Washington, DC, will be updated on the Commission's contact page by the Monday before the meeting. See the contact page at <https://www.fec.gov/contact/>. If you would like to virtually access the meeting, see the instructions below.

STATUS: This meeting will be open to the public, subject to the above-referenced guidance regarding the COVID-19 hospital admission level and corresponding health and safety procedures. To access the meeting virtually, go to the Commission's website www.fec.gov and click on the banner to be taken to the meeting page.

MATTERS TO BE CONSIDERED:

Draft Advisory Opinion 2024-01: Texas Majority PAC

Audit Division Recommendation Memorandum on the 1199 SEIU United Healthcare Workers East Federal Political Action Fund (A21-10)

Management and Administrative Matters

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694-1220.

Individuals who plan to attend in person and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Laura E. Sinram, Secretary and Clerk, at (202)

694-1040 or secretary@fec.gov, at least 72 hours prior to the meeting date.

(Authority: Government in the Sunshine Act, 5 U.S.C. 552b)

Submitted: February 21, 2024.

Laura E. Sinram,

Secretary and Clerk of the Commission.

[FR Doc. 2024-03935 Filed 2-22-24; 11:15 am]

BILLING CODE 6715-01-P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than March 27, 2024.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri, 64198-0001. Comments can also be sent electronically to KCApplcationComments@kc.frb.org:

1. *FirstSun Capital Bancorp, Denver, Colorado*; to merge with Homestreet, Inc., and thereby indirectly acquire Homestreet Bank, both of Seattle, Washington.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024-03864 Filed 2-23-24; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000-0013; Docket No. 2023-0053; Sequence No. 11]

Submission for OMB Review; Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding certified cost or pricing data and data other than certified cost or pricing data.

DATES: Submit comments on or before March 27, 2024.

ADDRESSES: Written comments and recommendations for this 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: Zenaida Delgado, Procurement Analyst, at telephone 202-969-7207, or zenaida.delgado@gsa.gov.

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s):

OMB Control No. 9000-0013, Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

B. Need and Uses

The Truth in Negotiations Act, 10 U.S.C. chapter 271 and 41 U.S.C. chapter 35, requires the Government to obtain certified cost or pricing data from contractors prior to the award of certain

contract actions. Contractors may be exempt from this requirement under certain conditions. This clearance covers the information that offerors or contractors must submit to comply with the following FAR requirements:

- FAR 52.214-28, Subcontractor Certified Cost or Pricing Data—Modifications-Sealed Bidding. When contracting by sealed bidding, this clause requires contractors to require subcontractors to submit certified cost or pricing data for a modification involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-4(a)(1).

- FAR 52.215-12, Subcontractor Certified Cost or Pricing Data. When contracting by negotiation, this clause requires contractors to require subcontractors to submit certified cost or pricing data.

- FAR 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications. When contracting by negotiation, this clause requires contractors to require subcontractors to submit certified cost or pricing data for a modification involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-4(a)(1).

- FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. When contracting by negotiation, this provision requires offerors, if not granted an exception, to prepare and submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in accordance with the instructions contained in Table 15-2 of FAR 15.408, unless the contracting officer and the contractor agree to a different format.

- FAR 52.215-21, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications. When contracting by negotiation, this clause requires contractors, if not granted an exception, to submit, for a modification or price adjustment expected to exceed the threshold set forth at FAR 15.403-4(a)(1), certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in accordance with the instructions contained in Table 15-2 of FAR 15.408, unless the contracting officer and the contractor agree to a different format.

Certified cost or pricing data is used by agencies to assure that contract prices and any subsequent contract modifications are fair and reasonable.

C. Annual Burden

Respondents: 17,704.

Total Annual Responses: 53,966.

Total Burden Hours: 2,878,033.

D. Public Comment

A 60-day notice was published in the **Federal Register** at 88 FR 87427, on December 18, 2023. No comments were received.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division, by calling 202-501-4755 or emailing GSARegSec@gsa.gov. Please cite OMB Control No. 9000-0013, Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

Janet Fry,

*Director, Federal Acquisition Policy Division,
Office of Governmentwide Acquisition Policy,
Office of Acquisition Policy, Office of
Governmentwide Policy.*

[FR Doc. 2024-03769 Filed 2-23-24; 8:45 am]

BILLING CODE 6820-EP-P

GENERAL SERVICES ADMINISTRATION

[Notice-A-2024-01; Docket No. 2024-0002; Sequence No. 7]

Reservation Economic Summit (RES) Tribal Consultation Notice

AGENCY: Office of the Administrator; General Services Administration, (GSA).

ACTION: Meeting notice.

SUMMARY: GSA is hosting a Tribal Consultation at the National Center for American Indian Enterprise Development (NCAIED) Reservation Economic Summit to discuss interests and concerns surrounding GSA's support of Tribes through its *SAM.gov* system.

DATES: March 13, 2024; 2 to 4:20 p.m. Pacific standard time (PST).

ADDRESSES: Caesars Palace, 3570 S Las Vegas Blvd., Las Vegas, NV 89109.

FOR FURTHER INFORMATION CONTACT: Mrs. Julie Ramey, GSA Office of the Administrator, GSA Tribal Liaison, (202) 969-7282, tribalaffairs@gsa.gov.

SUPPLEMENTARY INFORMATION:

Background

On behalf of the U.S. General Services Administration, I would like to invite you to a government-to-government consultation to discuss your interests, concerns, and suggestions surrounding GSA's support of Tribes through its *SAM.gov* system. The consultation will take place Wednesday, March 13, 2024,

from 2 through 4:20 p.m. PST at the Reservation Economic Summit (RES) in Las Vegas, NV hosted by the National Center for American Indian Enterprise Development (NCAIED).

GSA leadership understands that some members of Tribal communities have experienced challenges with the entity registration and renewal process using *SAM.gov*. Pursuant to the December 6, 2023 Executive order on Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination, we recognize that formal consultation with Tribal Nations is essential as GSA takes actions to improve Tribes' abilities to efficiently navigate *SAM.gov*, access funding opportunities and execute procurements. GSA representatives would also like to discuss the registration and renewal processes, requirements, and user experience on the *SAM.gov* system. We are also interested in getting input surrounding GSA's *SAM.gov* Federal acquisitions website. Your feedback during the consultation will be utilized to help GSA build a tribal user specific strategic plan and inform appropriate process improvements for both GSA and Tribal personnel to effectively do business with the Government.

As stated in the Executive order, the Biden-Harris Administration is "committed to protecting and supporting Tribal sovereignty and self-determination, and to honoring our trust and treaty obligations to Tribal Nations." In order to increase the accessibility, equity, flexibility, and utility of Federal funding and support programs for Tribal Nations, GSA is committed to working on ways to streamline a Tribe's ability to both receive funds from Government agencies and procure Government goods and services.

In addition to participating in the in-person consultation opportunity, GSA asks that you fill out a short, 10-question survey to help inform our Tribal User Specific strategic plan. This survey is also an opportunity to provide additional context in the comments section to any issues, concerns, or suggestions. Our goals are to:

1. Understand the needs of Tribal Nations with respect to *SAM.gov* purchasing.
2. Learn about the challenges that some Tribal Nations and Tribal Entities have faced when registering on *SAM.gov*.
3. Learn about challenges that Tribal Nations face when procuring goods or services and/or receiving funds through *SAM.gov*.

While registration for the RES 2024 event is not required to participate, we do ask that you register for the consultation through our website, or onsite, so that we can accurately identify the Tribal representatives attending the meeting. Tribes can register for the consultation and access the survey link on our website at gsa.gov/tribal.

These resources are intended to help Tribal leaders anticipate discussion items for consultation and consider Tribal interests related to the topics. The official comment period for this consultation will remain open for 30 days after the in-person consultation session occurs; however, our partnership with Tribal leadership will carry on.

Additional comments outside of the survey can be submitted via email at tribalaffairs@gsa.gov. Please use the subject line "GSA 2024 TRIBAL CONSULTATION COMMENTS SUBMISSION."

I am committed to transparency and collaboration with Tribal Governments, and I believe we can achieve positive outcomes for all stakeholders through a government-to-government relationship that is rooted in respect and earned trust.

Robin Carnahan,
GSA Administrator, General Services Administration.

[FR Doc. 2024-03811 Filed 2-23-24; 8:45 am]

BILLING CODE 6820-34-P

GENERAL SERVICES ADMINISTRATION

[Notice-PBS-2024-02; Docket No. 2024-0002; Sequence No. 3]

Notice of Availability of a Draft Environmental Impact Statement for the Alcan Land Port of Entry Expansion and Modernization in Alcan, Alaska

AGENCY: Public Buildings Service, General Services Administration (GSA).

ACTION: Notice of availability; announcement of public hearing.

SUMMARY: Pursuant to the requirements of the National Environmental Policy Act of 1969 (NEPA), GSA has prepared a Draft Environmental Impact Statement (DEIS) to analyze the potential environmental effects of the proposed expansion and modernization of the existing Alcan LPOE. The Alcan LPOE is located at Milepost 1221.8 on the Alaska Highway, 0.43 miles from the U.S./Canada Border. U.S. Customs and Border Protection (CBP) operates this

facility year-round in sub-arctic weather conditions. The Alcan LPOE is the only 24-hour port serving privately-owned vehicles (POVs) and commercial traffic between the Yukon Territory, Canada, and mainland Alaska. GSA proposes to build an expanded and modernized LPOE and new housing units at Alcan, Alaska, to replace the existing facilities. The DEIS describes the purpose and need for the proposed project, the alternatives considered, the existing environment that could be affected, the potential impacts resulting from each of the alternatives, and proposed best management practices and mitigation measures.

DATES: Public Comment Period—Interested parties are invited to provide comments on the DEIS. The public comment period begins with the publication of this NOA in the **Federal Register** and will end on April 11, 2024. Comments must be postmarked or received by the last day of the public comment period (see **ADDRESSES** section of this NOA for how to submit comments).

Hearing Date—GSA will host a hybrid public hearing for the DEIS on Tuesday, March 12, 2024, starting at 6 p.m. Alaska Daylight Saving Time (AKDT). Interested parties are invited to attend the hearing in person at the Northway Community Center, Main Hall at 183 Circle Drive, Northway, AK 99764 or participate online via the Zoom platform. Refer to the **ADDRESSES** section of this NOA for additional details on the public hearing location and registration.

ADDRESSES: The DEIS can be viewed or downloaded from the GSA website at www.gsa.gov/Alcan. Comments on the Alcan LPOE DEIS will be accepted until April 11, 2024, and may be submitted by one of the following methods:

- **Mail:** Written comments must be postmarked by April 11, 2024. Address all physical mail to: U.S. General Services Administration, Attention: Aaron Evanson, Capital Project Manager, 1301 A Street, Suite 610, Tacoma, WA 98402

- **Email:** Submit your comments via email to AlcanLPOE@gsa.gov. Include "Alcan DEIS" in the subject line of the message.

- **Public Hearing:** Verbal and written comments will be accepted during the hybrid public hearing on Tuesday, March 12, 2024, starting at 6 p.m. AKDT. The public hearing will begin with a presentation including an overview of the NEPA process and the proposed project as well as the findings of the DEIS. Following the presentation, there will be a moderated session during which members of the public

participating either virtually or in person will be able to provide comments verbally or in writing. A link to register to attend the public meeting virtually, via Zoom, is available at www.gsa.gov/Alcan. Members of the public may attend the meeting in person at Northway Community Center, Main Hall, 183 Circle Drive, Northway, AK 99764.

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 GSA. All comments received are part of the public record. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. GSA will accept anonymous comments.

FOR FURTHER INFORMATION CONTACT:

Aaron Evanson, Capital Project Manager, (206) 445-5876, AlcanLPOE@gsa.gov.

SUPPLEMENTARY INFORMATION: GSA identified one action alternative that meets the stated purpose and need of the proposed project and thus has been analyzed in detail in the DEIS. GSA also analyzed a “No Action” alternative, which evaluates the effects that would occur if GSA continued to operate the LPOE under current conditions (i.e., the status quo).

Alternative 1 consists of expanding and modernizing the existing Alcan LPOE. Alternative 1 would include: land acquisition; site preparation and grading; construction of a new Main LPOE Building, enclosed inspection vehicle spaces, new housing units with improved security measures, a firing range, and a helipad; and demolition of the existing LPOE structures. Land acquisition under Alternative 1 would expand the port to include up to 2.5 acres of land south of and across the Alaska Highway from the existing LPOE.

All facility and infrastructure improvements proposed under Alternative 1 would incorporate a sustainable, climate-resilient, cyber-secure, and operationally efficient design. GSA would seek to meet or exceed energy and sustainability goals established by federal guidelines and policies, along with industry standard building codes and best practices.

Based on CBP and GSA design standards, the total enclosed building area required for the modernized Alcan LPOE and housing would be 129,145 square feet (sf) with an additional 3,820 sf of booths and canopies and 3,600 sf of outdoor parking and hard surfaces.

Alternative 1 would provide dual-purpose inspection lanes to allow for flexibility of inspection operations as well as enclosed spaces for secondary inspection of POVs and commercial vehicles. A modernized Main LPOE Building would also enhance the holding and interview capabilities of the Alcan LPOE to meet current CBP security standards.

There would be approximately 15 acres of temporary ground disturbance and 5 acres of permanent ground disturbance under Alternative 1. Approximately 5 acres would be used as a staging area during construction. There are currently 8 acres of impermeable surfaces at the LPOE; expansion and modernization would add an estimated 4 additional acres of impervious surfaces.

GSA and CBP are considering an option under Alternative 1 to pursue joint operation of the Alcan LPOE with the Canada Border Services Agency (CBSA). CBSA and CBP officers would jointly operate the facility to conduct inspections of U.S. commercial vehicles and POVs entering Canada; however, no housing would be provided for CBSA officers at Alcan. This option would not affect the design or CBP staffing of the expanded and modernized Alcan LPOE, nor contribute additional environmental impacts under the action alternative, and hence is not analyzed further in the DEIS.

GSA also evaluated a No Action alternative, which assumes that expansion or modernization of the LPOE would not occur and that port operations would continue under current conditions. The No Action alternative does not meet the stated purpose and need of the proposed project.

Classification: The DEIS was prepared in compliance with the NEPA, as amended (42 United States Code [U.S.C.] *et seq.*), which requires federal agencies to examine the impacts of their proposed projects or actions on the human and natural environment and consider alternatives to the proposal before deciding on taking an action. The DEIS complies with the 2020 Council on Environmental Quality (CEQ) NEPA regulations (40 Code of Federal Regulations [CFR] § 1500-1508), as modified by the Phase I 2022 revisions. The effective date of the 2022 revisions was May 20, 2022, and reviews that began after this date are required to apply the 2020 regulations as modified by the Phase I revisions unless there is a clear and fundamental conflict with an applicable statute. The DEIS effort began on January 10, 2023, and accordingly proceeds under the 2020 regulations as

modified by the Phase I revisions. In addition, the DEIS also complies with the GSA Public Buildings Service NEPA Desk Guide and other relevant federal and state laws and regulations and executive orders and integrates the consultation processes required under Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act with the NEPA process.

Anamarie Crawley,

Director, R10 Facilities Management Division, 10PM.

[FR Doc. 2024-03780 Filed 2-23-24; 8:45 am]

BILLING CODE 6820-DL-P

OFFICE OF GOVERNMENT ETHICS

Agency Information Collection Activities; Information Collection Renewal; Comment Request for OGE Form 278e Executive Branch Personnel Public Financial Disclosure Report

AGENCY: Office of Government Ethics (OGE).

ACTION: Notice and request for comments.

SUMMARY: After this first round notice and public comment period, the Office of Government Ethics (OGE) plans to request that the Office of Management and Budget (OMB) renew its approval under the Paperwork Reduction Act for a modified version of an existing information collection, entitled the OGE Form 278e Executive Branch Personnel Public Financial Disclosure Report.

DATES: Written comments by the public and agencies on the proposed modification and extension are invited and must be received by April 26, 2024.

ADDRESSES: Comments may be submitted to OGE by any of the following methods:

Email: usoge@oge.gov (Include reference to “OGE Form 278e paperwork comment” in the subject line of the message.)

Mail: Office of Government Ethics, Attention: Jennifer Matis, Associate Counsel, 250 E Street SW, Suite 750, Washington, DC 20024-3249.

Instructions: Comments may be posted on OGE’s website, www.oge.gov. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Jennifer Matis at the U.S. Office of Government Ethics; telephone: 202-

482–9216; TTY: 800–877–8339; Email: jmatis@oge.gov. A copy of the form with proposed changes marked in red is available here: <https://oge.box.com/s/jrca898wqy81iwy1gklc8ydoyuyp963b>.

SUPPLEMENTARY INFORMATION:

Title: Executive Branch Personnel Public Financial Disclosure Report.

Agency Form Number: OGE Form 278e.

Abstract: The OGE Form 278e collects information from certain officers and high-level employees in the executive branch for conflicts of interest review and public disclosure. The form also collects information from individuals who are nominated by the President for high-level executive branch positions requiring Senate confirmation and individuals entering into and departing from other public reporting positions in the executive branch. The information is collected in accordance with 5 U.S.C. 13104 and OGE's implementing financial disclosure regulations at 5 CFR part 2634. The information collected relates to: assets and income; transactions; gifts, reimbursements and travel expenses; liabilities; agreements or arrangements; outside positions; and compensation over \$5,000 paid by a source—all subject to various reporting thresholds and exclusions.

OGE has approval for five versions of the Form 278e: a PDF version, an Excel version, an electronic version called *Integrity*, a Chinese language version, and a Spanish language version. The translated versions are intended to be informational only, to allow more members of the public to understand the content of filers' public reports. The version of the Form 278e that is produced by *Integrity* is a streamlined output report format that presents only the filer's inputs in given categories and does not report other categories not selected by the filer. It is this output report that is made available to the public in PDF form. Most public disclosure filers now use *Integrity* to file the OGE Form 278e. However, OGE also continues to maintain an Excel version of the form and a 508 compliant PDF version accessible to users who use screen readers to access and interact with digital information.

OGE seeks renewal of the OGE Form 278e with several modifications. OGE sought and received input from a variety of stakeholders before proposing these modifications. Comments submitted by the public in response to the **Federal Register** notices published during the last renewal in 2021 were reconsidered. In addition, OGE solicited and received additional comments from OGE employees, agency ethics officials (who

are the individuals responsible for reviewing the completed forms for potential conflicts of interest), interested Congressional offices, and the public. On January 19, 2023, OGE held a public meeting to discuss potential changes to the OGE Forms 450 and 278e and accepted written comments in lieu of appearing in-person. See 87 FR 73766 (Dec. 1, 2022).

OGE considered each comment submitted. The proposed modifications discussed below incorporate the suggested changes that OGE believes will provide added clarity and value to the financial disclosure process. OGE is declining to make other suggested changes at this time due to OGE's lack of regulatory authority to make such changes, lack of interest by the affected agencies, and/or the associated costs to *Integrity*.

The proposed modifications are described below. These changes apply to the English language versions of the form only; OGE will update its Spanish and Chinese instructional versions at a later date.

Changes to All English Versions (Excel, PDF, and Integrity)

OGE proposes to add a question for all filers regarding their type of appointment. The options offered are "PAS," "Non-Career," and "Career." The information may be provided by the filer or by their agency. This information will appear on the cover page. This change was requested by a good government group in order to help the public understand the filer's potential conflicts. One of the primary purposes of the public financial disclosure report is to allow the public to understand any potential conflicts of interest the filer might have. Knowing the filer's type of appointment is important to this understanding because different types of officials have different ethics requirements.

OGE also proposes to identify the date of appointment on the cover page of reports for all filers other than nominees (who have not yet been appointed at the time they complete the form). *Integrity* currently identifies the date of appointment on the cover page of a new entrant report only. The Excel and PDF versions currently have one field for both date of appointment and date of termination, which OGE proposes separating into two fields. The purpose is to benefit the public's understanding of the time period during which the individual was in a public filing position.

Lastly, OGE proposes to add a link to its online Public Financial Disclosure Guide, the most widely used resource

for completing and reviewing public financial disclosure reports.

Changes to the Excel and PDF Versions Only

OGE proposes instructional changes to the Excel and PDF versions to provide better guidance to those filers who do not use the *Integrity* application. OGE does not propose any changes to the information collected on the Excel and PDF versions of the form, beyond the addition of "appointment type" discussed above.

OGE proposes two changes to the initial instructions page to improve clarity: (1) changing the topic headings to plain language questions (e.g., changing "Late Filing" to "What Happens if I File Late?"); and (2) consolidating the guidance on which parts to complete into a new section headed "What Parts Must I Complete?"

In the rest of the instructions, OGE proposes to add clarifying guidance on reporting requirements, exceptions to reporting requirements, and definitions. OGE also proposes to add specific instructions to avoid reporting unnecessary personal information. Finally, OGE proposes to add a note indicating that the reporting thresholds for gifts are applicable for calendar years 2023–2025 and that the amounts are adjusted every three years.

OMB Control Number: 3209–0001.

Type of Information Collection: Extension of a currently approved collection.

Type of Review Request: Regular.

Affected Public: Private citizen Presidential nominees to executive branch positions subject to Senate confirmation; other private citizens who are potential (incoming) Federal employees whose positions are designated for public disclosure filing; those who file termination reports from such positions after their Government service ends; and Presidential and Vice-Presidential candidates.

Estimated Annual Number of Respondents: 4,257.

Estimated Time per Response: 10 hours.

Estimated Total Annual Burden: 42,570 hours.

Request for Comments: OGE is publishing this first round notice of its intent to request paperwork clearance renewal for OGE Form 278e. Public comment is invited specifically on the need for and practical utility of this information collection, the accuracy of OGE's burden estimate, the enhancement of quality, utility and clarity of the information collected, and the minimization of burden (including the use of information technology). OGE

specifically seeks comments on whether the proposed changes will change the burden of completing the form. Comments received in response to this notice will be summarized for, and may be included with, the OGE request for extension of OMB paperwork approval. The comments will also become a matter of public record.

Approved: February 20, 2024.

Shelley K. Finlayson,
Acting Director, U.S. Office of Government Ethics.

[FR Doc. 2024-03814 Filed 2-23-24; 8:45 am]

BILLING CODE 6345-03-P

OFFICE OF GOVERNMENT ETHICS

Agency Information Collection Activities; Information Collection Renewal; Comment Request for OGE Form 450 Executive Branch Confidential Financial Disclosure Report

AGENCY: Office of Government Ethics (OGE).

ACTION: Notice and request for comments.

SUMMARY: After this first round notice and public comment period, the Office of Government Ethics (OGE) plans to request that the Office of Management and Budget (OMB) renew its approval under the Paperwork Reduction Act for a modified version of an existing information collection, entitled the OGE Form 450 Executive Branch Confidential Financial Disclosure Report.

DATES: Written comments by the public and agencies on this proposed modification and extension are invited and must be received by April 26, 2024.

ADDRESSES: Comments may be submitted to OGE by any of the following methods:

Email: usoge@oge.gov (Include reference to “OGE Form 450 paperwork comment” in the subject line of the message.)

Mail: Office of Government Ethics, Attention: Jennifer Matis, Associate Counsel, 250 E Street SW, Suite 750, Washington, DC 20024-3249.

Instructions: Comments may be posted on OGE’s website, www.oge.gov. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Jennifer Matis at the U.S. Office of Government Ethics; telephone: 202-

482-9216; TTY: 800-877-8339; Email: jmatis@oge.gov. A copy of the form with proposed changes marked in red is available here: <https://oge.box.com/s/vm33qroo5vbbvg542xr4mvqzacyz36fx>.

SUPPLEMENTARY INFORMATION:

Title: Executive Branch Confidential Financial Disclosure Report.

Agency Form Number: OGE Form 450.

Abstract: The OGE Form 450 collects information from covered executive branch employees as required under OGE’s executive branch wide regulatory provisions in subpart I of 5 CFR part 2634. The basis for the OGE reporting regulation is section 201(d) of Executive Order 12674 of April 12, 1989 (as modified by Executive Order 12731 of October 17, 1990) and 5 U.S.C. 13109. The purpose of collecting this information is to allow agencies to identify and address potential financial conflicts of interest among covered employees. The information collected relates to: assets and income; liabilities; outside positions; agreements and arrangements; and gifts, reimbursements and travel expenses—all subject to various reporting thresholds and exclusions. OGE currently maintains the form in three formats on its website: a PDF version, a 508 compliant PDF version accessible to users who use screen readers to access and interact with digital information, and an Excel version.

OGE seeks renewal of the OGE Form 450 with several modifications. OGE sought and received input from a variety of stakeholders before proposing these modifications. Comments submitted by the public in response to the **Federal Register** notices published during the last renewal in 2021 were reconsidered. In addition, OGE solicited and received additional comments from OGE employees, agency ethics officials (who are the individuals responsible for reviewing the completed forms for potential conflicts of interest), interested Congressional offices, and the public. On January 19, 2023, OGE held a public meeting to discuss potential changes to the OGE Forms 450 and 278e and accepted written comments in lieu of appearing in-person. See 87 FR 73766 (Dec. 1, 2022).

OGE considered each comment submitted. The proposed modifications discussed below incorporate the suggested changes that OGE believes will provide added clarity and value to the financial disclosure process. OGE is declining to make other suggested changes at this time due to OGE’s lack of regulatory authority to make such changes, lack of interest by the affected

agencies, and/or the associated costs to agencies’ electronic financial disclosure filing systems.

The proposed modifications are described below:

On the instruction page, OGE simplified the navigation to OGEs website for filers who need instructions on completing the form and added a hyperlink.

On the cover page, OGE proposes to delete the field for mailing address and to add a question regarding whether the filer has a spouse who has paid employment outside the federal government. The yes/no question would be added to the current list of yes/no questions. Filers are required by regulation to report their spouses’ employment income. In OGE’s listening sessions with agency ethics officials, they felt strongly that the addition of this yes/no question would permit agency reviewers to better identify potential inadvertent omissions elsewhere on the form. OGE believes that the minor impact to the filers of answering this additional yes/no question is outweighed by the benefit to the efficiency and effectiveness of the financial disclosure review process. OGE also clarified the definition of “special government employee” on the cover page based on feedback regarding the current explanatory language.

In the main body of the form, OGE proposes to make a number of changes to the instructions to increase their clarity. Guidance would be added to make it clearer what is and is not reportable. A note would be added indicating that the reporting thresholds for gifts are applicable for calendar years 2023–2025 and that the amounts are adjusted every three years. Additional examples would be added to the Examples page and each section, further demonstrating how particular information should be reported, and some definitions would be removed to make room for additional examples and other clarifying changes. The information that had been provided in the removed definitions is more clearly addressed on other parts of the form.

These changes would not modify the confidential financial disclosure reporting requirements in any way. They are intended to help ensure that filers report all required information in the proper manner, without overreporting unnecessary personally identifiable information.

Finally, OGE plans to discontinue use of the PDF version of the form that is not accessible to users who use screen readers (*i.e.* it is not “508 compliant”). This version has a feature that allows users to add additional blank pages.

This feature is no longer technologically supported. OGE proposes to discontinue use of the nonaccessible PDF version and instead add additional blank lines to the 508 compliant PDF version. Going forward, therefore, OGE seeks approval only for two versions of the form—the 508 compliant PDF version and the Excel version.

OMB Control Number: 3209–0006.

Type of Information Collection:
Extension of a currently approved collection.

Type of Review Request: Regular.

Affected public: Prospective Government employees, including special Government employees, whose positions are designated for confidential disclosure filing and whose agencies require that they file new entrant confidential disclosure reports prior to assuming Government responsibilities.

Estimated Annual Number of Respondents: 31,654.

Estimated Time per Response: 3 hours.

Estimated Total Annual Burden: 94,962 hours.

Request for Comments: OGE is publishing this first round notice of its intent to request paperwork clearance renewal for the OGE Form 450. Public comment is invited specifically on the need for and practical utility of this information collection, the accuracy of OGE's burden estimate, the enhancement of quality, utility and clarity of the information collected, and the minimization of burden (including the use of information technology). OGE specifically seeks comments on whether the proposed changes will change the burden of completing the form. Comments received in response to this notice will be summarized for, and may be included with, the OGE request for extension of OMB paperwork approval. The comments will also become a matter of public record.

Approved: February 20, 2024.

Shelley K. Finlayson,
Acting Director, U.S. Office of Government Ethics.

[FR Doc. 2024–03813 Filed 2–23–24; 8:45 am]

BILLING CODE 6345–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2024–0015]

Proposed Updates for Developing, Implementing, and Evaluating Infection Control Programs for Viral Hemorrhagic Fevers, Andes Virus, and Nipah Virus: Appendix A

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) in the Department of Health and Human Services (HHS) announces the opening of a docket to obtain comment on *Draft Proposed Updates for Viral hemorrhagic fevers, Andes virus, and Nipah virus: Appendix A* (“*Draft Updates: Appendix A*”). The updated recommendations in the *Draft Updates: Appendix A* are intended for use by frontline healthcare personnel, as well as infection control personnel and other persons responsible for developing, implementing, and evaluating infection control programs for healthcare settings across the continuum of care.

DATES: Written comments must be received on or before April 26, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2024–0015 by either of the methods listed below. *Do not submit comments by email. CDC does not accept comments by email.*

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **Mail:** Healthcare Infection Control Practices Advisory Committee (HICPAC) Secretariat, Division of Healthcare Quality Promotion, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H16–3, Atlanta, Georgia 30329, Attn: Docket Number CDC–2024–0015.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to <http://regulations.gov>, including any personal information provided. For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Laura Wells, Division of Healthcare Quality Promotion, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H16–2, Atlanta,

Georgia 30329; Telephone: (404) 639–4000.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data related to *Draft Updates: Appendix A*.

Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on <https://www.regulations.gov>. Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. Do not submit comments by email. CDC does not accept comment by email.

Background

The *Draft Updates: Appendix A*, located in the “Supporting and Related Material” tab of the docket, updates the recommendations in Appendix A of the *Guideline for Isolation Precautions: Preventing Transmission of Infectious Agents in Healthcare Settings (2007)* on the type and duration of isolation precautions for Viral hemorrhagic fevers, Andes virus, and Nipah virus. The *Draft Updates: Appendix A* provides recommendations to prevent transmission, focusing primarily on types and durations of precautions available to frontline healthcare personnel. The recommendations are being updated to include additional viruses with potential for importation to the United States. The *Draft Updates: Appendix A* is intended for use by frontline healthcare personnel, as well as infection control personnel and other persons responsible for developing, implementing, and evaluating infection control programs for healthcare settings across the continuum of care. Once the *Draft Updates: Appendix A* is finalized, the corresponding content in Appendix A of the *Guideline for Isolation Precautions: Preventing Transmission of Infectious Agents in Healthcare Settings (2007)* will be updated on the CDC

Infection Control website (<https://www.cdc.gov/infectioncontrol/guidelines/isolation/appendix/index.html>).

The updated recommendations in *Draft Updates: Appendix A* are informed by review and consideration of available literature on transmission principles and infection prevention and control practices for each virus. Draft recommendations were presented to the Healthcare Infection Control Practices Advisory Committee (HICPAC), whose feedback was incorporated into the finalized draft recommendations. HICPAC is a Federal advisory committee appointed to provide advice and guidance to HHS and CDC regarding the practice of infection control and strategies for surveillance, prevention, and control of healthcare-associated infections, antimicrobial resistance, and related topics in United States healthcare settings. HICPAC includes, but is not limited to, representatives with expertise in public health, infectious diseases, and infection prevention and control. HICPAC also includes ex officio members who represent regulatory and other Federal agencies and liaison representatives from professional societies.

CDC is seeking comments on the *Draft Updates: Appendix A*. Please provide references to new evidence and justification to support any suggested revisions or additions. This *Draft Updates: Appendix A* is not a Federal rule or regulation.

Noah Aleshire,

Chief Regulatory Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024-03784 Filed 2-23-24; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC-2024-0014]

Draft Infection Control in Healthcare Personnel: Epidemiology and Control of Selected Infections Transmitted Among Healthcare Personnel and Patients: Cytomegalovirus and Parvovirus B19 Sections and Draft Source Control Definition

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), in the

Department of Health and Human Services (HHS), announces the opening of a docket to obtain comment on the *Draft Infection Control in Healthcare Personnel: Epidemiology and Control of Selected Infections Transmitted Among Healthcare Personnel and Patients: Cytomegalovirus and Parvovirus B19 Sections* ("Draft Guideline: Cytomegalovirus and Parvovirus B19 Sections"), and on the accompanying *Draft "Source Control" Definition* adapted for *Infection Control in Healthcare Personnel* to be in the "Terminology" Appendix. The updated recommendations in the *Draft Guideline: Cytomegalovirus and Parvovirus B19 Sections* are intended for use by the leaders and staff of Occupational Health Services (OHS), as further provided herein. These updated recommendations will help facilitate the provision of occupational infection prevention and control services to healthcare personnel (HCP) who have been exposed or infected and may be contagious to others in the workplace.

DATES: Written comments must be received on or before April 26, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC-2024-0014 by either of the methods listed below. Do not submit comments by email. CDC does not accept comments by email.

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **Mail:** Healthcare Infection Control Practices Advisory Committee (HICPAC) Secretariat, Division of Healthcare Quality Promotion, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H16-3, Atlanta, Georgia 30329, Attn: Docket Number CDC-2024-0014.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Laura Wells, Division of Healthcare Quality Promotion, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H16-2, Atlanta, Georgia 30329; Telephone: (404) 639-4000.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and

data related to the *Draft Guideline: Cytomegalovirus and Parvovirus B19 Sections*, and the accompanying *Draft "Source Control" Definition*.

Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on <https://www.regulations.gov>. Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. Do not submit comments by email. CDC does not accept comments by email.

Background

The *Draft Guideline: Cytomegalovirus and Parvovirus B19 Sections*, located in the "Supporting & Related Material" tab of the docket, updates the *Guideline for infection control in health care personnel, 1998, Part E: Epidemiology and Control of Selected Infections Transmitted Among Health Care Personnel and Patients*, and its corresponding recommendations in Part II of the *1998 Guideline*: "3. Cytomegalovirus;" and "11. Parvovirus." The accompanying *Draft "Source Control" Definition* adapted for *Infection Control in Healthcare Personnel* to be in the "Terminology" Appendix (<https://www.cdc.gov/infectioncontrol/guidelines/healthcare-personnel/terminology.html>) is also located in the "Supporting & Related Material" tab of the docket. The *1998 Guideline* provided information and recommendations for Occupational Health Services (OHS) of healthcare facilities and systems on the prevention of transmission of infectious diseases among healthcare personnel (HCP) and patients and can be found at <https://stacks.cdc.gov/view/cdc/11563>.

As described in the Executive Summary of this guideline (<https://www.cdc.gov/infectioncontrol/guidelines/healthcare-personnel/exec-summary.html>), in this document, "OHS" is used synonymously with "Employee Health," "Employee Health Services," "Employee Health and Safety," "Occupational Health," and other such programs. OHS refers to the

group, department, or program that addresses many aspects of health and safety in the workplace for HCP, including the provision of clinical services for work-related injuries, exposures, and illnesses. In healthcare settings, OHS addresses workplace hazards including communicable diseases; slips, trips, and falls; patient-handling injuries; chemical exposures; HCP burnout; and workplace violence.

This *Draft Guideline: Cytomegalovirus and Parvovirus B19 Sections* update is part of a larger guideline update: *Infection Control in Healthcare Personnel*. Part I, *Infrastructure and Routine Practices for Occupational Infection Prevention and Control Services (2019)*, and the Diphtheria, Group A *Streptococcus*, Meningococcal Disease, Pertussis, and Rabies sections of Part II, *Epidemiology and Control of Selected Infections Transmitted Among Healthcare Personnel and Patients (2022)* are complete and have been published on the CDC Infection Control Guideline website: <https://www.cdc.gov/infectioncontrol/guidelines/healthcare-personnel/index.html>. The *Draft Guideline: Cytomegalovirus and Parvovirus B19 Sections*, once finalized, is intended for use by the leaders and staff of OHS to guide the management of exposed or infected HCP who may be contagious to others in the workplace. The draft recommendations in *Draft Guideline: Cytomegalovirus and Parvovirus B19 Sections* update the 1998 recommendations with current guidance on the management of HCP exposed to or potentially infected with cytomegalovirus or parvovirus B19, focusing on postexposure management, including postexposure prophylaxis, for exposed HCP and work restrictions for exposed or infected HCP. The adapted *Draft "Source Control" Definition* is being added to the "Terminology" Appendix of the *Infection Control in Healthcare Personnel Guideline* (<https://www.cdc.gov/infectioncontrol/guidelines/healthcare-personnel/terminology.html>) because the term "Source Control" is used in the *Draft Guideline: Parvovirus B19 Section*, and may be used in subsequent sections.

Since 2015, the Healthcare Infection Control Practices Advisory Committee (HICPAC) has worked with national partners, academicians, public health professionals, healthcare providers, and other partners to develop *Infection Control in Healthcare Personnel* (<https://www.cdc.gov/infectioncontrol/guidelines/healthcare-personnel/index.html>) as a segmental update of the 1998 *Guideline*. HICPAC is a Federal advisory committee appointed to

provide advice and guidance to HHS and CDC regarding the practice of infection control and strategies for surveillance, prevention, and control of healthcare-associated infections, antimicrobial resistance, and related events in United States healthcare settings. HICPAC includes, but is not limited to, representatives with expertise in public health, infectious diseases, and infection prevention and control. HICPAC also includes ex officio members who represent regulatory and other Federal agencies, and liaison representatives from professional societies. *Draft Guideline:*

Cytomegalovirus and Parvovirus B19 Sections, once finalized, will be the next sections to be posted to the *Infection Control in Healthcare Personnel* website. The accompanying *Draft "Source Control" Definition* will be added to the *Infection Control in Healthcare Personnel "Terminology" Appendix* (<https://www.cdc.gov/infectioncontrol/guidelines/healthcare-personnel/terminology.html>).

The updated draft recommendations in *Draft Guideline: Cytomegalovirus and Parvovirus B19 Sections* are informed by reviews of the 1998 *Guideline*; CDC resources (e.g., CDC infection control website), infection control guidance, and guidelines, as noted more specifically in the draft document; and new scientific evidence, when available. CDC is seeking comments on the *Draft Guideline: Cytomegalovirus and Parvovirus B19 Sections* and the accompanying *Draft "Source Control" Definition*. Please provide references to new evidence and justification to support any suggested revisions or additions. This *Draft Guideline: Cytomegalovirus and Parvovirus B19 Sections* and the accompanying *Draft "Source Control" Definition* are not Federal rules or regulations.

Noah Aleshire,

Chief Regulatory Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024-03783 Filed 2-23-24; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS-3456-PN]

Medicare and Medicaid Programs; Application From the Joint Commission for Continued CMS-Approval of Its Ambulatory Surgical Center Accreditation Program

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

ACTION: Notice with comment.

SUMMARY: This notice acknowledges the receipt of an application from the Joint Commission for continued recognition as a national accrediting organization for Ambulatory Surgical Centers that wish to participate in the Medicare or Medicaid programs.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, by March 27, 2024.

ADDRESSES: In commenting, refer to file code CMS-3456-PN.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://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-3456-PN, P.O. Box 8010, Baltimore, MD 21244-8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-3456-PN, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:

Caecilia Andrews, (410) 786-2190.

Erin Imhoff, (410) 786-2337.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential

business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: <https://www.regulations.gov>. Follow the search instructions on that website to view public comments. CMS will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm an individual. CMS continues to encourage individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

I. Background

Ambulatory Surgical Centers (ASCs) are distinct entities that operate exclusively for the purpose of furnishing outpatient surgical services to patients. Under the Medicare program, eligible beneficiaries may receive covered services from an ASC provided certain requirements are met. Section 1832(a)(2)(F)(i) of the Social Security Act (the Act) establishes distinct criteria for a facility seeking designation as an ASC. Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are at 42 CFR part 488. The regulations at 42 CFR part 416 specify the conditions that an ASC must meet in order to participate in the Medicare program, the scope of covered services, and the conditions for Medicare payment for ASCs.

Generally, to enter into an agreement, an ASC must first be certified by a state survey agency (SA) as complying with the conditions or requirements set forth in part 416 of our Medicare regulations. Thereafter, the ASC is subject to regular surveys by an SA to determine whether it continues to meet these requirements.

Section 1865(a)(1) of the Act provides that, if a provider entity demonstrates through accreditation by a Centers for Medicare & Medicaid Services (CMS) approved national accrediting organization (AO) that all applicable Medicare conditions are met or exceeded, we may deem that provider entity as having met the requirements. Accreditation by an AO is voluntary and is not required for Medicare participation.

If an AO is recognized by the Secretary of the Department of Health and Human Services as having standards for accreditation that meet or exceed Medicare requirements, any

provider entity accredited by the national accrediting body's approved program may be deemed to meet the Medicare conditions. The AO applying for approval of its accreditation program under part 488, subpart A, must provide CMS with reasonable assurance that the AO requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare conditions. Our regulations concerning the approval of AOs are set forth at § 488.5.

The Joint Commission's (TJC's) current term of approval for its ASC program expires December 20, 2024.

II. Approval of Deeming Organization

Section 1865(a)(2) of the Act and our regulations at § 488.5 require that our findings concerning review and approval of an AO's requirements consider, among other factors, the applying AO's requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities found not in compliance with the conditions or requirements; and ability to provide CMS with the necessary data for validation.

Section 1865(a)(3)(A) of the Act further requires that we publish, within 60 days of receipt of an organization's complete application, a notice that identifies the national accrediting body making the request, describes the nature of the request, and provides at least a 30-day public comment period. We have 210 days from the receipt of a complete application to publish notice of approval or denial of the application.

The purpose of this proposed notice is to inform the public of TJC's request for continued CMS-approval of its ASC accreditation program. This notice also solicits public comment on whether TJC's requirements meet or exceed the Medicare conditions for coverage (CfCs) for ASCs.

III. Evaluation of Deeming Authority Request

TJC submitted all the necessary materials to enable us to make a determination concerning its request for continued CMS-approval of its ASC accreditation program. This application was determined to be complete on January 19, 2024. Under section 1865(a)(2) of the Act and § 488.5, our review and evaluation of TJC will be conducted in accordance with, but not necessarily limited to, the following factors:

- The equivalency of TJC's standards for ASCs as compared with Medicare's CfCs for ASCs.

- TJC's survey process to determine the following:

- ++ The composition of the survey team, surveyor qualifications, and the ability of the organization to provide continuing surveyor training.

- ++ The comparability of TJC's processes to those of State agencies, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited facilities.

- ++ TJC's processes and procedures for monitoring an ASC found out of compliance with TJC's program requirements. These monitoring procedures are used only when TJC identifies noncompliance. If noncompliance is identified through validation reviews or complaint surveys, the State survey agency monitors corrections as specified at § 488.9(c)(1).

- ++ TJC's capacity to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

- ++ TJC's capacity to provide CMS with electronic data and reports necessary for the effective validation and assessment of the organization's survey process.

- ++ The adequacy of TJC's staff and other resources, and its financial viability.

- ++ TJC's capacity to adequately fund required surveys.

- ++ TJC's policies with respect to whether surveys are announced or unannounced, to ensure that surveys are unannounced.

- ++ TJC's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys or participate in accreditation decisions.

- ++ TJC's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as CMS may require (including corrective action plans).

IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

V. Response to Public Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Vanessa Garcia, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Vanessa Garcia,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2024-03821 Filed 2-23-24; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS-10387 and CMS-10500]

Agency Information Collection Activities: Submission for OMB Review; 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 (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 a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate 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 on the collection(s) of information must be received by the OMB desk officer by March 27, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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 Parham at (410) 786-4669.

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. 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 (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to publish a 30-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 that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Minimum Data Set 3.0 Nursing Home and Swing Bed Prospective Payment System (PPS) For the collection of data related to the Patient Driven Payment Model and the Skilled Nursing Facility Quality Reporting Program (QRP); *Use:* We are requesting to implement the MDS 3.0

v1.19.1 beginning October 1, 2024 in order to meet the requirements of policies finalized in the Federal Fiscal Year (FY) 2024 Skilled Nursing Facility (SNF) Prospective Payment System (PPS) final rule (CMS-1779-F, RIN 0938-AV02). Specifically, CMS adopted two new measures and removed three measures from the SNF QRP. As a result of these changes, the total annual hour burden across facilities has decreased, and the annual cost burden across facilities has decreased. *Form Number:* CMS-10387 (OMB control number: 0938-1140); *Frequency:* Yearly; *Affected Public:* Private Sector: Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 15,471; *Total Annual Responses:* 3,469,183; *Total Annual Hours:* 2,861,351. (For policy questions regarding this collection contact Heidi Magladry at 410-786-6034).

2. *Type of Information Collection Request:* Extension without change of the previously approved collection; *Title of Information Collection:* National Implementation of the Outpatient and Ambulatory Surgery Consumer Assessment of Healthcare Providers and Systems (OAS CAHPS) Survey; *Use:* As documented in the CY 2022 OPPI/ASC Final Rule (86 FR 63863 through 63866), OAS CAHPS Survey data will be linked to reimbursement beginning with CY 2024 for HOPDs and CY 2025 for ASCs. ASCs will continue with voluntary implementation of the OAS CAHPS Survey throughout CY 2024.

HOPDs and ASCs contract with a CMS-approved, independent third-party survey vendor to implement the survey on their behalf and to submit the OAS CAHPS data to CMS. CMS publicly reports comparative results from OAS CAHPS after each facility has conducted data collection for 4 quarters. Data from OAS CAHPS enable consumers to make more informed decisions when choosing an outpatient surgery facility, aid facilities in their quality improvement efforts, and help CMS monitor the performance of outpatient surgery facilities. Considering the increasing Medicare expenditures for outpatient surgical services from HOPDs and ASCs, the implementation of OAS CAHPS provides CMS with much-needed statistically valid data from the patient perspective to inform quality improvement and comparative consumer information about specific facilities. The information collected in the OAS CAHPS survey will be used for the following purposes: To provide a source of information from which patient experience of care measures can be publicly reported to beneficiaries to help them make informed decisions for

outpatient surgery facility selection; To aid facilities with their internal quality improvement efforts and external benchmarking with other facilities; and to provide CMS with information for monitoring and public reporting purposes. *Form Number:* CMS–10500 (OMB control number: 0938–1240); *Frequency:* Once; *Affected Public:* Business or other for-profits and Not-for-profits institutions; *Number of Respondents:* 2,534,643; *Total Annual Responses:* 2,534,643; *Total Annual Hours:* 614,976. (For policy questions regarding this collection contact Memuna Ifedirah at 410–786–6849).

William N. Parham, III,

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024–03866 Filed 2–23–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Family Violence Prevention and Services Grants to States; Native American Tribes and Alaskan Native Villages; and State Domestic Violence Coalitions (Office of Management and Budget #0970–0280)

AGENCY: Office of Family Violence Prevention and Services; Administration for Children and Families; U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Family Violence Prevention and Services Act (FVPSA) program within the Office of Family Violence Prevention and Services (OFVPS) plans to extend data collection for the Family Violence Prevention and Services Grants to States; Native American Tribes and Alaskan Native Villages; and State Domestic Violence Coalitions (Office of Management and Budget (OMB) #0970–0280; Expiration Date: May 31, 2024). Minor changes are proposed to the existing information collection.

DATES: *Comments due within 60 days of publication.* In compliance with the

requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing *info collection@acf.hhs.gov*. Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: Under the FVPSA, OFVPS has a legislative requirement for grantees to report on activities carried out throughout their grant period and provide an evaluation on the effectiveness of the activities in achieving the purposes of the grant. Grantees must collect unduplicated data and only share non-personally identifying information, in the aggregate, regarding services to their clients in order to comply with Federal, State, or Tribal reporting, evaluation, or data collection requirements (42 U.S.C. 10406(c)(5)(D)). Client-level data shall not be shared with a third party, regardless of encryption, hashing, or other data security measures, without a written, time-limited release as described in 42 U.S.C. 10406(c)(5).

Respondents: FVPSA-funded grantees.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Total number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
FVPSA State Grants Notice of Funding Opportunity	52	1	10	520	173
FVPSA Tribes/Tribal Organizations Grants Notice of Funding Opportunity	143	1	10	1,430	500
FVPSA State Domestic Violence Coalitions Grants Notice of Funding Opportunity	56	1	10	560	187
State FVPSA Grant Performance Progress Report	52	3	8	1,248	416
Tribal FVPSA Grant Performance Progress Report	143	3	8	3,432	1,144
State Domestic Violence Coalition Performance Progress Report	56	3	8	1,344	448
Estimated Total Annual Burden Hours					2,868

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information

on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: The Family Violence Prevention and Services Act, 42 U.S.C. 10401.

Mary C. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2024–03843 Filed 2–23–24; 8:45 am]

BILLING CODE 4184–32–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Commission on Childhood Vaccines Meeting; Correction

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice; correction.

SUMMARY: HRSA published a notice in the *Federal Register* on February 2, 2024, concerning 2024 calendar year meetings of the Advisory Commission on Childhood Vaccines (ACCV). The notice contained incorrect dates. The notice originally stated the 2024 calendar year meetings will take place in “2023” and the meeting dates are being updated to say “2024.”

FOR FURTHER INFORMATION CONTACT: Pita Gomez, Principal Staff Liaison, Division of Injury Compensation Programs, HRSA, 5600 Fishers Lane, 8W–25A, Rockville, Maryland, 20857; 800–338–2382; or ACCV@hrsa.gov

SUPPLEMENTARY INFORMATION:

Correction

In the *Federal Register* of February 2, 2024, FR Doc. 2024–02106, page 7400, column 2, correct the **DATES** caption to read: “The ACCV meetings will be held on:

- March 7, 2024, 1 p.m. eastern time (ET)–4 p.m. ET;
- March 8, 2024, 1 p.m. ET–4 p.m. ET;
- September 5, 2024, 1 p.m. ET–4 p.m. ET;
- September 6, 2024, 1 p.m. ET–4 p.m. ET.”

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2024–03824 Filed 2–23–24; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the National Advisory Committee on Rural Health and Human Services

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this

notice announces that the Secretary’s National Advisory Committee on Rural Health and Human Services (NACRHHS) has scheduled a public meeting. Information about NACRHHS and the agenda for this meeting can be found on the NACRHHS website at: <https://www.hrsa.gov/advisory-committees/rural-health/index.html>.

DATES: Tuesday, April 9, 2024, 9 a.m.–5 p.m. central time (CT); Wednesday, April 10, 2024, 9 a.m.–5 p.m. CT; Thursday, April 11, 2024, 9 a.m.–12 p.m. CT.

ADDRESSES: This meeting will be held at the Hyatt House, 901 Neches Street, Austin, Texas 78701. The meeting will also be accessible to the public via Zoom. Please use the following information to join the meeting: <https://us02web.zoom.us/j/83119377601>.

Or One tap mobile:

+13052241968,,83119377601# U.S.

+19294362866,,83119377601# U.S.
(New York)

Or Telephone:

Dial (for higher quality, dial a number based on your current location):

+1 305 224 1968 U.S.

+1 929 436 2866 U.S. (New York)

+1 301 715 8592 U.S. (Washington, DC)

+1 312 626 6799 U.S. (Chicago)

+1 669 900 6833 U.S. (San Jose)

+1 253 215 8782 U.S. (Tacoma)

+1 346 248 7799 U.S. (Houston)

Webinar ID: 831 1937 7601

International numbers available:

<https://us02web.zoom.us/j/kwqsKE6sY>.

FOR FURTHER INFORMATION CONTACT:

Sahira Rafiullah, Executive Secretary of NACRHHS, 5600 Fishers Lane, Rockville, Maryland 20857; 240–316–5874; or srafiullah@hrsa.gov.

SUPPLEMENTARY INFORMATION:

NACRHHS provides advice and recommendations to the Secretary of Health and Human Services on policy, program development, and other matters of significance concerning both rural health and rural human services. At this meeting, NACRHHS will discuss two topics: technology and innovation in rural health and quality reporting by rural health clinics. Members of the public will have the opportunity to provide comments.

Public participants wishing to provide oral comments must submit a written version of their statement at least 3 business days in advance of the scheduled meeting. Oral comments will be honored in the order they are requested and may be limited as time permits. Public participants wishing to offer a written statement should send it to Sahira Rafiullah, using the contact information above, at least 3 business

days prior to the meeting. Individuals who plan to attend in person and need special assistance or another reasonable accommodation should notify Sahira Rafiullah at the address and phone number listed above at least 10 business days prior to the meeting.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2024–03823 Filed 2–23–24; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings 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 Institute of Neurological Disorders and Stroke Special Emphasis Panel; ADRD Initiative.

Date: March 19, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Mirela Milescu, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH/HHS, NSC, 6001 Executive Blvd., Rockville, MD 20852, mirela.milescu@nih.gov, 301–496–5720.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; P01 Review.

Date: March 21–22, 2024.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Li Jia, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH/HHS, NSC, 6001 Executive Blvd., Rockville, MD 20852, 301–451–2854, li.jia@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS.)

Dated: February 20, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-03818 Filed 2-23-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; AIDS and Cancer Specimen Resource-UM1.

Date: March 20, 2024.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W126, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Mukesh Kumar, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W126, Rockville, Maryland 20850, 240-276-6611, mukesh.kumar3@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: February 21, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-03840 Filed 2-23-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings 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; Small Business: Endocrinology, Metabolism and Reproduction.

Date: March 7-8, 2024.

Time: 10:00 a.m. to 7:00 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: Dianne Hardy, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6175, MSC 7892, Bethesda, MD 20892, 301-435-1154, dianne.hardy@nih.gov.

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Aging, Injury, Musculoskeletal, and Rheumatologic Disorders Study Section.

Date: March 14-15, 2024.

Time: 9:00 a.m. to 8:00 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: Nketi I. Forbang, MD, MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1006K1, Bethesda, MD 20892, (301) 594-0357, forbangni@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Oncology.

Date: March 14-15, 2024.

Time: 10:00 a.m. to 8:00 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: Reigh-Yi Lin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Rm. 4152, MSC 7846, Bethesda, MD 20892, (301) 827-6009, lin.reigh-yi@nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; BRAIN Initiative: Targeted BRAIN Circuits Projects.

Date: March 14-15, 2024.

Time: 10:00 a.m. to 8:00 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: Jonathan Arias, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892, (301) 435-2406, ariasj@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Understanding pathogenesis and pathophysiology of neurodegenerative diseases.

Date: March 14, 2024.

Time: 1:30 p.m. to 6:30 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: Wei-Qin Zhao, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181, MSC 7846, Bethesda, MD 20892-7846, 301-827-7238, zhaow@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Endocrine and Metabolism Study Section.

Date: March 14, 2024.

Time: 12:00 p.m. to 6:00 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: Heather Marie Brockway, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 813H, Bethesda, MD 20892, (301) 594-5228, brockwayhm@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR-RM-23-018: Community Partnerships to Advance Science for Society (CompPASS): Health Equity Research Hubs.

Date: March 15, 2024.

Time: 10:00 a.m. to 8:00 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: Maria De Jesus Diaz Perez, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1000G, Bethesda, MD 20892, (301) 496-4227, diazperez2@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Cellular and Molecular Aspects of the Blood-Brain Barrier and Neurovascular System and Therapeutic Strategies.

Date: March 15, 2024.

Time: 11:00 a.m. to 5:00 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: Vanessa S. Boyce, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Rm. 4185, MSC 7850, Bethesda, MD 20892, (301) 402-3726, boycevs@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cellular Mechanisms in Aging and Development.

Date: March 15, 2024.

Time: 11:00 a.m. to 3:00 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: Jessica Smith, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301.402.3717, jessica.smith6@nih.gov. (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: February 20, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-03762 Filed 2-23-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings 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 Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NIAAA Member Conflict Applications—Basic Sciences.

Date: March 15, 2024.

Time: 1:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ranga Srinivas, Ph.D., Chief, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700B Rockledge Drive, Room 2114, Bethesda, MD 20892, (301) 451-2067, srinivar@mail.nih.gov.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NIAAA Member Conflict Applications: Treatment and Prevention Research.

Date: March 22, 2024.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ranga Srinivas, Ph.D., Chief, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700B Rockledge Drive, Room 2114, Bethesda, MD 20892, (301) 451-2067, srinivar@mail.nih.gov.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; RFA-AA-23-005 HEAL Initiative: Developing an Evidence Base for Co-Occurring OUD/AUD Interventions.

Date: March 29, 2024.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ranga Srinivas, Ph.D., Chief, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700B Rockledge Drive, Room 2114, Bethesda, MD 20892, (301) 451-2067, srinivar@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.273, Alcohol Research Programs, National Institutes of Health, HHS)

Dated: February 21, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-03845 Filed 2-23-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; 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 Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Resource Related Research Projects (R24 Clinical Trial Not Allowed).

Date: March 11, 2024.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G11, Rockville, MD 20852 (Video Assisted Meeting).

Contact Person: Barry J. Margulies, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G11, (301) 761-7956, barry.margulies@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 20, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-03817 Filed 2-23-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Virology Core Laboratory (VCL).

Date: March 20, 2024.

Time: 11:00 a.m. to 11:30 a.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G33, Rockville, MD 20892 (Video Assisted Meeting).

Contact Person: Poonam Pegu, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G33, Rockville, MD 20852, 240-292-0719, poonam.pegu@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 20, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024-03819 Filed 2-23-24; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[OMB Control Number 1651-0111]

Agency Information Collection Activities; Revision; Arrival and Departure Record and Electronic System for Travel Authorization (ESTA)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the

following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than April 26, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0111 in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

Email. Submit comments to: CBP_PRA@cbp.dhs.gov.

FOR FURTHER INFORMATION CONTACT:

Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email CBP_PRA@cbp.dhs.gov. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (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, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions 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, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Arrival and Departure Record and Electronic System for Travel Authorization (ESTA).

OMB Number: 1651-0111.

Form Number: N/A.

Current Actions: Revision of an existing information collection.

Type of Review: Revision.

Affected Public: Individuals.

Abstract: CBP is implementing a new capability within CBP One™ to allow nonimmigrants who are subject to Form I-94 ("I-94") requirements, and who are departing the United States, to voluntarily provide biographic data, facial images, and geolocation to provide evidence of that departure. This collection is a part of CBP's critical efforts in fulfilling DHS's mandate to collect biometric information from departing nonimmigrants and CBP's plans to fully automate I-94 information collection. This capability will close the information gap on nonimmigrant entries and exits by making it easier for nonimmigrants subject to I-94 requirements to report their exit to CBP after their departure from the United States. It will also create a biometrically confirmed, and thereby more accurate, exit record for such nonimmigrants leaving the United States.

Certain nonimmigrants subject to I-94 requirements may voluntarily submit their facial images using the CBP One™ mobile application (the app) in order to report their exit from the United States.

Nonimmigrants may use the app to voluntarily submit their biographic information from their passports, or other traveler documents after they have exited the United States.

Nonimmigrants will then use the app to take a "selfie" picture. CBP will utilize geolocation services to confirm that the nonimmigrant is outside the United States as well as run "liveness detection" software to determine that the selfie photo is a live photo, as opposed to a previously uploaded photo. The app will then compare the live photo to facial images for that person already retained by CBP to confirm the exit biometrically.

CBP will utilize this information to help reconcile a nonimmigrant's exit with that person's last arrival. The report of exit will be recorded as a biometrically confirmed departure in

the Arrival and Departure Information System (ADIS) maintained by CBP. Nonimmigrants may utilize this information as proof of departure, which is most relevant in the land border environment, but may be utilized for departures via air and sea if desired.

As it pertains to the land environment, there is no requirement for nonimmigrants leaving the United States to report their departure to CBP. However, as described further below, CBP encourages nonimmigrants to report their departure to CBP when they exit, so that CBP can record their exit from the United States.

Although CBP routinely collects biometric data from nonimmigrants entering the United States, there currently is no comprehensive system in place to collect biometrics from nonimmigrants departing the country. Collecting biometrics at both arrival and departure will thus enable CBP and DHS to know with better accuracy whether nonimmigrants are departing the country when they are required to depart. Further, collecting biometric data will help to reduce visa or travel document fraud and improve CBP's ability to identify criminals and known or suspected terrorists. CBP has been testing various options to collect biometrics at departure in the land and air environments since 2004.

At the same time, CBP is also now working to fully automate all I-94 processes. Currently CBP issues electronic I-94s to most nonimmigrants entering the United States at land border ports of entry.

Currently CBP does not routinely staff exit lanes at land border ports of entry, nor does CBP possess a single process for nonimmigrants subject to I-94 requirements to voluntarily report their departure. Nonimmigrants can currently report their departure by any one of the following means: (1) stopping at a land border port of entry and presenting a printed copy of their electronic I-94 to a CBP officer; (2) stopping at a land border port of entry and placing a printed copy of their electronic I-94 in a drop box provided by the port where available; (3) if exiting by land on the northern U.S. border, by turning in a paper copy of their electronic I-94 to the Canadian Border Services Agency (CBSA) when entering Canada (CBSA will then return the form to CBP); or (4) mailing a copy of their electronic I-94 and other proof of departure to CBP.

The current options are burdensome and, in many cases, impractical or inconvenient due to the location and design of the ports. They also lead to haphazard record keeping and inaccurate data collection with respect

to the nonimmigrants leaving the country. Most land border ports of entry provide limited access to the port for vehicles exiting the United States and have minimal parking available to the public. For this reason, most nonimmigrants do not report their departure when exiting at land border ports of entry. In those cases, CBP has no way to confirm that a nonimmigrant has exited the United States at the time of departure. CBP often discovers that a nonimmigrant has previously left the United States at a later date, when that same nonimmigrants attempts to re-enter the United States. Having proof of an exit via the CBP One™ app would provide nonimmigrants some information for CBP officers to consider in the event the officer is unsure whether a nonimmigrant complied with the I-94 requirements provided upon their previous entry.

In addition, CBP intends to update the ESTA application website to require applicants to provide a photograph of their face, or "selfie", in addition to the photo of the passport biographical page. These photos would be used to better ensure that the applicant is the rightful possessor of the document being used to obtain an ESTA authorization.

Currently, applicants are allowed to have a third party apply for ESTA on their behalf. While this update would not remove that option, third parties, such as travel agents or family members, would be required to provide a photograph of the ESTA applicant.

The ESTA Mobile application currently requires applicants to take a live photograph of their face, which is compared to the passport photo collected during the ESTA Mobile application process. This change will better align the application processes and requirements of ESTA website and ESTA Mobile applicants.

Type of Information Collection: Paper I-94.

Estimated Number of Respondents: 1,782,564.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,782,564.

Estimated Time per Response: 8 minutes.

Estimated Total Annual Burden Hours: 237,675.

Type of Information Collection: I-94 website.

Estimated Number of Respondents: 91,411.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 91,411.

Estimated Time per Response: 4 minutes.

Estimated Total Annual Burden Hours: 6,094.

Type of Information Collection: ESTA Mobile Application.

Estimated Number of Respondents: 500,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 500,000.

Estimated Time per Response: 22 minutes.

Estimated Total Annual Burden Hours: 183,333.

Type of Information Collection: ESTA website.

Estimated Number of Respondents: 15,000,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 15,000,000.

Estimated Time per Response: 19 minutes.

Estimated Total Annual Burden Hours: 4,750,000.

Type of Information Collection: CBP One Mobile Application.

Estimated Number of Respondents: 600,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 600,000.

Estimated Time per Response: 2 minutes.

Estimated Total Annual Burden Hours: 20,000.

Dated: February 20, 2024.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2024-03772 Filed 2-23-24; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-HQ-OC-2023-N088;
FXGO16600926000-FF09X60000-245]

Hunting and Wildlife Conservation Council; Charter Re-Establishment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of the Interior and U.S. Department of Agriculture are re-establishing the Hunting and Wildlife Conservation Council (Council). The Council provides recommendations to the Federal Government, through the Secretaries,

regarding the establishment and implementation of existing and proposed policies and authorities with regard to wildlife and habitat conservation endeavors that benefit wildlife resources; encourage partnership among the public, sporting conservation organizations, and Federal, State, Tribal, and Territorial governments; and benefit recreational hunting and recreational shooting sports.

DATES: Comments regarding the re-establishment of the Council charter must be submitted no later than March 12, 2024.

ADDRESSES: You may submit comments via email to doug_hobbs@fws.gov.

FOR FURTHER INFORMATION CONTACT:

Douglas Hobbs, U.S. Fish and Wildlife Service, Designated Federal Officer, by telephone at (703) 358–2336, or by email at doug_hobbs@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 Hunting and Wildlife Conservation Council (Council) is re-established under the authority of the Secretary of the Interior and regulated by the Federal Advisory Committee Act, as amended (FACA; 5 U.S.C. Ch. 10). The Council's duties are strictly advisory and consist of, but are not limited to, providing recommendations for implementation of Executive Order (E.O.) 13443, Facilitation of Hunting Heritage and Wildlife Conservation; E.O. 14008, Tackling the Climate Crisis at Home and Abroad; and Secretarial Order 3362, Improving Habitat Quality in Western Big Game Winter Range and Migration Corridors. Duties include, but are not limited to:

A. Assessing and quantifying implementation of E.O. 13443, E.O. 14008, and Secretarial Order 3362 across relevant departments, agencies, and offices and making recommendations to enhance and expand their implementation as identified;

B. Making recommendations regarding policies and programs that accomplish the following objectives:

1. Conserve and restore wetlands, grasslands, forests, and other important wildlife habitats, and improve management of rangelands and agricultural lands to benefit wildlife;

2. Promote opportunities for fair chase hunting and safe recreational shooting sports and wildlife-associated recreation on public and private lands; encourage hunting and recreational shooting sports safety, including by developing sighting-in ranges on public lands; recruit and retain hunters; and increase public awareness of the importance of wildlife conservation and the social and economic benefits of fair chase hunting, safe recreational shooting sports, and wildlife-associated recreation; and

3. Encourage coordination among the public; the hunting and shooting sports communities; wildlife conservation groups; wildlife-associated recreation interests; and Federal, State, Tribal, and territorial governments.

The Council will meet at least two times per year.

Public Disclosure 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.

Certification Statement: I hereby certify that the Hunting and Wildlife Conservation Council is necessary, in the public interest, and is in connection with the performance of duties imposed on the Department of the Interior and the Department of Agriculture under 43 U.S.C. 1457 and provisions of the Fish and Wildlife Act of 1956 (16 U.S.C. 742a), the Federal Land Policy and Management Act of 1996 (43 U.S.C. 1701 *et seq.*), the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*), the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee), and Executive Order 13443, Facilitation of Hunting Heritage and Wildlife Conservation.

Authority: 5 U.S.C. ch. 10.

Deb Haaland,

Secretary, Department of the Interior.

[FR Doc. 2024–03828 Filed 2–23–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2024–0030; FXIA16710900000–245–FF09A30000]

Foreign Endangered Species; Receipt of Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications to conduct certain activities with foreign species that are listed as endangered under the Endangered Species Act (ESA). With some exceptions, the ESA prohibits activities with listed species unless Federal authorization is issued that allows such activities. The ESA also requires that we invite public comment before issuing permits for any activity otherwise prohibited by the ESA with respect to any endangered species.

DATES: We must receive comments by March 27, 2024.

ADDRESSES:

Obtaining Documents: The applications, application supporting materials, and any comments and other materials that we receive will be available for public inspection at <https://www.regulations.gov> in Docket No. FWS–HQ–IA–2024–0030.

Submitting Comments: When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- **Internet:** <https://www.regulations.gov>. Search for and submit comments on Docket No. FWS–HQ–IA–2024–0030.

- **U.S. Mail:** Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2024–0030; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT:

Timothy MacDonald, by phone at 703–358–2185 or via email at DMAFR@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:

I. Public Comment Procedures

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others' public comments at <https://www.regulations.gov> unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at <https://www.regulations.gov>, your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, 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. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(c) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the ESA prohibits certain activities with listed species unless Federal authorization is issued that allows such activities. Permits issued under section 10(a)(1)(A) of the ESA allow otherwise prohibited activities for scientific purposes or to enhance the propagation or survival of the affected species. Service regulations regarding prohibited activities with endangered species, captive-bred wildlife registrations, and permits for any activity otherwise prohibited by the ESA with respect to any endangered species are available in title 50 of the Code of Federal Regulations in part 17.

III. Permit Applications

Applicant: U.S. Fish and Wildlife Service Forensics Laboratory, Ashland, OR; Permit No. PER8152300

The applicant requests a permit to import a specimen derived from a rhinoceros species (*Rhinoceros unicornis*) from Canada for law enforcement purposes. This notification is for a single import.

Applicant: Saint Louis Zoo, St. Louis, MO; Permit No. PER8298704

The applicant requests a permit to re-export two live, captive-born horned guans (*Oreophaps derbianus*) from Saint Louis Zoo, Missouri, to Africam Safari, Mexico, for the purpose of enhancing the propagation or survival of the species. This notification is for a single re-export.

Applicant: The Board of Trustees of the University of Illinois DBA Sponsored Programs Administration, Champaign, IL; Permit No. PER7081584

The applicant requests authorization to import biological samples from wild or captive-born populations of cheetah (*Acinonyx jubatus*), northern white rhinoceros (*Ceratotherium simum cottoni*), Sumatran rhinoceros (*Dicerorhinus sumatrensis*), black rhinoceros (*Diceros bicornis*), Asian elephant (*Elephas maximus*), Pakistan sand cat (*Felis margarita scheffeli*), black-footed cat (*Felis nigripes*), large-eared hutia (*Capromys auritus*), Cabrera's hutia (*Capromys angelcabrerai*), dwarf hutia (*Capromys nana*), little earth hutia (*Capromys sanfelipensis*), lion (*Panthera leo leo*), jaguar (*Panthera onca*), leopard

(*Panthera pardus*), tiger (*Panthera tigris*), Javan rhinoceros (*Rhinoceros sondaicus*), great Indian rhinoceros (*Rhinoceros unicornis*), Cuban solenodon (*Solenodon cubanus*), Haitian solenodon (*Solenodon paradoxus*), Central American tapir (*Tapirus bairdii*), and Asian tapir (*Tapirus indicus*) for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching <https://www.regulations.gov> for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to [regulations.gov](https://www.regulations.gov) and search for "12345A".

V. Authority

We issue this notice under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and its implementing regulations.

Timothy MacDonald,

Government Information Specialist, Branch of Permits, Division of Management Authority.

[FR Doc. 2024-03836 Filed 2-23-24; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX24AC0000EXP00]

Advisory Committee for Science Quality and Integrity Establishment; Request for Nominations

AGENCY: U.S. Geological Survey, Department of the Interior

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act (FACA) of 1972, the U.S. Geological Survey (USGS) is establishing and seeking nominations for the Advisory Committee for Science Quality and Integrity (Committee). The Committee will advise the Secretary of the Interior and the Director of the USGS on matters related to the responsibilities of the USGS Office of Science Quality and Integrity (OSQI) including monitoring and enhancing the integrity, quality, and health of all USGS science through

executive oversight and development of strong practices, policy, and supporting programs. Functional areas in the OSQI include Scientific Integrity; Science Quality; Fundamental Science Practices; Office of Tribal Relations; Youth and Education in Science (YES); Science, Technology, Engineering, and Mathematics (STEM); Laboratories; Postdoctoral Research; and Research and Equipment Development Grade Evaluations of USGS scientists.

DATES: Comments regarding the establishment of this Committee must be submitted no later than March 12, 2024. Nominations for the Committee must be submitted by April 11, 2024.

ADDRESSES: You may submit comments and/or nominations by any of the following methods: Mail comments and/or nominations to Joanne C. Taylor, U.S. Geological Survey, Office of Science Quality and Integrity, 12201 Sunrise Valley Drive, Mailstop 911, Reston, VA 20192; or email comments and/or nominations to jctaylor@usgs.gov.

FOR FURTHER INFORMATION CONTACT: Joanne C. Taylor, Designated Federal Officer (DFO), by U.S. mail at the U.S. Geological Survey, 12201 Sunrise Valley Drive, Mailstop 911, Reston, VA 20192; by telephone at 703-648-6837; or by email at jctaylor@usgs.gov.

SUPPLEMENTARY INFORMATION: The Committee is established under the authority of the Secretary of the Interior (Secretary) and regulated by the Federal Advisory Committee Act, as amended (5 U.S.C. ch. 10). The Committee's duties are strictly advisory and will include advising on: (a) Identification of key scientific quality and integrity processes to advance the USGS mission. (b) Effective mechanisms for engaging the next-generation USGS workforce and others through the YES program and with other Federal agencies in STEM and underserved communities. (c) The nature and effectiveness of mechanisms to provide oversight of science quality within USGS laboratories. (d) Mechanisms that may be employed by the USGS to ensure high standards of science quality and integrity in its programs and products.

The Committee will meet approximately one to two times per year. The Committee will consist of no more than 15 members appointed by the Secretary who represent the diversity of this nation's constituencies, and include the following interests:

- Local and State governments;
- Non-governmental organizations;
- Native American, Native Alaskan, and Native Hawaiian organizations, including representatives from Tribal governments and Tribal colleges;

- Academia; and
- Other stakeholders and sectors, including private industry, that make use of USGS science including, but not limited to, areas including laboratory sciences, natural resource managers, natural hazards protections, and wildlife organizations.

The Committee may include scientific experts and will include rotating representation from one or more local, Tribal, State, regional, and/or national organizations.

Nominations should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the Department of the Interior (DOI) to make an informed decision regarding meeting the membership requirements of the Committee and to permit a potential member to be contacted.

Members of the Committee serve without compensation. However, while away from their homes or regular places of business, Committee and subcommittee members engaged in Committee or subcommittee business that the DFO approves may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by 5 U.S.C. 5703, in the same manner as persons employed intermittently in Federal Government service.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personally identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you may ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Certification Statement: I hereby certify that the Advisory Committee for Science Quality and Integrity is necessary, in the public interest, and is in connection to the responsibilities of the DOI, USGS, under the President's Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, January 27, 2021; the DOI policy on Integrity of Scientific and Scholarly Activities (305 DM 3); and the USGS policy on Scientific Integrity (SM 500.25).

Authority: 5 U.S.C. ch. 10.

Deb Haaland,

Secretary of the Interior.

[FR Doc. 2024-03829 Filed 2-23-24; 8:45 am]

BILLING CODE 4338-11-P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[BLM_HQ_FRN_MO4500176277]

National Environmental Policy Act Implementing Procedures for the Bureau of Land Management (516 DM 11)

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of proposed policy revisions.

SUMMARY: This notice announces the intent to revise the Bureau of Land Management's (BLM) policies and procedures for compliance with the National Environmental Policy Act (NEPA), as amended, various Executive Orders, and the Council on Environmental Quality's NEPA Implementing Regulations by proposing to remove four administratively established categorical exclusions (CXs) and to incorporate two CXs established by Congress.

DATES: Comments must be postmarked no later than March 27, 2024.

ADDRESSES: The public can review the proposed changes to the Departmental Manual (DM) online BLM's ePlanning site: <https://eplanning.blm.gov/eplanning-ui/home>. Comments can be submitted:

Through the BLM National NEPA Register: <https://eplanning.blm.gov/eplanning-ui/home>. Follow the instruction at this website.

By mail: Director (210), Attention: Senior NEPA Lead, P.O. Box 261117, Lakewood, CO 80226.

By personal or messenger delivery: Director (210), Attention: Senior NEPA Lead, Denver Federal Center, Building 40 (Door W-4), Lakewood, CO 80215 DC 20003.

FOR FURTHER INFORMATION CONTACT: Heather Bernier, Division Chief, Decision Support, Planning, and NEPA, at (303) 239-3635, or hbernier@blm.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 for contacting Heather Bernier. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The BLM is proposing to revise its NEPA procedures. Specifically, BLM is proposing to revise the list of BLM actions that are normally categorically excluded from the requirement to

complete an environmental assessment (EA) or environmental impact statement (EIS) absent extraordinary circumstances. The BLM's NEPA procedures, located at Chapter 11 of Part 516 of the Departmental Manual (516 DM 11), were last updated December 10, 2020. The BLM's current procedures can be found on the Department of the Interior's (DOI) Electronic Library of Interior Policies (ELIPS) at: https://www.doi.gov/sites/doi.gov/files/elips/documents/516-dm-11_0.pdf.

The BLM proposes to remove four administrative CXs from its NEPA procedures. Given the complexity of land management, legal frameworks, and other factors, the BLM is considering the removal of the CXs described in 516 DM 11.C(10) regarding the salvaging of dead and dying trees; 516 DM 11.D(10) regarding vegetation management activities; 516 DM 11.D(11) regarding issuance of livestock grazing permits or leases; and 516 DM 11.J(1) regarding certain activities within sagebrush and sagebrush-steppe plant communities to manage pinyon pine and juniper trees for the benefit of mule deer or sage-grouse habitats. Removing these CXs would require the BLM to assess whether another CX applies or prepare an EA or EIS when proposing actions that would have previously been covered by these CXs. BLM previously discontinued use of these CXs through instruction memoranda (IM) (available online at <https://www.blm.gov/policy/instruction-memorandum>). The BLM discontinued use of 516 DM 11.D(10) and 516 DM 11.D(11) on August 21, 2009, through IM 2009–199; discontinued use of 516 DM 11.C(10) on August 3, 2022, through PIM 2022–010; and discontinued use of 516 DM 11.J(1) on November 30, 2022, through PIM 2023–002. The BLM is not presently considering modifying the terms of these CXs.

Additionally, the BLM proposes to incorporate two CXs established by Congress in the Infrastructure Investment and Jobs Act (Pub. L. 117–58). Section 11318 established a CX for sundry notices or rights-of-way for gathering lines and associated field compression or pumping units on Federal land servicing oil and gas wells under the conditions described therein. Section 40806 excludes forest management activities for the establishment of fuel breaks in forests and other wildland vegetation from preparation of an EA or EIS under NEPA, as described therein.

Below outlines the proposed changes to the text of 516 DM Chapter 11, reflecting the addition of the statutorily established CXs and deletion of the

administrative CXs proposed. Because the new CXs were established by Congress, the BLM does not have the discretion to change their terms. A redline version is available for review at the website identified in the **ADDRESSES** section.

11.9 Actions Eligible for a Categorical Exclusion (CX)

- C. *Forestry*
- (10) Reserved
- D. *Rangeland Management*
- (10) Reserved
- (11) Reserved
- J. *Habitat Restoration* (Reserved)

11.10 Categorical Exclusions Established or Directed by Statute

D. Section 11318 of the Infrastructure Investment and Jobs Act (Pub. L. 117–58) established a CX as defined in 40 CFR part 1508 for sundry notices or rights-of-way for gathering lines and associated field compression or pumping units on Federal land servicing oil and gas wells under the conditions described below. Application of this CX requires extraordinary circumstances review consistent with 43 CFR 46.215.

Section 11318. CERTAIN GATHERING LINES LOCATED ON FEDERAL LAND AND INDIAN LAND of the Infrastructure Investment and Jobs Act provides:

- (a) Definitions.—In this section:
 - (1) Federal land.—
 - (A) In general.—The term "Federal land" means land the title to which is held by the United States.
 - (B) Exclusions.—The term "Federal land" does not include—
 - (i) a unit of the National Park System;
 - (ii) a unit of the National Wildlife Refuge System;
 - (iii) a component of the National Wilderness Preservation System;
 - (iv) a wilderness study area within the National Forest System; or
 - (v) Indian land
 - (2) Gathering line and associated field compression or pumping unit.—
 - (A) In general.—The term "gathering line and associated field compression or pumping unit" means—
 - (i) a pipeline that is installed to transport oil, natural gas and related constituents, or produced water from 1 or more wells drilled and completed to produce oil or gas;
 - (ii) if necessary, 1 or more compressors or pumps to raise the pressure of the transported oil, natural gas and related constituents, or produced water to higher pressures necessary to enable the oil, natural gas and related constituents, or produced water to flow into pipelines and other facilities; and
 - (iii) if necessary, cathodic protection ancillary to the line.

(iii) if necessary, cathodic protection ancillary to the line.

(B) Inclusions.—The term "gathering line and associated field compression or pumping unit" includes a pipeline and its cathodic protection as needed, or associated compression or pumping unit that is installed to transport oil or natural gas from a processing plant to a common carrier pipeline or facility.

(C) Exclusions.—The term "gathering line and associated field compression or pumping unit" does not include a common carrier pipeline.

(3) Indian land.—The term "Indian land" means land the title to which is held by—

(A) the United States in trust for an Indian Tribe or an individual Indian; or

(B) an Indian Tribe or an individual Indian subject to a restriction by the United States against alienation.

(4) Produced water.—The term "produced water" means water produced from an oil or gas well bore that is not a fluid prepared at, or transported to, the well site to resolve a specific oil or gas well bore or reservoir condition.

(5) Secretary.—The term "Secretary" means the Secretary of the Interior.

(b) Certain Gathering Lines.—

(1) In general.—Subject to paragraph (2), the issuance of a sundry notice or right-of-way for a gathering line and associated field compression or pumping unit that is located on Federal land or Indian land and that services any oil or gas well may be considered by the Secretary to be an action that is categorically excluded (as defined in section 1508.1 of title 40, Code of Federal Regulations (as in effect on the date of enactment of this Act)) for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) if the gathering line and associated field compression or pumping unit—

(A) are within a field or unit for which an approved land use plan or an environmental document prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) analyzed transportation of oil, natural gas, or produced water from 1 or more oil or gas wells in the field or unit as a reasonably foreseeable activity;

(B) are located adjacent to or within—

- (i) any existing disturbed area; or
- (ii) an existing corridor for a right-of-way; and

(C) would reduce—

(i) in the case of a gathering line and associated field compression or pumping unit transporting methane, the total quantity of methane that would otherwise be vented, flared, or unintentionally emitted from the field or unit; or

(ii) in the case of a gathering line and associated field compression or pumping unit not transporting methane, the vehicular traffic that would otherwise service the field or unit.

(2) Applicability.—Paragraph (1) shall apply to Indian land, or a portion of Indian land—

(A) to which the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) applies; and

(B) for which the Indian Tribe with jurisdiction over the Indian land submits to the Secretary a written request that paragraph (1) apply to that Indian land (or portion of Indian land).

(c) Effect on Other Law.—Nothing in this section—

(1) affects or alters any requirement—

(A) relating to prior consent under—

(i) section 2 of the Act of February 5, 1948 (62 Stat.18, chapter 45; 25 U.S.C. 324); or

(ii) section 16(e) of the Act of June 18, 1934 (48 Stat. 987, chapter 576; 102 Stat. 2939; 114 Stat. 47; 25 U.S.C. 5123(e)) (commonly known as the “Indian Reorganization Act”);

(B) under section 306108 of title 54, United States Code; or

(C) under any other Federal law (including regulations) relating to Tribal consent for rights-of-way across Indian land; or

(2) makes the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) applicable to land to which that Act otherwise would not apply.

E. Section 40806 of the Infrastructure Investment and Jobs Act (Pub. L. 117–58) excludes forest management activities for the establishment of fuel breaks in forests and other wildland vegetation from preparation of an EA or EIS under NEPA, as described below.

Section 40806. ESTABLISHMENT OF FUEL BREAKS IN FORESTS AND OTHER WILDLAND VEGETATION of the Infrastructure Investment and Jobs Act provides:

(a) DEFINITION OF SECRETARY CONCERNED.—In this section, the term “Secretary concerned” means—

(1) the Secretary of Agriculture, with respect to National Forest System land; and

(2) the Secretary of the Interior, with respect to public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) administered by the Bureau of Land Management.

(b) CATEGORICAL EXCLUSION ESTABLISHED.—Forest management activities described in subsection (c) are a category of actions designated as being categorically excluded from the preparation of an environmental assessment or an environmental impact

statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) if the categorical exclusion is documented through a supporting record and decision memorandum.

(c) FOREST MANAGEMENT ACTIVITIES DESIGNATED FOR CATEGORICAL EXCLUSION.—

(1) IN GENERAL.—The category of forest management activities designated under subsection (b) for a categorical exclusion are forest management activities described in paragraph (2) that are carried out by the Secretary concerned on public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) administered by the Bureau of Land Management or National Forest System land the primary purpose of which is to establish and maintain linear fuel breaks that are—

(A) up to 1,000 feet in width contiguous with or incorporating existing linear features, such as roads, water infrastructure, transmission and distribution lines, and pipelines of any length on Federal land; and

(B) intended to reduce the risk of uncharacteristic wildfire on Federal land or catastrophic wildfire for an adjacent at-risk community.

(2) ACTIVITIES.—Subject to paragraph (3), the forest management activities that may be carried out pursuant to the categorical exclusion established under subsection (b) are—

(A) mowing or masticating;

(B) thinning by manual and mechanical cutting;

(C) piling, yarding, and removal of slash or hazardous fuels;

(D) selling of vegetation products, including timber, firewood, biomass, slash, and fenceposts;

(E) targeted grazing;

(F) application of—

(i) pesticide;

(ii) biopesticide; or

(iii) herbicide;

(G) seeding of native species;

(H) controlled burns and broadcast burning; and

(I) burning of piles, including jackpot piles.

(3) EXCLUDED ACTIVITIES.—A forest management activity described in paragraph (2) may not be carried out pursuant to the categorical exclusion established under subsection (b) if the activity is conducted—

(A) in a component of the National Wilderness Preservation System;

(B) on Federal land on which the removal of vegetation is prohibited or restricted by Act of Congress, Presidential proclamation (including the applicable implementation plan), or regulation;

(C) in a wilderness study area; or

(D) in an area in which carrying out the activity would be inconsistent with the applicable land management plan or resource management plan.

(4) EXTRAORDINARY CIRCUMSTANCES.—The Secretary concerned shall apply the extraordinary circumstances procedures under section 220.6 of title 36, Code of Federal Regulations (or a successor regulation), in determining whether to use a categorical exclusion under subsection (b).

(d) ACREAGE AND LOCATION LIMITATIONS.—Treatments of vegetation in linear fuel breaks covered by the categorical exclusion established under subsection (b)—

(1) may not contain treatment units in excess of 3,000 acres;

(2) shall be located primarily in—

(A) the wildland-urban interface or a public drinking water source area;

(B) if located outside the wildland-urban interface or a public drinking water source area, an area within Condition Class 2 or 3 in Fire Regime Group I, II, or III that contains very high wildfire hazard potential; or

(C) an insect or disease area designated by the Secretary concerned as of the date of enactment of this Act; and

(3) shall consider the best available scientific information.

(e) ROADS.—

(1) PERMANENT ROADS.—A project under this section shall not include the establishment of permanent roads.

(2) EXISTING ROADS.—The Secretary concerned may carry out necessary maintenance and repairs on existing permanent roads for the purposes of this section.

(3) TEMPORARY ROADS.—The Secretary concerned shall decommission any temporary road constructed under a project under this section not later than 3 years after the date on which the project is completed.

(f) PUBLIC COLLABORATION.—To encourage meaningful public participation during the preparation of a project under this section, the Secretary concerned shall facilitate, during the preparation of each project—

(1) collaboration among State and local governments and Indian Tribes; and

(2) participation of interested persons.

(Authority: NEPA, the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*); E.O. 11514, March 5, 1970, as amended by E.O. 11991,

May 24, 1977; and CEQ regulations (40 CFR 1500–1508)).

Stephen G. Tryon,

Director, Office of Environmental Policy and Compliance.

[FR Doc. 2024–03846 Filed 2–23–24; 8:45 am]

BILLING CODE 4331–27–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_OR_FRN_MO4500177642]

Notice of Availability of the Record of Decision and Approved Resource Management Plan Amendment for the Southeastern Oregon Resource Management Plan, Vale District, Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the Approved Resource Management Plan (RMP) Amendment for the Southeastern Oregon RMP, located in the BLM's Vale District. The State Director, Oregon/Washington signed the ROD on February 16, 2024, which constitutes the decision of the BLM and makes the Approved RMP Amendment effective immediately.

DATES: The State Director, Oregon/Washington signed the ROD/Approved RMP Amendment on February 16, 2024.

ADDRESSES: The ROD/Approved RMP Amendment is available online at the BLM National NEPA Register at <https://eplanning.blm.gov/eplanning-ui/project/87435/510>. Printed copies of the ROD/Approved RMP Amendment are available for public inspection at the BLM Vale District Office, 100 Oregon Street, Vale, Oregon 97918, telephone: (541) 473–3144.

A copy of the Protest Resolution Report is available at: <https://www.blm.gov/programs/planning-and-nepa/public-participation/protest-resolution-reports>.

FOR FURTHER INFORMATION CONTACT:

Caryn Burri, Planning and Environmental Coordinator, Vale District Office; telephone: (541) 473–3144; email: cburri@blm.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 for contacting Ms. Burri. 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 Approved RMP Amendment amends the existing 2002 Southeastern Oregon RMP. The Southeastern Oregon planning area covers approximately 4.6 million acres of public lands in Malheur, Grant, Harney, and Baker Counties. The Approved RMP Amendment provides management direction for lands with wilderness characteristics; makes planning-area-wide travel and transportation/off-highway vehicle (OHV) allocations of open, limited, and closed; and provides management direction for livestock grazing in areas that fail to meet the BLM's Standards for Rangeland Health and for processing voluntary livestock grazing permit relinquishments.

The Approved RMP Amendment prioritizes the protection of 33 of the 76 areas the BLM identifies as having wilderness characteristics. The 33 protected areas will be managed as: Visual Resource Management Class II public lands, which only allows for low levels of change to the landscapes' visual character; Land Tenure Zone 1, where the BLM retains the lands in public ownership for the life of the RMP; OHV limited; and exclusion areas for major rights-of-way and commercial renewable energy projects. No surface occupancy for the development and extraction of leasable and saleable minerals, including new mineral material sites, within the protected areas is allowed. Where roads form the boundary of a protected wilderness characteristic unit, a 250-foot management setback is established. The setback areas total 9,247 acres.

Under the Approved RMP Amendment, two areas totaling 40,368 acres near the city of Vale, Oregon, will be managed as open to OHV use; 319,501 acres currently classified as open will be designated as limited to existing routes, resulting in a total 4.5 million acres of limited OHV classification in the planning area; and 15,829 acres closed to OHV use will remain closed.

The Approved RMP Amendment: (1) requires the BLM to consider taking action in areas that are not meeting Standards for Rangeland Health even if existing livestock grazing is not a causal factor for non-attainment of the standard; (2) clarifies that the BLM will not permit increases to animal unit months if analysis finds that doing so could cause negative impacts to other resources in an area where there is either no rangeland health assessment

and evaluation or if the evaluation no longer represents the existing resource conditions; and (3) requires the BLM to review the suitability and compatibility of livestock grazing use with other existing resources in the permitted area when a voluntary permit relinquishment is received. If livestock grazing is found to be unsuitable and/or incompatible, the area will become unavailable to grazing and the forage allocation will be made to another resource. If grazing is found to be suitable and/or compatible, then the allocation of forage to livestock grazing use would remain in place. The BLM could authorize grazing use for the area under a grazing permit or designate the area as a reserve common allotment.

The BLM provided the Proposed RMP Amendment/Final Environmental Impact Statement (PRMPA/FEIS) for a 30-day public protest period starting on June 16, 2023, and received two valid protests. The BLM Assistant Director for Resources and Planning resolved both protests. Responses to protest issues were compiled and documented in a Protest Resolution Report (see **ADDRESSES**). Minor clarifications to the language in the Approved RMP Amendment related to the way BLM manages Wilderness Study Areas that are released from consideration for Wilderness designation by Congress were made in response to an issue raised on this topic in one of the protests received.

The BLM provided the PRMPA/FEIS to the Governor of Oregon for a 60-day Governor's consistency review on June 16, 2023. The Governor's Office identified some concerns and potential inconsistencies between the PRMPA and State and local plans, policies, and programs. The BLM discussed the concerns with the Governor's Office and, in response, made minor clarifications in the Approved RMP Amendment regarding how lands with wilderness characteristics that are not prioritized for protection will be managed and the way in which BLM manages Wilderness Study Areas that are released from consideration for Wilderness designation by Congress. The clarifications made to the Approved RMP Amendment in response to both the issues raised in one of the protests received and the Oregon Governor's consistency review were minor and did not represent a change requiring the BLM to provide the public with an opportunity to comment as discussed in 43 CFR 1610.2(f)(5) and 1610.5–1.

(Authority: 40 CFR 1506.6; 43 CFR 1610.5–1)

Barry R. Bushue,

State Director.

[FR Doc. 2024–03766 Filed 2–23–24; 8:45 am]

BILLING CODE 4331–24–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

Agency Information Collection Activities; New Collection: Information Management Standard Assessment Questionnaires

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Second Notice of New Information Collection; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the National Indian Gaming Commission (NIGC or Commission) is providing notice that it is requesting, concurrently with the publication of this notice or soon thereafter, for the Office of Management and Budget (OMB) to review and approve a new information collection.

DATES: The OMB has up to 60 days to approve or disapprove information collection requests, but may respond after 30 days. Therefore, public comments should be submitted to OMB by no later than March 27, 2024, in order to be assured of consideration.

ADDRESSES: Submit comments directly to OMB's Office of Information and Regulatory Affairs, Attn: Policy Analyst/Desk Officer for the National Indian Gaming Commission. Comments can also be emailed to <OIRA_Submission@omb.eop.gov>, include reference to "NIGC PRA New Collection" in the subject line.

FOR FURTHER INFORMATION CONTACT: For further information, including copies of the proposed collections of information and supporting documentation, contact Tim Osumi by email at tim.osumi@nigc.gov, or by telephone at (771) 220–3592; or by fax at (202) 632–7066 (not toll-free numbers). You may also review these information collection requests by going to <<https://www.reginfo.gov>> (Information Collection Review, Currently Under Review, Agency: National Indian Gaming Commission).

SUPPLEMENTARY INFORMATION:

I. Background

The Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701, *et seq.*, was signed into law on

October 17, 1988. The IGRA established the National Indian Gaming Commission (NIGC) and outlined a comprehensive framework for the regulation of gaming on Indian lands. Among the IGRA's requirements is that persons who apply for a "key employee" (KE) or "primary management official" (PMO) position at a tribal gaming operation must undergo a background investigation ((§ 2710(b)(2)(F)(i)). Similarly, the IGRA requires that persons who have direct or indirect financial interest in, or management responsibility for, a tribal gaming management contract, must undergo a background investigation and be evaluated for suitability as part of the NIGC's management contract review process ((§ 2711(a), (e)(1)(D)). In keeping with these background investigative statutory requirements, NIGC regulations 25 CFR 522.2(g), 25 CFR 556.4(a)(14), and 25 CFR 537.1(b)(2) stipulate that prospective KEs/PMOs and management contractors must submit their fingerprints to the Federal Bureau of Investigations (FBI) and undergo a criminal history record information (CHRI) check.

Although CHRI checks are integral to the tribal KE/PMO applicant licensing process, tribes do not possess the necessary statutory authority to directly access FBI CHRI for this purpose. The NIGC, as a Federal agency empowered under the IGRA to access CHRI ((§ 2706(b)(3) & (7), 2708), accepts tribal fingerprint submissions and transmits them to the FBI for this purpose. In return, the FBI provides CHRI check results to the NIGC and the NIGC shares these results with the requesting tribe. In this process, the NIGC assumes the role of a CJIS (Criminal Justice Information Services) Systems Agency (CSA), a duly authorized agency on the CJIS network that provides service to criminal justice users with respect to the criminal justice information (from the various systems managed by the Federal Bureau of Investigations (FBI) CJIS Division.

The roles and responsibilities under which the NIGC, FBI, and tribes process CHRI checks are memorialized in Memoranda of Understanding between the FBI and the NIGC and between the NIGC and each requesting tribe. One such responsibility is to monitor the dissemination of CHRI to ensure FBI-compliant privacy and security standards are followed. This responsibility is detailed in FBI CJIS Security Policy, Policy Area 11 (CJISSECPOL 5.11.2) which specifies that the NIGC, as a CSA, is required to establish a process to periodically audit tribes that receive CHRI to ensure

compliance with applicable statutes, regulations and policies. To fulfill this obligation, the NIGC has established a CJIS Audit Unit (CAU), which is tasked with coordinating with tribal authorities to ensure that NIGC-disseminated CHRI is handled and managed in accordance with applicable statutes, regulations, and policies.

In performing its oversight duties, the CAU will deploy questionnaires to gather information. This information will be used to assess and document tribal compliance with privacy and security standards and will enable the CAU to identify information management risk factors that may require remediation. Responding to this information collection is voluntary, however, failure to collect this information may impair the NIGC's ability to fulfill its obligations under its MOUs with the FBI and its tribal partners. Indeed, this information collection is a vital tool for the NIGC CAU to perform its function and helps to ensure that the NIGC can continue to support the successful tribal operation of tribal gaming under the IGRA.

II. Data

Title: Information Management Standard Assessment Questionnaires.

OMB Control Number: 3141–xxxx.

Brief Description of Collection:

The collection involves questions that seek information about tribal security and privacy protections governing the processing, handling, and storing of NIGC-disseminated CHRI. The questions closely track the FBI's standard CJIS compliance questionnaires but have been streamlined and adapted to tribal specific standards. The information collected is related to information policies, procedures, and system configurations and includes some type and amount of measurable evidence that confirms their proper implementation.

Respondents: Indian tribal gaming operations.

Estimated Number of Annual Respondents: 140.

Estimated Number of Annual Responses: 140.

Estimated Time per Response: 37.5 minutes.

Frequency of Responses: Annually.

Estimated Total Annual Burden Hours on Respondents: 87.5.

Estimated Total Non-hour Cost Burden: \$0.

Edward Simermeyer,
Chairman.

[FR Doc. 2024–03773 Filed 2–23–24; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF THE INTERIOR**National Park Service**

[NPS-WASO-NAGPRA-NPS0037456;
PPWOCRADNO-PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: U.S. Department of Agriculture, Forest Service, Allegheny National Forest, Bradford, PA

AGENCY: National Park Service, Interior.
ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the U.S. Department of Agriculture, Forest Service, Allegheny National Forest intends to repatriate certain cultural items that meet the definition of objects of cultural patrimony and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the cultural items in this notice may occur on or after March 27, 2024.

ADDRESSES: Jamie Davidson, United States Forest Service, Allegheny National Forest, 4 Farm Colony Drive, Warren, PA 16365, telephone (814) 728-6299, email jamie.davidson@usda.gov.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Allegheny National Forest. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Allegheny National Forest.

Description

The three cultural items were gifted to the Allegheny National Forest at an unknown date for display in the Bradford Ranger District office by a contemporary artist enrolled with the Seneca Nation of Indians and named on an accompanying plaque. The cultural items were displayed for an unknown period of time and later removed from display and placed in storage. This occurred at an unknown time but prior to 2018. The three items are carved false-face masks. They were carved from white pine and each one is approximately one foot wide and two feet in height.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable

earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: other relevant information.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Allegheny National Forest has determined that:

- The three cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Seneca Nation of Indians.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after March 27, 2024. If competing requests for repatriation are received, the Allegheny National Forest must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The Allegheny National Forest is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25

U.S.C. 3004, and the implementing regulations, 43 CFR 10.9.

Dated: February 16, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-03801 Filed 2-23-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR**National Park Service**

[NPS-WASO-NAGPRA-NPS0037454;
PPWOCRADNO-PCU00RP14.R50000]

Notice of Inventory Completion: SUNY, Broome Community College, Binghamton, NY

AGENCY: National Park Service, Interior.
ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), SUNY Broome Community College has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from the region of Fort Ancient archeological culture (the Upper Ohio River drainage) including parts of the current states of Ohio, Indiana, West Virginia, and Kentucky.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after March 27, 2024.

ADDRESSES: Harold Koster, Ph.D., SUNY Broome Community College, Professor Emeritus, NAGPRA Coordinator, SUNY Broome Community College, 907 Front Street, Binghamton, NY 13905, telephone (607) 692-4232, email kosterha@sunybroome.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of SUNY Broome Community College. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by SUNY Broome Community College.

Description

Human remains representing, at minimum two individuals, were

removed from the region of Fort Ancient archeological culture (the Upper Ohio River drainage), including parts of the current states of Ohio, Indiana, West Virginia, and Kentucky.

The collection was donated to the Susquehanna River Archaeological Center (SRAC), Waverly, New York in 2012. The collection was subsequently donated to SUNY Broome Community College by SRAC to be used as a teaching collection. Deb Twigg, the co-founder, and executive director of SRAC, identified the human remains as being a donation collected in the 20th century in the Ohio, Indiana, Kentucky, or West Virginia region. The collection, which was referred to as the Les Rolfe/Libold Collection, was reportedly donated to SRAC by the family of unidentified deceased collectors. No provenience or location information was provided with the collection, nor was any notice included of any human remains present in the collection. The collection was received in 31 buckets with slips of paper marked "Lee" or "Davis."

The collection includes, at minimum, the human remains of two Ancestors, a juvenile of undetermined sex, aged 7–10 years, based on dentition, and an adult of undetermined sex. No known individuals were identified. There are 13 teeth, one foot, and two hand phalanges associated with the juvenile. There are five teeth, a maxillary fragment, one foot, and three hand phalanges associated with the adult. Identifications were made by professional anthropologists at SUNY Broome Community College and by a professional osteologist at Binghamton University.

The 3,514 associated funerary objects are 949 pottery sherds and assorted ceramics; 964 lithic tools, flakes, cores and assorted stone; three unidentified minerals; 683 freshwater bivalve shells; six shell hoes with drilled holes; five modified bones/shells; 19 turtle carapaces/fragments; one elk cranium; 775 large and small mammal bones; 76 fish bones; nine bird bones; three pieces of charcoal; 10 lots of carbonized maize cobs, seeds, nuts and wood; one nut; one piece of unidentified wood; three pieces of glass; one metal buckle; two broken metal spoons; one large metal nail; one metal spike; and one unidentified metal fragment.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the

identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological information, archeological information, geographical information, biological information, historical information, and oral tradition.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, SUNY Broome Community College has determined that:

- The human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- The 3,514 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Delaware Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Prairie Band Potawatomi Nation; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Saginaw Chippewa Indian Tribe of Michigan; and the Shawnee Tribe.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after March 27, 2024. If competing requests for repatriation are received, SUNY Broome Community College must

determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. SUNY Broome Community College is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 16, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03798 Filed 2–23–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037457; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: James B. and Rosalyn L. Pick Museum of Anthropology at Northern Illinois University, DeKalb, IL (Formerly Anthropology Museum at Northern Illinois University)

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the James B. and Rosalyn L. Pick Museum of Anthropology at Northern Illinois University (Pick Museum) intends to repatriate a cultural item that meets the definition of a sacred object and that has a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice.

DATES: Repatriation of the cultural item in this notice may occur on or after March 27, 2024.

ADDRESSES: Dr. Christy DeLair, Museum Director, James B. and Rosalyn L. Pick Museum of Anthropology at Northern Illinois University, 1425 W Lincoln Hwy., DeKalb, IL 60015, telephone (815) 753–0230, email cdelair@niu.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the

National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Pick Museum. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Pick Museum.

Description

In 1969, the Pick Museum purchased a medicine face mask (catalog no. 69–27–50) from Kohlberg's in Denver, CO. The Pick Museum records identify the medicine face as Seneca. The medicine face mask is a sacred object.

Cultural Affiliation

The cultural item in this notice is connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological information, historical information, oral tradition, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Pick Museum has determined that:

- The one cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- There is a relationship of shared group identity that can be reasonably traced between the cultural item and the Tonawanda Band of Seneca.

Requests for Repatriation

Additional, written requests for repatriation of the cultural item in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural item in this notice to a requestor may occur on

or after March 27, 2024. If competing requests for repatriation are received, the Pick Museum must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural item are considered a single request and not competing requests. The Pick Museum is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3004, and the implementing regulations, 43 CFR 10.9.

Dated: February 16, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03800 Filed 2–23–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

**[NPS–WASO–NAGPRA–NPS0037459;
PPWOCRADNO–PCU00RP14.R50000]**

Notice of Inventory Completion: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Peabody Museum of Archaeology and Ethnology, Harvard University (PMAE) has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Cross and Poinsett Counties, AR.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after March 27, 2024.

ADDRESSES: Patricia Capone, PMAE, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617)

496–3702, email pcapone@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the PMAE. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the PMAE.

Description

Human remains representing, at minimum, seven individuals were removed from Stanley Mounds, also known as the Parkin Site (state site number 3CS29; Parkin Phase) in Cross County, AR in 1879 as part of a Peabody Museum of Archaeology and Ethnology expedition led by Edwin Curtiss. The 42 associated funerary objects include: 39 lots consisting of ceramic vessel or vessel fragments and three lots consisting of faunal items.

Human remains representing, at minimum, 10 individuals were removed from Fortune Mounds (state site number 3CS71; Parkin Phase) in Cross County, AR in 1880 as part of a Peabody Museum of Archaeology and Ethnology expedition led by Edwin Curtiss. The 16 associated funerary objects include 11 lots consisting of ceramic vessel or vessel fragments; one lot consisting of copper items; and four lots consisting of faunal items.

Human remains representing, at minimum, three individuals were removed from Halcomb's Mounds (state site number 3CS28; Parkin Phase) in Cross County, AR in 1880 as part of a Peabody Museum of Archaeology and Ethnology expedition led by Edwin Curtiss. The two associated funerary objects include one lot consisting of ceramic vessel or vessel fragments, and one lot consisting of a copper item.

Human remains representing, at minimum, 54 individuals were removed from Neeley's Ferry Mounds (state site number 3CS24; Parkin Phase) in Cross County, AR in 1880 as part of a Peabody Museum of Archaeology and Ethnology expedition led by Edwin Curtiss. The 66 associated funerary objects include: one lot consisting of ceramic items; 53 lots consisting of ceramic vessel or vessel fragments; eight lots consisting of faunal items; one lot consisting of red pigment; two lots consisting of stone items; and one lot consisting of stone or coal fragment.

Human remains representing, at minimum, two individuals were

removed from Robinson's Mound (Parkin Phase) in Cross County, AR in 1880 as part of a Peabody Museum of Archaeology and Ethnology expedition led by Edwin Curtiss. The two associated funerary objects are one lot consisting of ceramic vessel or vessel fragments and one lot consisting of faunal bones and vessel fragments.

Human remains representing, at minimum, 52 individuals were removed from Rose Mound (state site number 3CS27; Parkin Phase) in Cross County, AR in 1880 as part of a Peabody Museum of Archaeology and Ethnology expedition led by Edwin Curtiss. The 73 associated funerary objects include: one lot consisting of a ceramic item(s); 51 lots consisting of ceramic vessel or vessel fragments; one lot consisting of a clay item; one lot consisting of a copper item; 13 lots consisting of faunal items; and six lots consisting of stone items.

Human remains representing, at minimum, one individual was removed from Hazel (state site number 3PO6) in Poinsett County, AR in 1970 by Jeffrey P. Brain and Stephen Williams as part of the Lower Mississippi Survey Expedition. At that time, the Survey Expedition was a project of Harvard University. No associated funerary objects are present.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological information, archeological information, biological information, folklore, geographical information, historical information, kinship, linguistics, oral tradition, other relevant information, or expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the PMAE has determined that:

- The human remains described in this notice represent the physical remains of 129 individuals of Native American ancestry.
- The 201 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or

later as part of the death rite or ceremony.

- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Quapaw Nation.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after March 27, 2024. If competing requests for repatriation are received, the PMAE must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The PMAE is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 16, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-03803 Filed 2-23-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0037462; PPWOCRADN0-PCU00RP14.R50000]

Notice of Inventory Completion: Ohio History Connection, Columbus, OH

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Ohio History Connection has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from the Neilson Site (20-MR-501) in Monroe County, Michigan.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after March 27, 2024.

ADDRESSES: Nekole Alligood, NAGPRA Specialist, Ohio History Connection, 800 E. 17th Avenue, Columbus, OH 43211, telephone (614) 297-2300, email nalligood@ohiohistory.org.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Ohio History Connection. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Ohio History Connection.

Description

On an unknown date the 20 individuals were removed from the Neilson Site by a private collector and put on temporary loan to the University of Toledo for "study and analysis." The University of Toledo described them as Culturally Unidentifiable Inventory in 1995. At some point, the individuals were returned to the private collector and on an unknown date, the individuals were transferred to the Firelands Archaeological Research Center (FARC). In 2021 FARC transferred the 20 individuals to Ohio History Connection. It was determined by the University of Toledo and Ohio

History Connection in April 2023 that legal control of the 20 Ancestors lays with the Ohio History Connection. The 96 associated funerary objects are six pre-contact ceramic sherds along with faunal remains, debitage (stone flakes), charcoal, and debris from the soils.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: archeological information, geographical information, and indigenous knowledge from the consulting Tribes.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Ohio History Connection has determined that:

- The human remains described in this notice represent the physical remains of 20 individuals of Native American ancestry.
- The 96 objects describe in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana; Citizen Potawatomi Nation, Oklahoma; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Michigan; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little

River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan; Ottawa Tribe of Oklahoma; Pokagon Band of Potawatomi Indians; Michigan and Indiana; Prairie Band Potawatomi Nation; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Seneca Nation of Indians; Seneca-Cayuga Nation; Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Tonawanda Band of Seneca; Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in

ADDRESSES. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after March 27, 2024. If competing requests for repatriation are received, the Ohio History Connection must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The Ohio History Connection is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

This notice was submitted after the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024) but in the older format. As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 16, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03804 Filed 2–23–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037442; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Office of the State Archaeologist Bioarchaeology Program, University of Iowa, Iowa City, IA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Office of the State Archaeologist Bioarchaeology Program (OSA–BP) has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Adams, Allamakee, Clay, Lyon, Polk, and Warren Counties, IA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after March 27, 2024.

ADDRESSES: Dr. Lara Noldner, Office of the State Archaeologist Bioarchaeology Program, University of Iowa, 700 S Clinton Street, Iowa City, IA 52242, telephone (319) 384–0740, email lara-noldner@uiowa.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the OSA–BP. The National Park Service is not responsible for the determinations in this notice.

Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the OSA–BP.

Description

In 1965 and 1966, human remains representing, at minimum, 43 individuals were removed from the Howard Goodhue Site (13PK1) in Polk County, IA. The human remains were recovered during excavations conducted by the Iowa State University Archaeology Laboratory (ISUAL) under contract with the National Park Service in the area of the Red Rock Reservoir. In 1991, the ISUAL transferred the human remains to the OSA–BP. Additional human remains were later discovered in the ISUAL collections and were transferred to the OSA–BP in 1996, 1997, and 2005. The transferred human remains were labeled with the following ISUAL catalog numbers: 16a, 1715, 2383, 2925, 3518, 5712, 6318, 6534, 9225, 10209, 13118, 13120, 13154–5, 13344–5, 13701, 14601, 16804, 16342, 16797, 20489, 20737–9, 21659–64, 21723–46, 21753–7, 21758–65, 23060a, 23106–12, 23539–40, 23545–60, 23562–4, 23566–9, 23577–9, 23585, 23638–9, 23641–4, 23893–23914, 23970–2, 23975–6, 24048–59. Among the 43 individuals, 24 adults and 18 juveniles were identified. The adults include four possible males and eight possible females. Young and middle-aged adults are represented, as well as one old adult. Four of the juveniles are infants ranging from newborn to 2.5 years. Two juveniles fall in the two- to four-year-old range, and two in the four- to six-year-old range. Two juveniles fall in the six- to ten-year-old range, and five were aged somewhere between 10 and 16 years. The remaining three juveniles were roughly estimated to be between eight and 21 years old (Burial Project 521, 990, 1141, 1825). The associated funerary objects were transferred to the OSA–BP in 1996 (Catalog #s 23640, 23645a, 23892). The 27 associated funerary objects are 16 small copper beads, eight cylindrical copper beads and fragments, one portion of a reconstructed vessel, and two ceramic sherds.

In 1966, human remains representing, at minimum, one individual were removed from the Clarkson Site (13WA2) in Warren County, IA. The human remains were recovered during excavations conducted by the ISUAL under contract with the National Park Service as part of the interagency river basin salvage program at the Red Rock Reservoir. In 1991, the human remains were transferred from the ISUAL to the

OSA–BP. The transferred human remains were labeled with the following ISUAL catalog numbers: 3837–3952, 3954–3967, 3969–3997. A child aged 2.5 to 3.5 years is represented by the human remains (Burial Project 519). No associated funerary objects are present.

In 1968, human remains representing, at minimum, three individuals were removed from site 13WA105 in Warren County, IA. The human remains were recovered during salvage excavations conducted by the ISUAL after the land was acquired by the U.S. Army Corps of Engineers. The ISUAL transferred the human remains to the OSA–BP in 1991. The transferred human remains were labeled with the following ISUAL catalog numbers: 2013, 2275, 3980, 4937a. Two young to middle-aged adults are represented by the human remains, as well as a child approximately three months to one year old (Burial Project 520). No associated funerary objects are present.

In 2008, human remains representing, at minimum, one individual were removed from Adams County, IA. The culturally modified human cranium was discovered on a sand bar (find spot 13AA106) in the East Nodoway River by a private citizen. No Native American habitation or burial sites have been recorded in the vicinity of the findspot, so the original location of the cranium is unknown. The human remains were transferred to the Iowa OSA–BP. A young adult female is represented by the cranial remains, which exhibit pictorial incising including a “birdman” figure and a four-pointed star (Burial Project 2300). The design motifs have been documented on other culturally modified cranial fragments from other archaeologically defined Oneota sites. No associated funerary objects are present.

At an unknown time, human remains representing, at minimum, one individual were removed from the Blood Run Site (13LO2) in Lyon County, IA. The human remains were collected from the site by a private citizen before being transferred to the OSA with faunal remains from the site in April 2022. The human remains were initially thought to be faunal before being properly identified by OSA staff. The human remains are a single fragmented ilium representing a single juvenile individual aged between 8 and 10 years. The fragment exhibits green staining from contact with copper (Burial Project 3685). No associated funerary objects are present.

At an unknown time, human remains representing, at minimum, two individuals were removed from Blood Run Site (13LO2) in Lyon County, IA.

The human remains were collected by a private citizen before being transferred to the OSA with other artifacts collected from the site in July of 2023. The human remains are a single fragmented adult right ulna and a right mandible fragment from a juvenile individual aged between 8 and 11 years old (BP3812). No associated funerary objects are present.

In May of 2023, human remains representing, at minimum, one individual were removed from the Fort Des Moines site (13PK61) in Polk County, IA. The human remains were excavated by Wapsi Valley Archaeology Inc. during a Phase III excavation for a new watermain. Tribal monitors were contacted to observe the rest of the Phase III, and the human remains were transferred to the OSA. They represent one adult individual of unknown sex and age (BP3798). No associated funerary objects are present.

At an unknown time, human remains representing, at minimum, one individual were removed from site 13CY2 in Clay County IA. The human remains were collected by a private collector and then donated to the OSA. In July of 2023 the human remains were identified in the donated materials by OSA staff. The human remains are a left second mandibular molar from an adult individual (BP 3817). No associated funerary objects are present.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological information, archeological information, geographical information, historical information, linguistics, and oral tradition.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the OSA–BP has determined that:

- The human remains described in this notice represent the physical remains of 53 individuals of Native American ancestry.
- The 27 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or

later as part of the death rite or ceremony.

- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Ho-Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Iowa Tribe of Oklahoma; Omaha Tribe of Nebraska; Otoe-Missouria Tribe of Indians, Oklahoma; Ponca Tribe of Indians of Oklahoma; Ponca Tribe of Nebraska; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; and the Winnebago Tribe of Nebraska.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after March 27, 2024. If competing requests for repatriation are received, the OSA-BP must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The OSA-BP is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 16, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-03797 Filed 2-23-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0037455; PPWOCRADNO-PCU00RP14.R50000]

Notice of Inventory Completion: Department of Anthropology at Northern Illinois University, DeKalb, IL

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Department of Anthropology at Northern Illinois University (NIU Department of Anthropology) has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from an unknown county, IL, and Marshall County, IL.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after March 27, 2024.

ADDRESSES: Dr. Leila Porter, Chair, Department of Anthropology at Northern Illinois University, 1425 W Lincoln Hwy., DeKalb, IL 60115, telephone (815) 753-5669, email lmporter@niu.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the NIU Department of Anthropology. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the NIU Department of Anthropology.

Description

In 1976, human remains representing, at minimum, one individual were donated to the NIU Department of Anthropology and were identified by the donor as being from an unknown county, IL. It is not known how or when the donor acquired the human remains, but the donor was the owner of antique stores in Aurora, IL, and Geneva, IL. No associated funerary objects are present.

In fall 1975, human remains representing, at minimum, one

individual were removed from Hopewell Estates in Marshall County, IL. A 2010 collections inventory by NIU Department of Anthropology staff noted these human remains and associated funerary objects in an envelope marked with collection date and site information, but there is no earlier record or information on how they came to be in the NIU Department of Anthropology collections or who originally collected them. The six associated funerary objects are one red ceramic sherd and five lithic fragments.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, geographical, historical information, and oral tradition.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the NIU Department of Anthropology has determined that:

- The human remains described in this notice represent the physical remains of two individuals of Native American ancestry.

- The six objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Ho-Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Fond du Lac Band); Omaha Tribe of Nebraska; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Ponca Tribe of Indians of Oklahoma; Prairie Band Potawatomi Nation; Saginaw Chippewa Indian Tribe of Michigan;

Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Shawnee Tribe; and the Winnebago Tribe of Nebraska.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in

ADDRESSES. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after March 27, 2024. If competing requests for repatriation are received, the NIU Department of Anthropology must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The NIU Department of Anthropology is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 16, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-03799 Filed 2-23-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0037443;
PPWOCRADN0-PCU00RP14.R50000]

Notice of Inventory Completion: Illinois State Museum, Springfield, IL

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Illinois State Museum has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from the Dickson Mounds site (11F10/11Fo34), Dickson Camp site (11F10/11Fv35), and a Middle Woodland mound site (11F10/11Fo36), in Fulton County, IL.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after March 27, 2024.

ADDRESSES: Brooke M. Morgan, Illinois State Museum Research & Collections Center, 1011 East Ash Street, Springfield, IL 62703, telephone (217) 785-8930, email brooke.morgan@illinois.gov.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Illinois State Museum. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Illinois State Museum.

Description

Between 1927 and 1929, Dr. Don F. Dickson exposed and left in situ human remains representing, at minimum, 286 individuals in Mounds 10(I) and 2(E) at the Dickson Mounds site (11F10/11Fo34), Fulton County, IL. These burials date to the Spoon River focus of the Mississippian period (ca. A.D. 1150-1300). Associated funerary objects were often left with their burial of origin, but some were removed and placed with a different burial or displayed in what would become the Museum. The in situ former burial exhibit was known as the "Dickson Excavation" and was on display from 1927 until its closure in 1992. Dickson Mounds State Park was transferred from the Department of Conservation to the Illinois State Museum in 1965, which is when the "Dickson Excavation" was accessioned into the Museum's collection. In 1993, human remains representing, at

minimum, one individual were removed from this same location prior to the entombment of the former Dickson Mounds burial exhibit by the Illinois State Museum.

The 773 associated funerary objects are nine antler flakers, two polished antler rings, 274 shell beads, one fluorspar bead, four bone bracelets, one bone weaving tool, two fishhook blanks, three bone fishhooks, one bone awl, three bone pins, seven chipped stone drills, two chert hoes, 49 chert flakes, 20 flake knives, 24 triangular projectile points, 45 chipped stone scrapers, one galena cube, one groundstone celt, one flotation sample, five sandstone abraders, five unmodified deer phalanges, one ceramic trowel, 17 bone needles, 10 shell pendants, one groundstone pipe, 65 ceramic vessels, three lots of ceramic sherds, 45 shell rattles or clackers, three shell hoes, 26 shell spoons, 11 unmodified mussel shells, 123 terrestrial snail shells, two lots of burial fill, and six unmodified stones.

Between 1966 and 1968, human remains representing, at minimum, 830 individuals were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, when the Illinois State Museum performed salvage excavations prior to construction of the current building, which opened to the public in 1972. These 830 individuals were removed from four precontact cemeteries and 11 mounds constructed during the Late Woodland and Mississippian periods and are comprised of 136 individuals dating to the Late Woodland period (A.D. 700-1100), 440 individuals dating to the Mississippian period (A.D. 1150-1300), and 254 individuals dating to an undetermined precontact archeological period. Precontact period individuals for which time period was unable to be determined were generally removed from indeterminate mounds or from the disturbed upper levels of the mounds that were subject to extensive looting prior to the 1927 Dickson excavation. Archeologists determined these human remains had been historically disassociated from their original positions within the mounds and, as a result, were often commingled and unable to be separated by individual.

The 2,024 associated funerary objects belonging to the Late Woodland period individuals are two antler flakers, one antler hairpin, 1,678 shell beads, 11 lots of faunal remains, one bone pin, one bone fishhook, 18 chert flakes, three flake knives, 18 projectile points, 12 chipped stone scrapers, one sandstone file, one discoidal, one grinding stone, three copper ear spools, seven lots of

charcoal, one lot of burned clay, 77 lots of burial fill, 24 flotation samples, three pieces of hematite, two puma canine ear pendants, five shell pendants, 47 ceramic vessels, 47 lots of ceramic sherds, four shell rattles or clackers, 42 shell spoons, 10 unmodified mussel shells, and four unmodified stones.

The 3,646 associated funerary objects belonging to the Mississippian period individuals are seven antler flakers, two antler hair rings, 2,689 shell beads, two beaver incisor chisels, one bird wing fan, two bone bipointed objects, five bone bracelets, one bone comb, two cut bird bones, 15 lots of faunal remains, eight bone scarifier needles, nine bone awls, 13 bone pins, one biface fragment, one chert drill, three chert gravers, 122 chert flakes, 10 flake knives, 57 projectile points, 32 chipped stone scrapers, two sandstone abraders, two groundstone celts, one discoidal, three grinding stones, two groundstone paint palettes, four polishing stones, one hematite plummet, four copper ear spoons, one copper gorget, one galena cube bead, one lot of sand tempering material, seven lots of charcoal, two lots of burned clay, 115 lots of burial fill, 25 flotation samples, two lots of preserved woven fabric, three pieces of hematite, 183 quartz pebbles from rattles, one sandstone elbow pipe, two puma canine ear pendants, 16 shell pendants, 58 ceramic vessels, 92 lots of ceramic sherds, four ceramic trowels, 58 shell rattles, one worked marine shell, 49 shell spoons, 22 lots of unmodified mussel shells, and two unmodified stones.

The 681 associated funerary objects belonging to the Precontact period individuals are 571 shell beads, two elk astragali, four lots of faunal remains, one modified bird bone, one turtle carapace plaque, one chert biface, 14 chert flakes, two flake knives, three projectile points, three chert scrapers, one groundstone anvil, one lot of charcoal, 25 lots of burial fill, two flotation samples, 10 shell pendants, three ceramic vessels, 20 lots of ceramic sherds, two mussel shell hoes, 11 shell spoons, and four lots of unmodified mussel shell.

The 2,046 associated funerary objects belonging to multiple individuals or mounds are two worked antler artifacts, 63 shell beads, two beaver incisors, three bone bracelets, one bone hair ring, two bone shuttles, 16 lots of faunal remains, three turtle carapace fragments, 11 bone pins or awls, 18 chert bifaces, 220 chert flakes, three flake knives, 36 projectile points, 47 chert scrapers, five sandstone abraders, three groundstone celts, two galena cubes, 21 lots of burial fill, 28 lots of charcoal, 26 lots of soil,

four soil core samples, seven flotation samples, 18 shell pendants, four lots of hematite, 618 lots of ceramic sherds, 31 ceramic vessels, five worked shells, 49 shell spoons, 248 lots of unmodified shell, and 550 lots of unmodified stone.

Prior to 1967, human remains representing, at minimum, 143 individuals were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, by Dr. Don F. Dickson or his colleagues. These were used primarily for exhibits at the Dickson Mounds Museum between 1945–1978 and were known as the Dickson Osteology Collection. The human remains were purchased by the Illinois State Museum in 1967 as the Dickson Pathology Collection. No associated funerary objects are present.

Prior to 1985, human remains representing, at minimum, 14 individuals were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, by a private collector. The human remains were donated to the Illinois State Museum in 1985 as part of the Dan Morse Pathology Collection. No associated funerary objects are present.

Prior to 1923, human remains representing, at minimum, one individual were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, by an unknown person, and recovered by the Riverside County (California) Sheriff's Department in 1985. The remains were transferred to the Illinois State Museum in 1986. No associated funerary objects are present.

Prior to 1954, human remains representing, at minimum, one individual were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, by Dr. Don F. Dickson and given to a private citizen. The remains were donated to the Illinois State Museum in 1991. No associated funerary objects are present.

Prior to the 1930s, human remains representing, at minimum, one individual were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, by Dr. Don F. Dickson and given to a private citizen. The remains were donated to the Illinois State Museum in 2004. No associated funerary objects are present.

In 1967, human remains representing, at minimum, one individual were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, by Marion Dickson and given to a person working on the Dickson Mounds excavation team. The remains were donated to the Illinois State Museum in 2016 by a private citizen. No associated funerary objects are present.

Prior to 1968, human remains representing, at minimum, 10

individuals were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, by an unknown person and later donated to the Florida State University Department of Anthropology. Circumstances surrounding the recovery and donation are unknown. The remains and associated funerary objects were transferred to the Illinois State Museum in 2022. The 18 associated funerary objects include three mussel shell fragments, one terrestrial gastropod shell, two groundstone tools, four rocks, one projectile point tip fragment, three chert flakes, two pieces of burned botanical material, one bone awl, and one lot of unidentified faunal bone.

Prior to the 1980s, human remains representing, at minimum, 15 individuals were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, and later donated to the Iowa Office of the State Archaeologist by a private citizen. The remains and associated funerary objects were transferred to the Illinois State Museum in 2022. The 21 associated funerary objects include four mussel shell fragments, one chert flake, and 16 limestone fragments.

In 1931, human remains representing, at minimum, four individuals were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, by Dr. Don F. Dickson and donated to the Field Museum of Natural History in Chicago. The remains and associated funerary objects were transferred to the Illinois State Museum in 2023. The 22 associated funerary objects include six chert flakes, one groundstone abrader, two mussel shell spoons, one marine shell pendant, one marine shell pendant or bead, two chert knives, four projectile points, one shell tempered ceramic beaker with a handle, one shell tempered undecorated ceramic jar with loop handles, one shell tempered undecorated ceramic water bottle, one shell tempered decorated ceramic jar, and one groundstone celt.

On an unknown date, human remains representing, at minimum, 13 individuals were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, and donated or otherwise acquired by the Illinois State Museum on an unknown date. No associated funerary objects are present.

Prior to 1945, human remains representing, at minimum, one individual were removed from the Dickson Mounds site (11F10/11Fo34), Fulton County, IL, and given to a private citizen. The remains were donated to the Illinois State Museum in 2002. No associated funerary objects are present.

In 1965, human remains representing, at minimum, two individuals were removed from the Dickson Camp site (11F10/11Fv35), Fulton County, IL, during professional excavation by the Illinois State Museum. The Dickson Camp site dates to the Early Havana Tradition or Early Middle Woodland period (150–50 BC). The 24 associated funerary objects include one unmodified rock, 13 pieces of chert debitage, one piece of sandstone, one lamellar flake blade of Cobden-Dongola chert, three fire-cracked rocks, one piece of ochre, one drumfish tooth, one mussel shell, one cordmarked ceramic vessel, and one mussel shell spoon.

In 1966, human remains representing, at minimum, one individual were removed from the Dickson Camp site (11F10/11Fv35), Fulton County, IL, during salvage excavation by the Illinois State Museum. The 11 associated funerary objects include one projectile point, four chert flakes, and six ceramic sherds.

In 1961, human remains representing, at minimum, one individual were removed from a Middle Woodland (Hopewell) mound (11F10/11Fo36), Fulton County, IL, by the Illinois State Museum. In 1981, associated funerary objects from this mound collected on an unknown date were transferred from the Iowa Office of the State Archaeologist to the Illinois State Museum. The mound dates between 50 BC–A.D. 400. The 81 associated funerary objects include 31 lots of chert flakes, one lot of chert, one lot of clay pieces, one grinding stone, one grooved sandstone abrader, one hammerstone, 12 lots of ceramic sherds, two projectile points, 13 lots of rock, eight lots of soil, six lots of shell, one ash sample, one bark sample, and two sets of bark impressions in sediment matrix.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, biological, geographical, linguistic, and oral tradition information.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate

Indian Tribes and Native Hawaiian organizations, the Illinois State Museum has determined that:

- The human remains described in this notice represent the physical remains of 1,325 individuals of Native American ancestry.
- The 9,347 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Forest County Potawatomi Community, Wisconsin; Ho-Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Nottawaseppi Huron Band of the Potawatomi, Michigan; Otoe-Missouria Tribe of Indians, Oklahoma; Peoria Tribe of Indians of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation; The Osage Nation; and the Winnebago Tribe of Nebraska.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in

ADDRESSES. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after March 27, 2024. If competing requests for repatriation are received, the Illinois State Museum must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The Illinois State Museum is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the

notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 16, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03807 Filed 2–23–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037458; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Peabody Museum of Archaeology and Ethnology, Harvard University (PMAE) intends to repatriate certain cultural items that meet the definition of unassociated funerary objects that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Cross County, AR.

DATES: Repatriation of the cultural items in this notice may occur on or after March 27, 2024.

ADDRESSES: Patricia Capone, PMAE, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496–3702, email pcapone@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the PMAE. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the PMAE.

Description

The 531 cultural items were removed from Cross County, Arkansas between 1879 and 1880 as part of Peabody

Museum of Archaeology and Ethnology expeditions led by Edwin Curtiss. These cultural items consist of unassociated funerary objects from six sites. The 66 unassociated funerary objects at Fortune Mounds (state site number 3CS71; Parkin Phase) include 64 items that are present at the PMAE and two items that are not currently located. The 64 items present at the PMAE are two lots consisting of ceramic items, 50 lots consisting of ceramic vessel or vessel fragments, one lot consisting of charcoal, eight lots consisting of faunal items, and three lots consisting of stone items. The two lots not currently located are two lots consisting of faunal items.

The 95 unassociated funerary objects at Halcomb's Mounds (state site number 3CS28; Parkin Phase) include 94 objects that are present at the PMAE and one object that is not currently located. The 94 objects present are two lots consisting of ceramic items, 79 lots consisting of ceramic vessel or vessel fragments, five lots consisting of faunal items, five lots consisting of stone items, one lot consisting of clay items, one lot consisting of floral items, one lot consisting of an unidentified organic item. The one object not present is one lot consisting of ceramic vessel or vessel fragments.

The 156 unassociated funerary objects at Neeley's Ferry Mounds (state site number 3CS24; Parkin Phase) include 154 objects that are present at the PMAE and two objects that are not currently located. The 154 objects present at the PMAE are: six lots consisting of ceramic items, 116 lots consisting of ceramic vessel or vessel fragments, 22 lots consisting of faunal items, seven lots consisting of stone items, one lot consisting of floral items, and two lots consisting of charcoal items. The two objects not present are one lot consisting of ceramic vessel or vessel fragments, and one lot consisting of faunal remains.

The 14 unassociated funerary objects at Robinson's Mound (Parkin Phase) are one lot consisting of ceramic items, 11 lots consisting of ceramic vessel or vessel fragments, one lot consisting of faunal items, and one lot consisting of clay items.

The 161 unassociated funerary objects at Rose Mound (state site number 3CS27; Parkin Phase) are four lots consisting of ceramic items, 129 lots consisting of ceramic vessel or vessel fragments, 13 lots consisting of faunal items, eight lots consisting of stone items, four lots consisting of clay items, one lot consisting of floral items, and two lots consisting of metal items.

The 39 unassociated funerary objects at Stanley Mounds, also known as Parkin Site (state site number 3CS29;

Parkin Phase) are one lot consisting of ceramic items, 33 lots consisting of ceramic vessel or vessel fragments, four lots consisting of faunal items, and one lot consisting of copper items.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological information, archeological information, biological information, folklore, geographical information, historical information, kinship, linguistics, oral tradition, other relevant information, or expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the PMAE has determined that:

- The 531 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.

- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Quapaw Nation.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after March 27, 2024. If competing requests for repatriation are received, the PMAE must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not

competing requests. The PMAE is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3004, and the implementing regulations, 43 CFR 10.9.

Dated: February 16, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024-03802 Filed 2-23-24; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

**[NPS-WASO-NAGPRA-NPS0037441;
PPWOCRADN0-PCU00RP14.R50000]**

Notice of Inventory Completion: Office of the State Archaeologist Bioarchaeology Program, University of Iowa, Iowa City, IA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Office of the State Archaeologist Bioarchaeology Program (OSA-BP) has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Buena Vista, Cherokee, Mills, O'Brien, Plymouth, and Polk Counties, IA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after March 27, 2024.

ADDRESSES: Dr. Lara Noldner, Office of the State Archaeologist Bioarchaeology Program, University of Iowa, 700 S Clinton Street, Iowa City, IA 52242, telephone (319) 384-0740, email lara-noldner@uiowa.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative

responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the OSA–BP. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the OSA–BP.

Description

In 2019, human remains representing, at minimum, six individuals were removed from the Joy Creek Major site (13PM7) in Plymouth County, IA. Flood-related breaches in a levee near the site caused the erosion of a mortuary feature and the scattering of human remains across an agricultural field. The human remains were collected by personnel from the Sanford Museum in Cherokee, IA, and the OSA–BP. An older adolescent or young adult male, a middle to older adult possible male, and three adults of unknown age and sex are represented by the human remains. A child 10-to-12 years old is represented by a naturally-shed deciduous tooth (BP3443). No associated funerary objects are present.

In 1959 and 1963, human remains representing, at minimum, three individuals were removed from the Wittrock Site (13OB4) in O'Brien County, IA. Archeological excavations of this Mill Creek village were conducted by the University of Iowa in 1959 and 1965, and by the University of Wisconsin-Madison in 1963. Human skeletal remains identified during the 1959 and 1965 excavations were previously reported and reburied in 1978. In 2010, a human patella from the 1963 excavation of 13OB4 was transferred from the Department of Anthropology at the University of Wisconsin-Madison to the Iowa Office of the State Archaeologist (OSA). Two teeth from the 1963 excavation were transferred from the Sanford Museum in Cherokee, Iowa, to the OSA–BP in 2014. Additional human elements from the 1959 excavation were identified in the OSA Repository in 2014–2015 and transferred to the OSA–BP (Burial Projects 3017, 3068, 3095). No associated funerary objects are present.

In 1955, human remains representing, at minimum, one individual was removed from the Phipps Site (13CK21) in Cherokee County, IA. Archeological excavations of this Mill Creek village were conducted by Reynold Ruppé and sponsored by the Northwest Chapter of the Iowa Archaeological Society, the Sanford Museum, and the University of Iowa from 1952–1956. Faunal remains from the 1955 field season were housed

at the Sanford Museum before being transferred to the OSA–BP in 2018. During processing of these faunal remains, a single human tooth was identified and transferred to the OSA–BP. The tooth, bearing the catalog number CK4042, represents an older adult (Burial Project 3394). No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, four individuals were removed from the Phipps Site (13CK21), the Bultman Site (13BV2) and site 13CK1. An archeologist from the Sanford Museum in Cherokee County, Iowa, noted the human remains on display at Jim's History Barn in Peterson, IA. The human remains were confiscated by the OSA–BP in 2019. At a minimum, four individuals, one juvenile and three adults, are represented by a phalanx, three isolated teeth and a partial mandible (Burial Project 3478). No associated funerary objects are present.

In 1969, human remains representing, at minimum, one individual was removed from the Broken Kettle West Site (13PM25) in Plymouth County, IA. The site was excavated in 1969 by the University of Nebraska. At an unknown date, these human remains were transferred to the OSA and rediscovered in the OSA repository in 2019 (Burial Project 3482). Two mandibular fragments represent one young adult (20–35 years old) of indeterminate sex. No associated funerary objects are present.

In 1966, human remains representing, at minimum, four individuals were removed from sites 13PM32, 13PM33, and possibly 13PM25 in Plymouth County, IA. The original location was indicated as being on the Blue Diamond Ranch, site numbers 13PM32 and 13PM33, where the University of Wisconsin excavated in 1966. At an unknown date cremated human remains from these sites were transferred to the University of Missouri. A bag with the remains was also labeled 13PM25. In January of 2023, the American Archaeology Division of the University of Missouri transferred the human remains to the OSA–BP (Burial Project 3747). Fragmentary cremated human remains represent four adults of indeterminate age and sex. The one associated funerary object is one lot of charcoal.

In 1963, human remains representing, at minimum, 26 individuals were removed from site 13PK38, also called the West Des Moines Burial Site, in Polk County, IA. The burial site was impacted by construction in 1963 and subsequently excavated by the State Department of History and Archives,

now the State Historical Society of Iowa. Human remains excavated were transferred to the OSA in 1983 and then temporarily loaned to Doug Owsley while at Louisiana State University in 1985. Owsley then took the collection with him upon his transition to the Smithsonian Institution's National Museum of Natural History. The human remains were transferred back to the OSA–BP in November of 2021 (Burial Project 3641). Mostly complete but commingled human remains represent at least 21 adult individuals, two infants, and three juveniles ranging in age from 2–17 years old. No associated funerary objects are present.

In 1971 and 1972, human remains representing, at minimum, one individual were removed from 13ML130 in Mills County, IA. Excavations were conducted at 13ML130 in 1971 and 1972 in a series of salvage archeology efforts in association with the Iowa Highway Program. Archeological material from the excavation was housed at the OSA repository. In 2014, a partial mandible and an isolated tooth were transferred to the OSA–BP after being discovered in the faunal material from 13ML130. The human remains represent one individual of indeterminate age and sex (BP 3066). No associated funerary objects are present.

In 1971 and 1972, human remains representing, at minimum, one individual were removed from 13ML135 in Mills County, IA. Excavations were conducted at 13ML135 in 1971 and 1972 in a series of salvage archeology efforts in association with the Iowa Highway Program. Archeological material from the excavation was housed at the OSA repository. In 2014, a foot phalanx was transferred to the OSA–BP after being discovered in the faunal material from 13ML135. Thin sections of human long bones were also found among the artifacts. The human remains represent one individual of indeterminate age and sex (BP 3067). The 90 associated funerary objects are 17 potsherds, three rim sherds, one bone fish hook, one knife fragment, one celt tip, three worked flakes, 10 unworked flakes, 26 faunal bone fragments, two charcoal samples, one nutshell, one wood sample, one piece of daub, five pieces of limestone, and 18 unmodified rocks.

In 1971 and 1972 human remains representing, at minimum, one individual were removed from 13ML139 in Mills County, IA, during a series of salvage archeology efforts in association with the Iowa Highway Program. Archeological material from the excavation were subsequently housed in the OSA repository. In 2017, a

deciduous tooth crown was transferred to the OSA-BP after being discovered in the faunal material from 13ML139. The human remains represent one juvenile individual 10.5–11.5 years old (BP 3302). No associated funerary objects are present.

In 1969 and 1970, human remains representing, at minimum, two individuals were removed from a Nebraska Phase earthlodge site (13ML124) in Mills County, IA. The human remains were excavated from the site between 1969 and 1970 and were stored in the OSA repository. In 2003, the human remains were discovered in the OSA repository (OSA accession #312) and transferred to the OSA-BP. An older juvenile and a young adult are represented by a femur and a single tooth (Burial Project 1724). No associated funerary objects are present.

In 1995, human remains representing, at minimum, one individual were removed from site 13ML175 in Mills County, IA. The human remains were excavated from 13ML175 during a Phase III archeological project conducted by the OSA in advance of road construction. The human remains were transferred to the OSA-BP. A child between the ages of 10 and 12 years is represented by the naturally shed deciduous tooth (Burial Project 849). No associated funerary objects are present.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological information, archeological information, biological information, geographical information, historical information, linguistics, and oral tradition.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the OSA-BP has determined that:

- The human remains described in this notice represent the physical remains of 51 individuals of Native American ancestry.
- The 91 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or

later as part of the death rite or ceremony.

- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Pawnee Nation of Oklahoma and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after March 27, 2024. If competing requests for repatriation are received, the Office of the State Archaeologist Bioarchaeology Program must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The Office of the State Archaeologist Bioarchaeology Program is responsible for sending a copy of this notice to the Indian Tribes and Native Hawaiian organizations identified in this notice.

This notice was submitted before the effective date of the revised regulations (88 FR 86452, December 13, 2023, effective January 12, 2024). As the notice conforms to the mandatory format of the **Federal Register** and includes the required information, the National Park Service is publishing this notice as submitted.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.10.

Dated: February 16, 2024.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2024–03795 Filed 2–23–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000
245S180110; S2D2S SS08011000
SX064A000 24XS501520; OMB Control
Number 1029–0083]

Agency Information Collection Activities; Certification of Blasters in Federal Program States and on Indian Lands

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before March 27, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Please provide a copy of your comments to Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, 1849 C Street NW, Room 1544–MIB, Washington, DC 20240, or by email to mgehlhar@osmre.gov. Please reference OMB Control Number 1029–0083 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Mark Gehlhar by email at mgehlhar@osmre.gov, or by telephone at (202) 208–2716. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA; 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other

Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on November 1, 2023 (88 FR 75026). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

- (1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;
- (2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; 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 entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The information is being collected to ensure that the applicants for blaster certification are qualified. This information, with blasting tests, will be used to determine the eligibility of the applicant.

Title of Collection: Certification of blasters in Federal program states and on Indian lands.

OMB Control Number: 1029–0083.

Form Number: OSM–74.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals.

Total Estimated Number of Annual Respondents: 15.

Total Estimated Number of Annual Responses: 15.

Estimated Completion Time per Response: 1 hour.

Total Estimated Number of Annual Burden Hours: 15.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: \$1,126.

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.*).

Mark J. Gehlhar,

*Information Collection Clearance Officer,
Office of Surfacing Mining Reclamation and
Enforcement.*

[FR Doc. 2024–03851 Filed 2–23–24; 8:45 am]

BILLING CODE 4310–05–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1341]

Certain Video Processing Devices and Products Containing Same; Notice of Request for Submissions on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that on February 5, 2024, the presiding administrative law judge (“ALJ”) issued the Final Initial Determination on Violation of Section 337 in this investigation. On February 20, 2024, the ALJ issued the Recommended Determination on Remedy and Bond (“RD”). The Commission is soliciting submissions on public interest issues raised by the recommended relief, should the Commission find a violation. This notice is soliciting comments from the public only.

FOR FURTHER INFORMATION CONTACT: Benjamin S. Richards, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–5453. Copies of non-confidential

documents filed in connection with this investigation may be viewed on the Commission's electronic docket system (“EDIS”) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

SUPPLEMENTARY INFORMATION: Section 337 of the Tariff Act of 1930 provides that, if the Commission finds a violation, it shall exclude the articles concerned from the United States unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. 19 U.S.C. 1337(d)(1). A similar provision applies to cease and desist orders. 19 U.S.C. 1337(f)(1).

The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation, specifically: (1) a limited exclusion order excluding importation of certain video processing devices and products containing same that are sold for importation into the United States or sold in the United States after importation by respondent HP Inc. (“HP”); and (2) a cease and desist order directed to respondent HP. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4).

The Commission is interested in further development of the record on the public interest in this investigation. Accordingly, members of the public are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the ALJ's RD issued in this investigation on February 20, 2024. Comments should address whether issuance of the recommended remedial orders in this investigation, should the Commission find a violation, would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the recommended remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third-party suppliers have the capacity to replace the volume of articles potentially subject to the recommended orders within a commercially reasonable time; and

(v) explain how the recommended orders would impact consumers in the United States.

Written submissions must be filed no later than by close of business on March 15, 2024.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (Mar. 19, 2020). Submissions should refer to the investigation number ("Inv. No. 337-TA-1341") in a prominent place on the cover page and/or the first page. (See *Handbook for Electronic Filing Procedures*, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.) Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. Any non-party wishing to submit comments containing confidential information must serve those comments on the parties to the investigation pursuant to the applicable Administrative Protective Order. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing and must be served in accordance with Commission Rule 210.4(f)(7)(ii)(A) (19 CFR 210.4(f)(7)(ii)(A)). All information, including confidential business information and documents for which confidential treatment is properly

sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: February 21, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024-03825 Filed 2-23-24; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE

[OMB Number 1117-0003]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Automation of Reports and Consolidated Orders System (ARCOS) Transaction Reporting

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Drug Enforcement Administration, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** on December 21, 2023, allowing for a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until March 27, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information

collection instrument with instructions or additional information, please contact Scott A. Brinks, Regulatory Drafting and Policy Support Section, Drug Enforcement Administration; Mailing Address: 8701 Morrisette Drive, Springfield, Virginia 22152; Telephone: (571) 362-3261, email: DPW@dea.gov.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the 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/or
- 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.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function and entering either the title of the information collection or the OMB Control Number 1117-0003. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.
2. *Title of the Form/Collection:* ARCOS Transaction Reporting.
3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* DEA Form 333. The applicable component within the Department of Justice is the Drug Enforcement Administration, Diversion Control Division.
4. *Affected public who will be asked or required to respond, as well as a brief abstract:*
Affected public (Primary): Private Sector—business or other for-profit institutions.
Abstract: Section 307 of the Controlled Substances Act (21 U.S.C. 827) requires controlled substance manufacturers and distributors to make periodic reports to DEA regarding the sale, delivery, and other disposal of certain controlled substances. These reports help ensure a closed system of distribution for controlled substances, and are used to comply with international treaty obligations.
5. *Obligation to Respond:* Mandatory 21 CFR 1304.
6. *Total Estimated Number of Respondents:* 1,239.
7. *Estimated Time per Respondent:* 0.50 minutes for DEA Form 333 (paper) and 0.25 minutes for DEA Form 333 (online) and DEA Form 333 (electronic data interchange).
8. *Frequency:* 7.93866 per year.
9. *Total Estimated Annual Time Burden:* 2,459 hours.
10. *Total Estimated Annual Other Costs Burden:* \$0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218 Washington, DC 20530.

Dated: February 21, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–03806 Filed 2–23–24; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0021]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Dispensing Records of Individual Practitioners

AGENCY: Drug Enforcement Administration, Department of Justice.
ACTION: 30-Day notice.

SUMMARY: The Drug Enforcement Administration, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** on December 21, 2023, allowing for a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until March 27, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Scott A. Brinks, Regulatory Drafting and Policy Support Section, Drug Enforcement Administration; Mailing Address: 8701 Morrisette Drive, Springfield, Virginia 22152; Telephone: (571) 362–3261, email: DPW@dea.gov.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the 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/or
- 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.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function and entering either the title of the information collection or the OMB Control Number 1117–0021. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.
2. *Title of the Form/Collection:* Dispensing Records of Individual Practitioners.
3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form: N/A. The applicable component within the Department of Justice is the Drug Enforcement Administration, Diversion Control Division.
4. *Affected public who will be asked or required to respond, as well as a brief abstract:*
Affected public (Primary): Private Sector—business or other for-profit.
Abstract: Pursuant to 21 U.S.C. 827(c), practitioners who regularly dispense or administer controlled substances to patients and charge them for the substances and those practitioners who administer controlled substances in the course of maintenance or detoxification treatment shall keep records of such activities, and accordingly must comply with the regulations on recordkeeping.
5. *Obligation to Respond:* Mandatory 21 CFR 1317, 21 CFR 1307, 21 CFR 1304.
6. *Total Estimated Number of Respondents:* 72,333.
7. *Estimated Time per Respondent:* 0.5 minutes for dispensing records of

individual practitioners and recordkeeping requirements of collectors.

8. *Frequency*: 1 per year.

9. *Total Estimated Annual Time Burden*: 36,167 hours.

10. *Total Estimated Annual Other Costs Burden*: \$0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W-218 Washington, DC 20530.

Dated: February 21, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024-03805 Filed 2-23-24; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE

[OMB Number 1121-0100]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Reinstatement of a Previously Approved Collection Census of Jails 2024-26

AGENCY: Bureau of Justice Statistics, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Justice Statistics (BJS), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information was published in the **Federal Register** on December 11, 2023, allowing a 60-day comment period. Following publication of the 60-day notice, the Bureau of Justice Statistics received three comments. Responses to these comments will be included in the final clearance package submitted to OMB.

DATES: Comments are encouraged and will be accepted for 30 days until April 26, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Zhen Zeng, Bureau of Justice Statistics, 810 Seventh Street NW, Washington, DC 20531, (email:

Zhen.Zeng@usdoj.gov; telephone: 202-598-9955).

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Reinstatement of a previously approved collection.

2. *The Title of the Form/Collection:* Census of Jails (COJ).

3. *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* The COJ contains one form—CJ-3: Census of Jails. The applicable component within the Department of Justice is the Bureau of Justice Statistics (BJS), in the Office of Justice Programs.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* The affected public that will be asked to respond to the COJ includes jail administrators and staff from approximately 2,900 city, county, regional, and private jails. The obligation to respond is voluntary.

Abstract: Since 1970, BJS has conducted the Census of Jails (COJ, OMB Control No. 1121-0010) every 5–6 years to gather data on jail facilities and inmate populations. The most recent COJ was conducted in 2019 and collected data from around 2,900 U.S. local jail respondents, representing approximately 3,100 jail facilities. The COJ is BJS's most comprehensive collection of jail data and serves as the

sampling frame for BJS's other jail surveys. In the years when the COJ is not fielded, BJS administers the Annual Survey of Jails (ASJ, OMB Control No. 1121-0094) to one third of the local jails nationwide. However, the ASJ's sample size is not sufficient to produce state-level estimates. To address this gap, BJS proposes to replace the ASJ with an annual census starting in 2025. The change will ensure that policymakers, correctional administrators, and government officials have timely and relevant data for policy development, budget planning, and oversight. The 2025 and 2026 COJ forms will be shorter, resembling the ASJ form in scope, with 16 items related to jail populations and facility characteristics. In 2024, the COJ will collect comprehensive data on jail population size and characteristics, such as one-day counts, demographics, conviction status, holds for federal and state prison authorities. It will also cover facility characteristics and jail programs. Notably, the 2024 COJ includes a special module on opioids use disorder screening and treatment which updates data first collected in 2019.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The total estimated number of respondents is 2,900 for each year of collection.

It takes 150 minutes to complete the 2024 COJ form. About 70% of the respondents (2,030) will be contacted for data quality follow-up and each follow-up will take 10 minutes. The total burden for the 2024 COJ is 7,588 hours. The 2025 and 2026 COJ forms are shorter than the 2024 form and take 80 minutes per response. The estimated time and number of respondents for data quality follow-up remain the same. In addition, it takes 5 minutes to verify jail status and point-of-contact per jail for the 2025 and 2026 COJ. The burden for the 2025 and 2026 COJ is 4,447 hours for each collection. Jail verification takes 10 minutes per jail for the 2024 COJ. This burden is covered by BJS's generic clearance agreement (OMB Control Number 1121-0339) and excluded from the current OMB application.

6. *An estimate of the total annual burden (in hours) associated with the collection:* The average annual burden is 5,494 hours, or 16,482 hours for three years of data collection.

7. *An estimate of the total annual cost burden associated with the collection, if applicable:* The estimated cost is \$534,016.80.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Average reporting time (min)	Total annual burden (hours)
2024 COJ					
Data collection	2,900	Annual	2,900	150	7,250
Data quality follow-up	2,030	Annual	2,030	10	338
Unduplicated Totals	2,900	.....	.....	.....	7,588
2025 COJ					
Data collection	2,900	Annual	2,900	80	3,867
Data quality follow-up	2,030	Annual	2,030	10	338
Jail status and point-of-contact verification	2,900	Annual	2,900	5	242
Unduplicated Totals	2,900	.....	.....	.....	4,447
2026 COJ					
Data collection	2,900	Annual	2,900	80	3,867
Data quality follow-up	2,030	Annual	2,030	10	338
Jail status and point-of-contact verification	2,900	Annual	2,900	5	242
Unduplicated Totals	2,900	.....	.....	.....	4,447
Unduplicated Totals for 2024, 2025, and 2026 COJ	2,900	.....	.....	.....	16,482

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W-218, Washington, DC.

Dated: February 20, 2024.

Darwin Arceo,
Department Clearance Officer for PRA, U.S.
Department of Justice.

[FR Doc. 2024-03768 Filed 2-23-24; 8:45 am]

BILLING CODE 4410-18-P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Proposed Renewal of the Approval of Information Collection Requirements; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor (DOL), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. The program helps ensure that requested data can be provided in the desired

format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Office of Federal Contract Compliance Programs (OFCCP) is soliciting comments concerning its proposal to obtain approval from the Office of Management and Budget (OMB) for renewal of the information collection for its construction program which includes the recordkeeping and reporting requirements associated with the program. This request includes two information collection instruments: the construction compliance review scheduling letter and itemized listing (collectively referred to as the “construction scheduling letter”) and the Construction Contract Award Notification Requirement Form (CC-314). OFCCP proposes changes to the currently authorized construction scheduling letter and CC-314. The current OMB approval for the construction scheduling letter and CC-314 expires on July 31, 2024. A copy of the proposed information collection request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this notice or by accessing it at www.regulations.gov.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before April 26, 2024.

ADDRESSES: You may submit comments by any of the following methods:

Electronic Comments: The Federal eRulemaking portal at www.regulations.gov. Follow the instructions found on that website for submitting comments.

Mail, Hand Delivery, Courier: Addressed to Tina T. Williams, Acting Deputy Director of OFCCP and Director of Policy & Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C-3325, Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. For faster submission, we encourage commenters to transmit their comment electronically via the www.regulations.gov website. Comments that are mailed to the address provided above must be postmarked before the close of the comment period. All submissions must include OFCCP’s name for identification. Comments submitted in response to the notice, including any personal information provided, become a matter of public record and will be posted on www.regulations.gov. Comments will also be summarized and/or included in the request for OMB approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Tina T. Williams, Acting Deputy Director of OFCCP and Director of Policy & Program Development, Office of Federal

Contract Compliance Programs, 200 Constitution Avenue NW, Room C-3325, Washington, DC 20210. Telephone: (202) 693-0103 or toll free at 1-800-397-6251. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services. Copies of this notice may be obtained in alternative formats (large print, braille, audio recording) upon request by calling the numbers listed above.

SUPPLEMENTARY INFORMATION:

I. Background

OFCCP administers and enforces the three equal employment opportunity authorities listed below:

- Executive Order 11246, as amended (E.O. 11246);
- Section 503 of the Rehabilitation Act of 1973, as amended (section 503); and
- Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA).

These authorities prohibit employment discrimination by Federal contractors and subcontractors and require them to take affirmative action to ensure that equal employment opportunities are available regardless of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Additionally, Federal contractors and subcontractors are prohibited from discriminating against applicants and employees for asking about, discussing, or sharing information about their pay or, in certain circumstances, the pay of their co-workers.

E.O. 11246 applies to Federal contractors and subcontractors and to federally assisted construction contractors holding a Government contract in excess of \$10,000, or Government contracts that have, or can reasonably be expected to have, an aggregate total value exceeding \$10,000 in a 12-month period. E.O. 11246 also applies to government bills of lading, depositories of Federal funds in any amount, and to financial institutions that are issuing and paying agents for U.S. savings bonds.

Section 503 prohibits Federal contractors and subcontractors from discriminating in employment against individuals with disabilities. It also requires Federal contractors and subcontractors to take affirmative action to ensure equal employment opportunity for individuals with disabilities. The Section 503 requirements apply to businesses with a direct Federal construction contract of more than \$15,000. If the construction

contractor has at least 50 employees and a single contract of \$50,000 or more, then it must also develop a section 503 affirmative action program (AAP), as described in 41 CFR 60-741, subpart C.

VEVRAA prohibits Federal contractors and subcontractors from discriminating in employment against protected veterans. It also requires Federal contractors and subcontractors to take affirmative action to ensure equal employment opportunity for protected veterans. The VEVRAA requirements apply to businesses with a direct Federal construction contract of \$150,000 or more. If the construction contractor has at least 50 employees and a single contract of \$150,000 or more, then it must also develop a VEVRAA AAP, as described in 41 CFR 60-300, subpart C.

This information collection request (ICR) seeks to renew the recordkeeping, reporting, third party disclosure, and other requirements for construction contractors. OFCCP seeks to renew its existing construction scheduling letter. This is the document contractors receive notifying them that they have been selected to undergo a construction compliance evaluation. OFCCP proposes changes to the construction scheduling letter to strengthen OFCCP's construction program and increase the effectiveness of OFCCP's construction compliance evaluations.

OFCCP also seeks to renew the CC-314 form. The CC-314 is the form that covered construction contractors submit to OFCCP notifying the agency of new contract awards that exceed \$10,000. OFCCP proposes adding additional information to the form which will increase the utility of the collection. OFCCP also proposes updating our help line call in information and other minor language changes on the CC-314 for clarity.

II. Review Focus

OFCCP is particularly interested in comments that:

- Evaluate the proposed changes to the construction scheduling letter and CC-314;
- 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.

III. Current Actions

OFCCP seeks the approval of this information collection in order to carry out its responsibility to enforce the nondiscrimination and affirmative action provisions of the three authorities it administers.

Type of Review: Renewal.

Agency: Office of Federal Contract Compliance Programs.

Title: Office of Federal Contract Compliance Programs Construction Recordkeeping and Reporting Requirements.

OMB Number: 1250-0001.

Agency Number: None.

Affected Public: Business or other for-profit entities.

Total Respondents: 9,982.

Total Annual Responses: 29,162.

Average time per response: Reviews with direct federal contracts: 36.4 hours; Reviews with federally assisted contracts: 19.7 hours; CC-314 form: .63 hours.

Estimated Total Burden Hours: 136,211.

Frequency: On occasion.

Total Monetized Burden Cost: \$10,371,086.

Total Burden Costs to Federal Government: \$192,624.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Tina T. Williams,

Acting Deputy Director of OFCCP and Director of Policy & Program Development, Office of Federal Contract Compliance Programs.

[FR Doc. 2024-03808 Filed 2-23-24; 8:45 am]

BILLING CODE 4510-CM-P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Current Population Survey Disability Supplement

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Bureau of Labor Statistics (BLS)-sponsored information collection request (ICR) to the Office of

Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before March 27, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nicole Bouchet by telephone at 202–693–0213, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: The CPS Disability Supplement will provide information on labor force participation rates for people with disabilities; the use of and satisfaction with programs that prepare people with disabilities for employment; the work history, barriers to employment, and workplace accommodations reported by persons with a disability; and the effect of financial assistance programs on the likelihood of working. Because the Disability Supplement is part of the CPS, the same detailed demographic information collected in the CPS will be available about respondents to the supplement. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on November 27, 2023 (88 FRN 82917).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition,

notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–BLS.

Title of Collection: Current Population Survey Disability Supplement.

OMB Control Number: 1220–0186.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 42,500.

Total Estimated Number of Responses: 42,500.

Total Estimated Annual Time Burden: 3,542 hours.

Total Estimated Annual Other Costs Burden: \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2024–03760 Filed 2–23–24; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0052]

Material Hoists, Personnel Hoists, and Elevators Standards; Extension of the Office of Management and Budget’s (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget’s (OMB) approval of the information collection requirements specified in the Standard on Material Hoists, Personnel Hoists, and Elevators.

DATES: Comments must be submitted (postmarked, sent, or received) by April 26, 2024.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at <https://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to <https://www.regulations.gov>. Documents in the docket are listed in the <https://www.regulations.gov> index; however, some information (e.g., copyrighted

material) is not publicly available to read or download through the websites. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2010–0052) for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the “Public Participation” heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA’s estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under

each requirement, as well as how they use it. The purpose of these requirements is in Paragraph (a)(2) of the Material Hoists, Personnel Hoists, and Elevators Standard requires that the rated load capacities, recommended operating speeds, and special hazard warnings or instructions be posted on cars and platforms. Paragraph (b)(1)(i) requires that operating rules for material hoists be established and posted at the operator's station of the hoist. These rules shall include signal system and allowable line speed for various loads. Paragraph (c)(10) requires that cars be provided with a capacity and data plate secured in a conspicuous place on the car or crosshead.

These posting requirements are used by the operator and crew of the material and personnel hoists to determine how to use the specific machine and how much it will be able to lift as assembled in one or a number of particular configurations. If not properly used, the machine would be subject to failures, endangering the workers in the immediate vicinity.

Paragraph (c)(15) requires that a test and inspection of all functions and safety devices be made following the assembly and erection of hoists. The test and inspection are to be conducted under the supervision of a competent person. A similar inspection and test is required following major alteration of an existing installation. All hoists shall be inspected and tested at three-month intervals. A certification record (the most recent) of the test and inspection must be kept on file, including the date the test and inspection was completed, the identification of the equipment and the signature of the person who performed the test and inspection. This certification ensures that the equipment has been tested and is in safe operating condition. The most recent certification record will be disclosed to a Compliance Safety and Health Officer during an OSHA inspection.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and

- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in the Standard on Material Hoists, Personnel Hoists, and Elevators. The agency is requesting an adjustment increase in the burden hour amount from 10,047 hours to 11,957 hours, a difference of 1,910 hours. This increase is due to the increase in the number of hoists and elevators from 8,304 to 9,882.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Standard on Material Hoists, Personnel Hoists, and Elevators.

OMB Control Number: 1218-0231.

Affected Public: Business or other for-profits.

Number of Respondents: 9,882.

Number of Responses: 44,518.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 11,957.

Estimated Cost (Operation and Maintenance): \$0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows:

(1) electronically at <https://www.regulations.gov>, which is the Federal eRulemaking Portal; or (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at 202-693-1648. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket Number OSHA-2010-0052). You may supplement electronic submission by uploading document files electronically.

Comments and submissions are posted without change at <https://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the <https://www.regulations.gov> index, some information (e.g., copyrighted material) is not publicly available to

read or download from this website. All submission, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the <https://www.regulations.gov> website to submit comments and access the docket is available at the website's "User Tips" link. Contact the OSHA Docket Office at (202) 693-2350, (TTY) (877) 889-5627 for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8-2020 (85 FR 58393).

Signed at Washington, DC, on February 16, 2024.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024-03761 Filed 2-23-24; 8:45 am]

BILLING CODE 4510-26-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE: 24-014]

Name of Information Collection: NASA Kennedy Space Center Exchange Evelyn Johnson Scholarship Program

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 March 27, 2024.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or

copies of the information collection instrument(s) and instructions should be directed to NASA PRA Clearance Officer, Bill Edwards-Bodmer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, phone 757-864-7998, or email hq-ocio-pra-program@mail.nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Evelyn Johnson Scholarship Program (EJSP) recognizes the academic achievement of, and provides financial assistance to, the dependents of NASA Kennedy Space Center (KSC) civil service and NASA KSC Exchange employees. The scholarship honors the dedication and commitment of the late Evelyn Johnson, a Deputy Director, Equal Opportunity Program Office at KSC. Applicants are evaluated on the basis of academic achievement, involvement in school and community activities, and education and career goals. The scholarship winners may pursue any course of study leading to an undergraduate degree at any accredited college in the country. The scholarship is intended to be used only for tuition, fees, books and supplies associated with attending college.

Authority: The National Aeronautics and Space Administration (NASA) is committed to effectively performing the Agency's communication function in accordance with the Space Act section 203(a)(3) to "provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof," and to enhance public understanding of, and participation in, the nation's space program in accordance with the NASA Strategic Plan.

II. Methods of Collection

Electronically available form.

III. Data

Title: NASA Kennedy Space Center Exchange Evelyn Johnson Scholarship Program.

OMB Number: 2700-new.

Type of Review: New information collection.

Affected Public: Individuals.

Estimated Annual Number of Activities: 20.

Estimated Number of Respondents per Activity: 1.

Annual Responses: 20.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 20 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. 2024-03861 Filed 2-23-24; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL CREDIT UNION ADMINISTRATION

[NCUA-2023-0070]

Minority Depository Institution Preservation Program

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final interpretive ruling and policy statement.

SUMMARY: The NCUA Board is issuing revisions to Interpretive Ruling and Policy Statement (IRPS) 13-1, regarding the Minority Depository Institution Preservation Program for credit unions.

DATES: The revised IRPS is effective March 27, 2024.

FOR FURTHER INFORMATION CONTACT: Supervisory Program Manager Kristi Kubista-Hovis or Program Manager Pamela Williams, Office of Credit Union Resources and Expansion, 703-518-6610 or CUREMDI@ncua.gov.

SUPPLEMENTARY INFORMATION

I. Background

Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) in response to the savings and loan industry crisis.¹ FIRREA included provisions designed to encourage federal financial regulators to preserve and promote minority depository

institutions.² Specifically, FIRREA section 308 required the Secretary of the Treasury to consult with the Office of Thrift Supervision (OTS) and the Federal Deposit Insurance Corporation (FDIC) on best methods to achieve the following goals:

- Preserving the number of minority depository institutions;
- Preserving the minority character of a minority depository institution involved in a merger or acquisition;
- Providing technical assistance to prevent the insolvency of minority depository institutions;
- Encouraging the formation of new minority depository institutions; and
- Providing training, technical assistance, and educational programs to minority depository institutions.³

Those agencies developed various initiatives aimed at preserving federally insured banks and savings institutions that meet FIRREA's definition of a minority depository institution.⁴

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).⁵ Section 367(4)(A) of the Dodd-Frank Act expanded FIRREA section 308 to require the Secretary of the Treasury to consult with the National Credit Union Administration (NCUA) and the Board of Governors of the Federal Reserve System, in addition to the FDIC and the Office of the Comptroller of the Currency on methods for best achieving the FIRREA goals.⁶ Section 367(4)(B) of the Dodd-Frank Act also amended FIRREA section 308 to require each agency to submit an annual report to Congress describing actions it has taken to preserve and encourage minority depository institutions.⁷

In 2013, the NCUA Board (Board) proposed Interpretive Ruling and Policy Statement (IRPS) 13-1 to establish a Minority Depository Institution Preservation Program to encourage the preservation of minority depository institutions and the establishment of new ones.⁸ In 2015, the Board approved final IRPS 13-1, establishing the

² *Id.* Title III, sec. 308, 103 Stat. 353, *codified at* 12 U.S.C. 1463 note, "Preserving Minority Ownership of Minority Financial Institutions."

³ *Id.* sec. (a). The Office of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System also initiated minority depository institution programs to comply with the spirit of FIRREA section 308, even though neither was originally required to do so. OTS became part of the Office of the Comptroller of the Currency on July 21, 2011.

⁴ *Id.* sec. (b).

⁵ Public Law 111-203, 124 Stat. 1376 (2010); 12 U.S.C. 5301 *et seq.*

⁶ 12 U.S.C. 1463 note sec. (a).

⁷ *Id.* sec. (c).

⁸ 78 FR 46374 (July 31, 2013).

¹ Public Law 101-73, 103 Stat. 183 (1989).

NCUA's Minority Depository Institution Preservation Program, administered by the agency's Office of Minority and Women Inclusion (OMWI).⁹ Consistent with the statutory language, IRPS 13–1 required that for designation as a minority depository institution, the majority of a credit union's members, the majority of its board, and the majority of the "community it services, as defined in its charter" must be eligible minorities. An eligible minority, under FIRREA section 308, is any Black American, Asian American, Hispanic American, or Native American.

The Board restructured the agency in 2018. Among other changes, the restructuring created the Office of Credit Union Resources and Expansion (CURE). At that time, CURE assumed administration of the NCUA's Minority Depository Institution Preservation Program from OMWI.

In June 2023, the Board invited comment on proposed revisions to IRPS 13–1.¹⁰ The proposed revisions included:

- Updating the administering office to CURE to reflect the agency's current structure;
- Clarifying that the meaning of "community it services," means a credit union's field of membership;
- Adding a reference to agency guidance to examiners regarding supervision of minority depository institutions;
- Clarifying the process for reviewing a minority depository institution's designation status; and
- Adding new subsection headings and expanding the discussion of agency actions and policies in the areas of minority depository institution engagement, technical assistance, examinations of minority depository institutions, grants and loans, and training.

The Board invited comment on all aspects of the IRPS, including suggestions for any other information or resources the agency could provide to assist credit unions that are minority depository institutions.

II. Summary of Comments on Proposed Changes to IRPS 13–1 and Final IRPS

The NCUA received five comments on the proposed changes. All commenters were broadly supportive of minority depository institutions and the NCUA's Minority Depository Institution Preservation Program. Commenters noted that minority depository institution credit unions provide important benefits to their communities,

including by offering services to those excluded from the mainstream financial system, providing safe and affordable alternatives to predatory lenders, and stimulating economic growth in the communities they serve. Most of the commenters also had suggestions for changes to the IRPS and ways in which the NCUA can better support minority depository institutions. After considering the comments, as discussed below, the Board is adopting the IRPS substantially as proposed.

One commenter requested that the NCUA extend or reopen the comment period, stating that some stakeholders may have been unaware of the proposed IRPS due to current industry and economic challenges. The Board is not extending or reopening the comment period. The original IRPS includes outdated references and the Board provided the standard 60 days for comments under NCUA rulemaking procedures.¹¹ Further, the comments received represented input from a variety of interested parties. One letter, from a trade association focused on community development and minority depository institution credit unions, had 42 co-signers, including 38 individual minority depository institution credit unions, a national credit union trade association, a state credit union trade association, and groups representing minority depository institution credit unions and credit union professionals. Another national trade association, a trade association for state credit union regulators, and one state-level trade association also submitted comments. Every commenter expressed support for the IRPS and the mission and purpose of minority depository institutions. Additionally, many minority depository institution credit unions are members of one or more of the associations that submitted comments. Considering the broad representation of credit union industry perspectives among the commenters, the Board finds that the comment period was adequate to ensure that it received sufficient feedback on the proposal.

Another commenter requested that the NCUA amend the eligibility standards so that credit unions that meet as few as one of the three required criteria could become minority depository institutions, instead of the requirement in the existing and proposed IRPS that all three criteria be met. This commenter noted challenges in establishing that a majority of "the community it services" is made up of

minorities. This change is not supported by the statute, which requires that a mutual institution meet all three standards to become a minority depository institution. The statute specifically requires that for a mutual institution to qualify as a minority depository institution, a majority of the board of directors, a majority of the account holders, and a majority of "the community which it services" are minorities.¹² The Board's longstanding interpretation of the statutory requirement is that credit unions are subject to the requirements for mutual institutions.¹³

Similarly, another commenter requested an expansion of the minority depository institution criteria to include all credit unions that commit to minority depository institution principles, that have some minority depository institution characteristics, or that have a minority depository institution credit union merge into them. The Board reiterates that the statute establishes the requirements for minority depository institution designation and permitting differing eligibility requirements would not comply with the statute.

Another commenter commended the NCUA for recognizing the uniqueness of minority depository institutions and the need for a tailored approach to examination and supervision of them. This commenter recommended that the NCUA increase efforts to promote and support the minority depository institution mentorship program and be proactive in providing more resources to minority depository institutions, such as regulatory updates, best practices, and opportunities for training. Through CURE, the NCUA communicates opportunities and resources to minority depository institution credit unions, such as through social media and direct email. The NCUA offered a Minority Depository Institution Mentoring Program from 2020–2022 in conjunction with the then Minority Depository Institution Mentoring grant initiative. Feedback from participating mentees and mentors was overall positive, yet there was not sufficient participation to sustain the program. The agency will continue to seek opportunities to support minority depository institution credit unions and increase their awareness of opportunities.

One commenter suggested the NCUA consider offering technical assistance

¹² Title III, sec. 308, Public Law 101–73, 103 Stat. 353 (1989), as amended by title III, sec. 367(4), Public Law 111–203, 124 Stat. 1556 (2010), *codified* at 12 U.S.C. 1463 note.

¹³ 80 FR 36356, 36357 (June 24, 2015).

⁹ 80 FR 36356 (June 24, 2015).

¹⁰ 88 FR 42105 (June 29, 2023).

¹¹ IRPS 87–2, as amended by IRPS 03–2 and IRPS 15–1, available at <https://ncua.gov/files/publications/irps/IRPS1987-2.pdf>.

funding support to very small minority depository institution credit unions and minority depository institution credit unions that are managing significant challenges, such as identified in their examination reports. The Board notes that for the first time during 2023 a minority depository institution could receive Community Development Revolving Loan Fund funding regardless of its low-income designation status. Such funding may be used for technical assistance in accordance with grant requirements. The NCUA's Small Credit Union and Minority Depository Institution Support Program offers technical assistance to address challenges such as those identified in their examination reports. This assistance is provided at no additional cost to participating credit unions.

Another commenter opined that it would be helpful if the agency provided additional transparency around examination standards for minority depository institution credit unions and explained how these examination standards differ from standard procedures. While examination standards for MDIs and non-MDI credit unions are the same, the Board notes that the NCUA provides guidance for examiners to consider the MDI's mission, unique characteristics, and tailored strategies during an examination. This same commenter suggested creating a group of examiners focused on small minority depository institution credit unions and extending regulatory flexibility to all small minority depository institution credit unions. These suggestions go beyond the scope of the proposed revisions to the IRPS and were provided to applicable NCUA offices to consider. During 2023, the NCUA developed peer metrics in order for examiners to compare minority depository institutions with minority depository institutions. The agency also issued customized guidance to examiners to provide insights into minority depository institutions' unique business models and members' needs. The guidance assists examiners in understanding minority depository institutions' distinct business model compared to other mainstream financial institutions by providing instruction on how to use minority depository institution peer metrics instead of traditional peer metrics.

Commenters also requested the NCUA provide resources to minority depository institution credit unions for specific purposes, such as travel support to enable participation in the NCUA's in-person events, access to an interactive analysis tool that would

simplify the process of determining whether an area meets the concentration of facilities test, and additional information about how to track and store member demographic data for purposes of minority depository institution certification. These suggestions were provided to applicable NCUA offices to consider.

Finally, one commenter requested that the NCUA consider supporting the establishment of a fund similar to the Mission-Driven Bank Fund.¹⁴ This commenter also encouraged the NCUA to advocate for more inclusion of minority depository institution credit unions in opportunities provided by the Economic Opportunity Coalition. As the Economic Opportunity Coalition is established and funded by the private sector, the Board believes it is not appropriate to take an advocacy role with respect to this organization. The NCUA is researching the feasibility of the establishment of a fund similar to the Mission-Driven Bank Fund and will inform stakeholders of the outcome of the research. It should be noted that the NCUA engages with other federal agencies to educate them about credit unions, ensure access to applicable resources, and to host webinars about resources they offer minority depository institutions. Examples include engagement with the Community Development Financial Institutions (CDFI) Fund concerning changes to the requirements for CDFI certification, and engagement with the U.S. Department of the Treasury to facilitate credit union access to the Emergency Capital Investment Program. The NCUA will continue to engage with other government entities to further support minority depository institution credit unions, consistent with its mission and statutory authorities.

In summary, the Board appreciates the various suggestions from commenters and, as noted above, will consider whether and how to implement some of the suggestions. The final paragraph of the IRPS also states that the NCUA's annual report to Congress will include a discussion of the feedback it has solicited and received from minority depository institution credit unions on the effectiveness of the agency's minority depository institution support and preservation activities. The Board believes that, should it determine to adopt some of the suggestions, further

changes to the IRPS would not be necessary.

After carefully considering the alternatives offered by these commenters, the Board adopts the revisions to IRPS 13–1 as proposed, with a few minor grammatical and stylistic changes and one correction. The stylistic changes are that the final IRPS consistently uses the phrase “field of membership,” (FOM) instead of the phrase “potential members” that the proposed IRPS had carried over from the prior version. This change makes the language of the entire IRPS consistent with the clarification that “community it services” means FOM.

Additionally, the proposed IRPS mischaracterized the agency's practice in stating that technical assistance is offered annually to each minority depository institution credit union, and the final version of the IRPS deletes this sentence. The Board emphasizes that the change in the language of the IRPS does not change the availability of technical assistance resources for minority depository institution credit unions, including through the Community Development Revolving Loan Fund's grants and loans and through the Small Credit Union and Minority Depository Institution Support Program.

Authority: 12 U.S.C. 1463 note; Sec. 308, Pub. L. 101–73, 103 Stat. 353; as amended by Sec. 367(4), Pub. L. 111–203, 124 Stat. 1556.

III. Interpretive Ruling and Policy Statement 13–1, Minority Depository Institution Preservation Program, as Amended

The text of IRPS 13–1 follows:

a. Goals and Objectives of the Minority Depository Institution Preservation Program

Minority depository institutions play an important and unique role in promoting the economic viability of minority and underserved communities. Through its Minority Depository Institution Preservation Program, the NCUA engages in a range of efforts to preserve minority depository institutions and foster their success. The Minority Depository Institution Preservation Program is designed to comply with section 308 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which requires the NCUA to submit an annual report to Congress summarizing

¹⁴ The Mission-Driven Bank Fund is an initiative of the Federal Deposit Insurance Corporation developed for FDIC-insured Minority Depository Institutions and Community Development Financial Institutions.

its actions taken in furtherance of section 308's goals to:¹⁵

- Preserve the present number of minority depository institutions;
- Preserve the minority character of minority depository institutions involved in mergers and acquisitions;
- Provide technical assistance to prevent insolvency of minority depository institutions that are not now insolvent;
- Promote and encourage the creation of new minority depository institutions; and
- Provide training, technical assistance, and educational programs for minority depository institutions.

b. Description of the Minority Depository Institution Preservation Program

The NCUA's Minority Depository Institution Preservation Program consists of proactive steps and outreach efforts to promote and preserve minority depository institutions in the credit union system. The NCUA's Office of Credit Union Resources and Expansion (CURE) administers the agency's Minority Depository Institution Preservation Program and will meet periodically with state regulators, other federal regulators, and other stakeholders to discuss outreach efforts, share ideas, and identify areas to work together to assist minority depository institutions.

The NCUA offers minority depository institution-designated credit unions a variety of initiatives to assist in preserving the economic viability of their institutions. The initiatives include technical assistance, educational opportunities, and funding. Examples of such initiatives include the following:

- Consulting and support programs;
- Trainings; and
- Grants and loans through the NCUA's Community Development Revolving Loan Fund (CDRLF), subject to eligibility.¹⁶

Examples of broad-based and individualized technical assistance include the following:

- Providing guidance in resolving examination concerns;
- Helping minority depository institutions locate new sponsors, mentors, or merger partners;

- Assisting with field of membership expansions;
- Supporting management in setting up new programs and services;
- Attempting to preserve the minority character of failing institutions during the resolution process; and
- Aiding groups that are interested in chartering a new minority depository institution.

Engagement With Minority Depository Institutions

The NCUA's Minority Depository Institution Preservation Program will provide periodic engagement with minority depository institutions through interaction with headquarters and field staff. This interaction includes:

- sharing information and expertise on supervisory topics;
- using various venues to engage in an open dialogue between the NCUA, minority depository institutions, and related organizations;
- seeking feedback on the NCUA's efforts under the Minority Depository Institution Preservation Program; and
- providing a variety of training opportunities hosted or sponsored by the NCUA.

The NCUA's outreach also includes seeking out, working with, and supporting groups interested in applying for a new federal or state charter with a minority depository institution designation and aiding existing credit unions interested in receiving the minority depository institution designation.

Technical Assistance

The NCUA will provide technical assistance to a minority depository institution upon request. A minority depository institution should contact its assigned NCUA regional office, supervisory examiner, or district examiner to request technical assistance.

Technical assistance is not an examination or supervisory activity and will be provided separately from examination and supervision contacts. Technical assistance includes, but is not limited to, assistance in understanding applicable laws and regulations, agency processes, reporting requirements, supervisory guidance, accounting standards, supervisory findings and conclusions (only after the conclusion of the applicable examination or supervision contact), applications or requests for agency approval or action (such as field of membership, bidding on a failing institution, regulatory waivers), and assistance in designating as a minority depository institution. In providing technical assistance, agency

staff will not perform tasks expected of an institution's management or employees. And while they may help the institution understand how to apply or bid, agency staff will not assist or guide the institution in developing the substance of such application or bid.

Examinations of Minority Depository Institutions

Minority depository institution-designated credit unions have a unique role in promoting the economic viability of minority and underserved communities, at times necessitating distinct approaches to taking and managing the related financial and operational risks. The NCUA expects examiners to recognize the distinctive characteristics and differences in core objectives of each financial institution and consider these when evaluating the institution's financial and operational condition and related management practices. Examiners will evaluate a minority depository institution using, among other things, peer metrics such as through the Financial Performance Report.

The NCUA provides examiners guidance to educate them about the unique challenges faced by minority depository institutions and the support and services the NCUA offers to help minority depository institutions address such challenges. The guidance acknowledges, at times, some minority depository institutions may need more or different support from the NCUA than other credit unions. The guidance also lists specific types of technical assistance a minority depository institution may request of the NCUA. It also advises that minority depository institutions often have unique memberships and provide financial services to consumers and businesses in communities that might not otherwise have access to another federally insured financial institution. Therefore, the policies, processes, risks, and practices of minority depository institutions may vary and comparison to other credit unions based solely on similar size may have limited value. Instead, examiners are instructed to assess each minority depository institution based on its unique strategy and membership.

CDRLF Grants and Loans

The CDRLF provides loans and grants to low-income designated credit unions, some of which are also designated as minority depository institutions, to expand outreach to underserved populations, improve digital services and cybersecurity, provide staff training, and support capacity-building programs, as examples. The

¹⁵ Title III, sec. 308, Public Law 101-73, 103 Stat. 353 (1989), as amended by title III, sec. 367(4), Public Law 111-203, 124 Stat. 1556 (2010), *codified at* 12 U.S.C. 1463 note.

¹⁶ Prior to 2023, under the annual appropriations statutes, grants and loans from the CDRLF were historically only available to low-income designated credit unions, some of which are also minority depository institutions. However, not all minority depository institutions have a low-income designation.

Consolidated Appropriations Act for fiscal year 2023 made minority depository institutions without the low-income designation eligible for CDRLF grants and loans through September 30, 2024.¹⁷

Training and Education

The NCUA offers training to credit unions including minority depository institutions, through various formats such as webinars, online courses, videos, and in-person events. Through the NCUA Learning Management System, the agency offers training and educational resources to credit union board members, management, employees, and volunteers online and at no charge. Examples of the content provided include guidance on credit union operations, compliance, community partnerships, and strategic planning.¹⁸

Preservation of Minority Depository Institutions

With regard to a potentially failing minority depository institution or the need for an assisted merger of a minority depository institution, as with any insured credit union, the Board will consider providing section 208 assistance under the Federal Credit Union Act to reduce the risk or avert a threatened loss to the National Credit Union Share Insurance Fund (NCUSIF), facilitate a merger or consolidation, or to prevent the closing of a credit union that the Board determines is in danger of closing.¹⁹ Requirements concerning field of membership apply to most mergers. In addition, the NCUA must consider resolution costs and safety and soundness implications for all mergers.

The NCUA will make every effort to preserve the minority character of failing minority depository institutions during the resolution process. In the event of the potential failure of an minority depository institution, the agency will contact minority depository institutions in the NCUA's merger registry that qualify to bid on a particular failing institution. Agency staff will solicit interest in bidding on the failing minority depository institution and offer technical assistance to any minority depository institution desiring to bid. The NCUA will also provide minority depository institutions interested in submitting a bid with an

additional two weeks to submit a bid whenever possible. Except in the cases of conservatorships, liquidations, or assisted mergers, the minority depository institution's board of directors is generally the decision-maker on a merger partner provided the selection is consistent with regulatory and safety and soundness standards. For conservatorships, liquidations, or assisted mergers, in the selection process, the NCUA will consider all the requirements applicable to a merger or purchase and assumption, including FIRREA's general preference guidelines.²⁰

c. Minority Depository Institution Designation Eligibility

The agency adopted the definition of a minority depository institution in FIRREA section 308 that applies to a mutual institution.²¹ Accordingly, a credit union is eligible to receive the minority depository institution designation if it meets all the following criteria:

- A majority of its current members are from any of the eligible minority groups;
- A majority of the members of its board of directors are from any of the eligible minority groups; and
- A majority of the community it services, as designated in its field of membership, are from any of the eligible minority groups.

For minority representation to be a "majority," it must be greater than 50 percent.

The NCUA relies on the FIRREA section 308 "minority" definition to identify an eligible minority as any Black American, Asian American, Hispanic American, or Native American.²² For the purpose of this IRPS, Asian American includes anyone who is Native Hawaiian or Other Pacific Islander, and Native American includes anyone who is American Indian or Alaska Native. Also, for the purpose of minority representation under the minority depository institution definition, an individual who falls into more than one of the minority categories will be considered as a single, eligible minority.

A credit union that meets the eligibility requirements can self-

designate as a minority depository institution by following the guidelines as specified on the NCUA's website. The instructions to the NCUA's *Credit Union Profile* form, which credit unions use to self-designate as a minority depository institution, contain detailed directions on how to make the designation.²³ A minority depository institution may participate in the NCUA's Minority Depository Institution Preservation Program subject to the eligibility requirements of any specific initiative. An eligible credit union's decision to designate as a minority depository institution or to participate in the Minority Depository Institution Preservation Program is voluntary.

A credit union defined as a "small credit union" by the NCUA under the Regulatory Flexibility Act (RFA) may self-designate greater than 50 percent representation among its current members, and within the community it services (field of membership), based solely on knowledge of those members. Under the RFA, the NCUA currently defines a small credit union as a credit union with total assets of less than \$100 million.²⁴

A credit union not defined as a small credit union by the NCUA may rely on one of the following methods, as applicable, to determine the minority composition of its current membership exclusively and of the community it services. The credit union must maintain documentation supporting its minority depository institution self-designation.

1. The credit union may ascertain the minority representation using demographic data from the U.S. Census Bureau website, based on the area(s) where the current membership or field of membership resides, such as a township, borough, city, county, or Metropolitan Statistical Area. If the U.S. Census data—for example, census tracts, zip codes, townships, boroughs, cities, or counties—shows the area's population comprises mostly eligible minorities, the credit union may assume that its current membership and the community it services each have the same minority composition as the Census data indicates.

2. The credit union may use Home Mortgage Disclosure Act (HMDA) data to calculate the reported number of minority mortgage applicants divided by the total number of mortgage applicants within the credit union's membership. If the share of minority

¹⁷ Div. E, title V, Public Law 117–328, 136 Stat. 4690 (2022). Refer to the Grants and Loans section of the NCUA website for eligibility requirements in future periods.

¹⁸ These training opportunities are accessible to all credit unions through the Learning section of the NCUA's website.

¹⁹ 12 U.S.C. 1788(a)(1)–(2).

²⁰ Generally, the NCUA is involved in the selection process when the transaction will cause a loss to the NCUSIF or when the failing credit union is in conservatorship and the NCUA Board is the conservator. For additional information on the NCUA's selection process, see Letter to Credit Unions 10–CU–11, *Information on NCUA's Merger and Purchase & Assumption Process*.

²¹ 12 U.S.C. 1463 note sec. (b)(1)(C).

²² *Id.*

²³ NCUA Form 4501A, <https://ncua.gov/files/publications/regulations/credit-union-profile-form-instructions-4501A-sept-2022.pdf>.

²⁴ 80 FR 57512 (Sept. 24, 2015).

representation among applicants is greater than 50 percent, the credit union may assume its current membership has the same minority composition as the HMDA data indicates. If a credit union grants a majority of its mortgage loans to minorities, it is likely the majority of the community the credit union services (its field of membership) will consist of minorities.²⁵

3. The credit union may elect to collect data from members who voluntarily choose to participate in such collection about their racial identity and use the data to determine minority representation among the credit union's membership. The credit union should consider using an unbiased third party to conduct such a collection. For example, data can be collected through a survey of members assessing the services they desire, or by mailed electoral ballots for official positions. Once collected, it is essential to maintain the confidentiality of the data; it should not be retained in the members' files or with any personal identifiers, such as, names, accounts, or Social Security numbers. If a majority of its current members are minorities, it is likely the majority of the community the credit union services (its field of membership) will consist of minorities.

4. The credit union may use any other reasonable form of data, such as membership address list analyses or an employer's demographic analysis of employees.

A minority depository institution credit union must assess whether it continues to meet the required definition of a minority depository institution whenever there is a change in its board of directors, or it makes a significant change to its field of membership, and update its designation, if necessary, in the NCUA *Credit Union Profile*. In accordance with the regular examination process, the NCUA will review whether a credit union has updated its analysis and made any corresponding changes to its self-designation in the *Credit Union Profile*. A minority depository institution may elect to withdraw its designation by not completing the relevant questions in the *Credit Union Profile*.

d. Monitoring and Reporting on Minority Depository Institutions

The NCUA will monitor minority depository institutions and report to Congress annually on the number and overall financial condition of minority depository institutions, along with

actions taken by the agency to preserve and strengthen them and to encourage the chartering of new ones.²⁶ The report will also summarize the NCUA's efforts to obtain feedback from minority depository institutions on the effectiveness of the agency's minority depository institution support and preservation activities. Additionally, the NCUA maintains a list of minority depository institutions on its website.

IV. Regulatory Procedures

Regulatory Flexibility Act

The RFA generally requires that when an agency issues a proposed rule or a final rule pursuant to the Administrative Procedure Act or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers credit unions with assets less than \$100 million to be small entities.²⁷ A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule.

The Board fully considered the potential economic impact of the changes during the development of the revised IRPS. The revised IRPS would clarify the NCUA's current policy on minority depository institution preservation and provide additional services to minority depository institutions. The revised IRPS would not impose any new significant burden on credit unions designated as minority depository institutions and may provide some additional resources. The resources gained, however, are unlikely to result in a significant economic impact for affected credit unions. Small credit unions are also not obligated to participate in the minority depository institution program. Accordingly, the NCUA certifies that the revised IRPS would not have a significant economic impact on a substantial number of small federally insured credit unions.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new information collection or amends existing

information collection requirements.²⁸ For purposes of the PRA, an information collection requirement may take the form of a reporting, recordkeeping, or a third-party disclosure requirement. The NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a valid Office of Management and Budget (OMB) control number. The current information collection requirements for the minority depository institution policy are approved under OMB control number 3133-0195, Minority Depository Institution Preservation Program.

This revision to IRPS 13-1 does not alter the information collection described under OMB control number 3133-0195, and the NCUA does not anticipate an increase in the burden based on the revisions. There are no additional information collections resulting from these changes.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive order to adhere to fundamental federalism principles. This revised IRPS 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. Although state-chartered credit unions are eligible to obtain the minority depository institution designation and receive assistance based on it, the NCUA does not believe this designation affects state governments generally or state credit union regulators in particular. The NCUA will continue to work cooperatively with state credit union regulators to examine federally insured, state-chartered credit unions and does not expect the revised IRPS to alter these relationships or allocation of responsibilities. The decision about whether to designate as a minority depository institution or seek minority depository institution program benefits will be an individual business decision for each credit union's board. The NCUA has determined that this revised IRPS does not constitute a policy that has federalism implications for purposes of the executive order.

²⁵ HMDA data can be obtained from the Federal Financial Institutions Examination Council website.

²⁶ 12 U.S.C. 1463 note sec. (c).

²⁷ See 80 FR 57512 (Sept. 24, 2015).

²⁸ 44 U.S.C. 3507(d); 5 CFR part 1320.

Assessment of Federal Regulations and Policies on Families

The NCUA has determined that these revisions to IRPS 13–1 will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.²⁹ The revisions to IRPS 13–1 may increase the ability of minority depository institutions to provide financial services to families. However, the Board does not have a means to quantify how this might affect family well-being as described in factors included in the legislation, which include the effects of the action on: the stability and safety of the family; parental authority and rights in the education, supervision, and nurture of their children; the ability of families to support their functions or substitute governmental activity for these functions; and increases or decreases to disposable income.

Small Business Regulatory Enforcement Fairness Act—Congressional Review Act

The Congressional Review chapter of the Small Business Regulatory Enforcement Fairness Act of 1996 generally provides for congressional review of agency rules.³⁰ A reporting requirement is triggered in instances where the NCUA issues a final rule as defined in the Administrative Procedure Act.³¹ Besides being subject to congressional oversight, an agency rule may also be subject to a delayed effective date if it is a “major rule.” The NCUA does not believe this revised IRPS is a “major rule” within the meaning of the relevant sections of the statute. As required by the statute, the NCUA will submit this final IRPS to OMB for it to determine if this final IRPS is a “major rule” for purposes of the statute. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

By the National Credit Union Administration Board on February 15, 2024.

Melane Conyers-Ausbrooks,
Secretary of the Board.

[FR Doc. 2024–03603 Filed 2–23–24; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Submission for OMB Review, Comment Request, Proposed Collection: Museums for All Program Evaluation

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 (IMLS) announces that the following information collection 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 clearance of the Museums for All Program Evaluation. 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 March 24, 2024.

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: Helen Wechsler, Supervisory Grants Management Specialist, Office of Museum Services, Institute of Museum and Library Services, 955 L’Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Ms. Wechsler can be reached by Telephone: 202–653–4779, or by email at hwechsler@imls.gov. Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

SUPPLEMENTARY INFORMATION: IMLS is 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 clearance of a program evaluation of the IMLS Museums for All Initiative to assess the impact of the program on participating institutions. A current IMLS cooperative agreement includes an evaluation of the Museums for All initiative, a program through which participating institutions offer free or reduced-price admission to families facing financial need. As part of this evaluation effort, a questionnaire, which is the subject of this Notice, will be undertaken to solicit information from participating institutions in Museums for All about the initiative’s implementation, benefits, and areas for improvement. A small number of participating institution staff will be interviewed virtually or in person as part of case study research. These information collections will be developed based on what is needed to undertake the evaluation. The information IMLS collects will build on,

²⁹ Public Law 105–277, 112 Stat. 2681 (1998).

³⁰ 5 U.S.C. 551.

³¹ *Id.*

but not duplicate existing or ongoing information collections.

The 60-day Notice was published in the **Federal Register** on December 20, 2023 (88 FR 88135) (Document Number 2023–27900). The agency has taken into consideration the one comment that was received under this Notice.

Agency: Institute of Museum and Library Services.

Title: Museums for All Program Evaluation.

OMB Control Number: 3137—NEW.

Agency Number: 3137.

Affected Public: Museum staff.

Total Number of Respondents: 914.

Frequency of Response: One time.

Average Hours per Response: .268.

Total Burden Hours: 245.

Total Annualized Capital/Startup

Costs: n/a.

Total Annual Cost Burden: \$7,951.

Total Annual Federal Costs: \$50,000.

Dated: February 20, 2024.

Suzanne Mhollo,

Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2024–03794 Filed 2–23–24; 8:45 am]

BILLING CODE 7036–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–192 and CP2024–198]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* February 27, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <https://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the

Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s):* MC2024–192 and CP2024–198; *Filing Title:* USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 37 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* February 16, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* February 27, 2024.

¹ See Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

This Notice will be published in the **Federal Register**.

Erica A. Barker,
Secretary.

[FR Doc. 2024–03779 Filed 2–23–24; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 1:00 p.m. on Thursday, February 29, 2024.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at <https://www.sec.gov>.

The General Counsel of the Commission, or her designee, has certified that, in her opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

- Institution and settlement of injunctive actions;
- Institution and settlement of administrative proceedings;
- Resolution of litigation claims; and
- Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION:

For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

(Authority: 5 U.S.C. 552b.)

Dated: February 22, 2024.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2024-04030 Filed 2-22-24; 4:15 pm]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-428, OMB Control No. 3235-0478]

Proposed Collection; Comment Request; Extension: Rule 11a1-1(T)

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 11a1-1(T) (17 CFR 240.11a1-1(T)), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) ("Exchange Act"). The Commission plans to submit this existing collection of information to the Office of Management and Budget ("OMB") for extension and approval.

On January 27, 1976, the Commission adopted Rule 11a1-1(T)—Transactions Yielding Priority, Parity, and Precedence (17 CFR 240.11a1-1(T)) under the Exchange Act (15 U.S.C. 78a *et seq.*) to exempt certain transactions of exchange members for their own accounts that would otherwise be prohibited under Section 11(a) of the Exchange Act. The Rule provides that a member's proprietary order may be executed on the exchange of which the trader is a member, if, among other things: (1) the member discloses that a bid or offer for its account is for its account to any member with whom such bid or offer is placed or to whom it is communicated; (2) any such member through whom that bid or offer is communicated discloses to others participating in effecting the order that it is for the account of a member; and (3) immediately before executing the order, a member (other than a specialist in such security) presenting any order for the account of a member on the exchange clearly announces or otherwise indicates to the specialist and to other members then present that he is presenting an order for the account of a member.

Without these requirements, it would not be possible for the Commission to monitor its mandate under the Exchange

Act to promote fair and orderly markets and ensure that exchange members have, as the principal purpose of their exchange memberships, the conduct of a public securities business.

There are approximately 531 respondents that require an aggregate total of approximately 15 hours per year to comply with this Rule. Each of these approximately 531 respondents makes an estimated 20 annual responses, for an aggregate of 10,620 responses per year. Each response takes approximately 5 seconds to complete. Thus, the total time burden per year is approximately 15 hours (10,620 × 5 seconds/60 seconds per minute/60 minutes per hour = 14.7618 hours rounded up to 15 hours). The approximate internal cost of compliance per hour is approximately \$405, resulting in a total internal cost of compliance of approximately \$6,075 per year (15 hours @ \$405).

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 will 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 April 26, 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: February 21, 2024.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024-03853 Filed 2-23-24; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99568; File No. SR-OCC-2023-007]

Self-Regulatory Organizations; Options Clearing Corporation; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Partial Amendment No. 1 and Amendment No. 2, Concerning Modifications to the Amended and Restated Stock Options and Futures Settlement Agreement Between the Options Clearing Corporation and the National Securities Clearing Corporation

February 20, 2024.

On August 10, 2023, the Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change SR-OCC-2023-007 ("Proposed Rule Change") pursuant to section 19(b) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4² thereunder to modify the Amended and Restated Stock Options and Futures Settlement Agreement dated August 5, 2017, between OCC and National Securities Clearing Corporation ("NSCC"), OCC's rules related to liquidity risk management, and OCC's rules related to default management in connection with the proposed modifications to the Existing Accord.³ The Proposed Rule Change was published for public comment in the **Federal Register** on August 30, 2023.⁴

On September 25, 2023, pursuant to section 19(b)(2) of the Exchange Act,⁵ the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Notice of Filing *infra* note 4, at 88 FR 59976.

⁴ Securities Exchange Act Release No. 98215 (Aug. 24, 2023), 88 FR 59976 (Aug. 30, 2023) (File No. SR-OCC-2023-007) ("Notice of Filing"). OCC also filed a related advance notice (SR-OCC-2023-801) ("Advance Notice") with the Commission pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 and Rule 19b-4(n)(1)(i) under the Exchange Act. 12 U.S.C. 5465(e)(1). 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b-4, respectively. The Advance Notice was published in the **Federal Register** on August 30, 2023. Securities Exchange Act Release No. 98214 (Aug. 24, 2023), 88 FR 59988 (Aug. 30, 2023) (File No. SR-OCC-2023-801).

⁵ 15 U.S.C. 78s(b)(2).

disapprove the Proposed Rule Change.⁶ On November 8, 2023, OCC filed a Partial Amendment No. 1 to the Proposed Rule Change.⁷ On November 14, 2023, the Commission published notice of Partial Amendment No. 1 and instituted proceedings, pursuant to section 19(b)(2)(B) of the Exchange Act,⁸ to determine whether to approve or disapprove the proposed rule change, as modified by the Partial Amendment No. 1.⁹ On January 23, 2024, OCC filed Amendment No. 2 to the Proposed Rule Change, which was published in the **Federal Register** for public comment on January 30, 2024.¹⁰ The Commission has received comments regarding the Proposed Rule Change.¹¹

Section 19(b)(2) of the Exchange Act¹² provides that proceedings to determine whether to approve or disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of filing of the proposed rule change. The time for conclusion of the proceedings may be

extended for up to 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination.¹³ The 180th day after publication of the Notice in the **Federal Register** is February 26, 2024.

The Commission is extending the period for Commission action on the Proposed Rule Change, as modified by Partial Amendment No. 1 and Amendment No. 2 (hereinafter, the “Proposed Rule Change”). The Commission finds that it is appropriate to designate a longer period within which to take action on the Proposed Rule Change so that the Commission has sufficient time to consider the issues raised by the Proposed Rule Change and to take action on the Proposed Rule Change. Accordingly, pursuant to section 19(b)(2)(B)(ii)(II) of the Exchange Act,¹⁴ the Commission designates April 26, 2024, as the date by which the Commission should either approve or disapprove the Proposed Rule Change SR–OCC–2023–007.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2024–03776 Filed 2–23–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99567; File No. SR–NSCC–2023–007]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Partial Amendment No. 1 and Amendment No. 2, To Modify the Amended and Restated Stock Options and Futures Settlement Agreement and Make Certain Revisions to the NSCC Rules

February 20, 2024.

On August 10, 2023, National Securities Clearing Corporation (“NSCC”) filed with the Securities and Exchange Commission (“Commission”) proposed rule change SR–NSCC–2023–007 (“Proposed Rule Change”) pursuant to Section 19(b) of the Securities Exchange Act of 1934 (“Exchange

Act”)¹ and Rule 19b–4² thereunder to modify the Amended and Restated Stock Options and Futures Settlement Agreement dated August 5, 2017, between NSCC and the Options Clearing Corporation (“OCC”) and make certain revisions to NSCC’s related Rules & Procedures.³ The Proposed Rule Change was published for public comment in the **Federal Register** on August 30, 2023.⁴

On September 25, 2023, pursuant to section 19(b)(2) of the Exchange Act,⁵ the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.⁶ On November 8, 2023, NSCC filed a Partial Amendment No. 1 to the Proposed Rule Change.⁷ On November 14, 2023, the Commission published notice of Partial Amendment No. 1 and instituted proceedings, pursuant to section 19(b)(2)(B) of the Exchange Act,⁸ to determine whether to approve or disapprove the proposed rule change, as modified by the Partial Amendment No. 1.⁹ On January 24, 2024, NSCC filed Amendment No. 2 to the Proposed Rule Change, which was published in the **Federal Register** for public comment on January 31, 2024.¹⁰ The Commission has received no comments regarding the substance of the Proposed Rule Change.¹¹

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ Capitalized terms not defined herein are defined in the NSCC Rules. The NSCC Rules are available at www.dtcc.com/-/media/Files/Downloads/legal/rules/nscc_rules.pdf.

⁴ Securities Exchange Act Release No. 98213 (Aug. 24, 2023), 88 FR 59968 (Aug. 30, 2023) (File No. SR–NSCC–2023–007) (“Notice of Filing”).

⁵ 15 U.S.C. 78s(b)(2).

⁶ Securities Exchange Act Release No. 98508 (Sep. 25, 2023), 88 FR 67407 (Sep. 29, 2023) (File No. SR–NSCC–2023–007).

⁷ Partial Amendment No. 1 delays implementation of the proposed change; however, Partial Amendment No. 1 was amended and replaced by Amendment No. 2. See Notice of Amendment *infra* note 10, at 89 FR 6140.

⁸ 15 U.S.C. 78s(b)(2)(B).

⁹ Securities Exchange Act Release No. 98930 (Nov. 14, 2023), 88 FR 80790 (Nov. 20, 2023) (File No. SR–NSCC–2023–007).

¹⁰ Securities Exchange Act Release No. 99432 (Jan. 25, 2024), 89 FR 6140 (Jan. 31, 2024) (File No. SR–NSCC–2023–007) (“Notice of Amendment”). Amendment No. 2 adds a second phase of changes to the proposed rule change. The changes added in Phase 2 include improved information sharing between OCC and NSCC and are designed to facilitate the shortening of the standard settlement cycle for most broker-dealer transactions from T+2 to T+1. See Securities Exchange Act Release No. 96930 (Feb. 15, 2023), 88 FR 13872 (Mar. 6, 2023) (File No. S7–05–22).

¹¹ The Commission received comments expressing general concerns unrelated to the substance of the filing. See, e.g., comments from JT Clark (Oct. 10, 2024) (general concern about

⁶ Securities Exchange Act Release No. 98508 (Sep. 25, 2023), 88 FR 67407 (Sep. 29, 2023) (File No. SR–OCC–2023–007).

⁷ Partial Amendment No. 1 delays implementation of the proposed change; however, Partial Amendment No. 1 was amended and replaced by Amendment No. 2. See Notice of Amendment *infra* note 10, at 89 FR 5974.

⁸ 15 U.S.C. 78s(b)(2)(B).

⁹ See Securities Exchange Act Release No. 98932 (Nov. 14, 2023), 88 FR 80781 (Nov. 20, 2023) (File No. SR–OCC–2023–007).

¹⁰ See Securities Exchange Act Release No. 99426 (Jan. 24, 2024), 89 FR 5974 (Jan. 30, 2024) (File No. SR–OCC–2023–007) (“Notice of Amendment”). Amendment No. 2 adds a second phase of changes to the proposed rule change. The changes added in Phase 2 include improved information sharing between OCC and NSCC and are designed to facilitate the shortening of the standard settlement cycle for most broker-dealer transactions from T+2 to T+1. See Securities Exchange Act Release No. 96930 (Feb. 15, 2023), 88 FR 13872 (Mar. 6, 2023) (File No. S7–05–22).

¹¹ Comments on the Advance Notice are available at <https://www.sec.gov/comments/sr-occ-2023-801/srocc2023801.htm>. The Commission received one comment supporting the proposed changes. See comment from John P. Davidson, Principal, Pirnie Advisory (Oct. 4, 2023), available at <https://www.sec.gov/comments/sr-occ-2023-801/srocc2023801-268179-645042.htm>. Since the proposal contained in the Advance Notice was also filed as a proposed rule change, all public comments received on the proposal are considered regardless of whether the comments are submitted on the Proposed Rule Change or the Advance Notice. Comments on the Proposed Rule Change are available at <https://www.sec.gov/comments/sr-occ-2023-007/srocc2023007.htm>. The Commission received comments on the proposed rule change that express concerns unrelated to the substance of the filing. See, e.g., comment from Gregory Englebert (Feb. 2, 2024) (raising concerns about a conflict of interest in the role of Financial Risk Management Officers as well as margin calls) comment from Curtis H. (Feb. 3, 2024) (referencing short selling and margin), and comment from CK Kashyap (Feb. 5, 2024) (referring to broker risk management in response to margin).

¹² 15 U.S.C. 78s(b)(2).

¹³ 15 U.S.C. 78s(b)(2)(B)(ii)(II).

¹⁴ *Id.*

¹⁵ 17 CFR 200.30–3(a)(57).

Section 19(b)(2) of the Exchange Act¹² provides that proceedings to determine whether to approve or disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination.¹³ The 180th day after publication of the Notice in the **Federal Register** is February 26, 2024.

The Commission is extending the period for Commission action on the Proposed Rule Change, as modified by Partial Amendment No. 1 and Amendment No. 2 (hereinafter, the “Proposed Rule Change”). The Commission finds that it is appropriate to designate a longer period within which to take action on the Proposed Rule Change so that the Commission has sufficient time to consider the issues raised by the Proposed Rule Change and to take action on the Proposed Rule Change. Accordingly, pursuant to section 19(b)(2)(B)(ii)(II) of the Exchange Act,¹⁴ the Commission designates April 26, 2024, as the date by which the Commission should either approve or disapprove the Proposed Rule Change SR–NSCC–2023–007.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–03775 Filed 2–23–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99566; File No. SR–NYSEAMER–2024–11]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Amending Rule 7.31E(a)(2)(B) Regarding Limit Order Price Protection

February 20, 2024.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934

corruption in the markets) and Anthony LaBree (Oct. 12, 2024) (concerns about OCC’s business practices). Comments are available at <https://www.sec.gov/comments/sr-nssc-2023-007/srnscc2023007.htm>.

¹² 15 U.S.C. 78s(b)(2).

¹³ 15 U.S.C. 78s(b)(2)(B)(ii)(III).

¹⁴ *Id.*

¹⁵ 17 CFR 200.30–3(a)(57).

¹ 15 U.S.C. 78s(b)(1).

(“Act”)² and Rule 19b–4 thereunder,³ notice is hereby given that, on February 9, 2024, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.31E(a)(2)(B) regarding Limit Order Price Protection. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 7.31E(a)(2)(B) (“Limit Order Price Protection”) to provide for the application of Limit Order Price Protection during the Core Trading Session even where a contra-side NBB (NBO) has not been established.

Currently, Rule 7.31E(a)(2)(B) provides that a Limit Order to buy (sell) will be rejected if it is priced at or above (below) the greater of \$0.15 or a specified percentage away from the National Best Offer (National Best Bid) (“NBO” and “NBB,” respectively),⁴ and

² 15 U.S.C. 78a.

³ 17 CFR 240.19b–4.

⁴ For securities with a reference price between \$0.00 and \$25.00, the specified percentage is 10%; for securities with a reference price between \$25.01 and \$50.00, the specified percentage is 5%; and for

that Limit Order Price Protection will not be applied to an incoming Limit Order to buy (sell) if there is no NBO (NBB).

The Exchange has recently received requests from market participants to modify this rule so that during the Core Trading Session, Limit Order Price Protection would apply even when no contra-side NBB or NBO has been established. In such cases, market participants have suggested that the Limit Order Price Protection calculation should use an alternate reference price, such as the last consolidated round-lot price of the trading day or the prior trading day’s official closing price. That way, even if no contra-side NBB or NBO has been established, the Exchange would still apply Limit Order Price Protection using the best-available alternate reference price, thereby offering market participants greater protections against the execution of Limit Orders with aberrant prices during the Core Trading Session. The Exchange is aware that the Limit Order Price Protection rule on the MIAX Pearl equities exchange (“MIAX Pearl”) currently features such a hierarchy of reference prices, so that Limit Order Price Protection is applied to all Limit Orders, even where no contra-side NBB or NBO has been established.⁵

In light of these requests from market participants, the Exchange now proposes to amend Rule 7.31E(a)(2)(B) to provide a hierarchy of reference prices against which Limit Order Price Protection would apply during the Core Trading Session. As in the current rule, during the Core Trading Session, a Limit Order to buy (sell) would be rejected if it is priced at or above (below) the greater of \$0.15 or a specified percentage (as set forth in the accompanying table) away from the NBO (NBB). But if such NBO (NBB) has not yet been established, the Exchange would use as the reference price the last consolidated round-lot price of that trading day, or, if none, the prior trading day’s Official Closing Price.⁶

securities with a reference price greater than \$50.00, the specified percentage is 3%.

⁵ Under current MIAX Pearl rules, a Limit Order to buy (sell) will be rejected if it is priced at or above (below) the greater of a specified dollar and percentage away from (1) the PBO (PBB), or, if unavailable, (2) the consolidated last sale price disseminated during the Regular Trading Hours on trade date, or, if unavailable, (3) the prior day’s Official Closing Price. See MIAX Pearl Rule 2614(a)(1)(ix)(A).

⁶ The Exchange’s proposed hierarchy of reference prices is substantially similar to the hierarchy in the MIAX Pearl rules. The only differences are that the Exchange’s proposal (a) would continue to reference the NBO (NBB) instead of the PBO (PBB), as the Exchange’s Limit Order Price Protection

Continued

The Exchange does not propose for this change to apply during the Early and Late Trading Sessions. This is because with respect to both the Early and Late Trading Sessions, there is a higher likelihood that overnight news developments may move the market more than the percentages specified in the Limit Order Price Protection rule. If, in the absence of an NBO (NBB), such percentages were applied to the prior trading day's Official Closing Price, this might lead the Exchange to reject orders that are appropriately trying to establish a quote at the new market level. For this reason, the Exchange believes the current rule should continue to govern during the Early and Late Trading Sessions, such that if there is no contra-side NBO (NBB), Limit Order Price Protection will not be applied.

Accordingly, the Exchange proposes to amend and reorganize Rule 7.31E(a)(2)(B) into three sub-sections, with sub-section (i) describing the relevant reference prices during the Core Trading Session, sub-section (ii) describing the relevant reference price during the Early and Late Trading Sessions, and sub-section (iii) describing the balance of the current rule.

Specifically, the Exchange proposes that new sub-section (i) of Rule 7.31E(a)(2)(B) would provide that during the Core Trading Session, a Limit Order to buy (sell) will be rejected if it is priced at or above (below) the greater of \$0.15 or a specified percentage (as set forth in the accompanying table) away from “(a) the NBO (NBB), or, if none, (b) the last consolidated round-lot price of that trading day, or, if none, (c) the prior trading day's Official Closing Price.”

The Exchange proposes that new sub-section (ii) of the rule would provide that during the Early and Late Trading Sessions, a Limit Order to buy (sell) will be rejected if it is priced at or above (below) the greater of \$0.15 or a specified percentage (as set forth in the accompanying table) away from the NBO (NBB), and that Limit Order Price Protection will not be applied to an incoming Limit Order to buy (sell) if there is no NBO (NBB).

Finally, the Exchange proposes that the balance of the current rule be moved

to new sub-section (iii) after the new subtitle “Applicability.”

The Exchange does not propose to make any other changes to the rule, nor does it propose any changes to the \$0.15 or specified percentages used in the calculation of Limit Order Price Protection.

Implementation

The Exchange anticipates implementing the proposed change in the first quarter of 2024 and, in any event, will implement the proposed rule change no later than the end of June 2024. The Exchange will announce the timing of such changes by Trader Update.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁷ in general, and with Section 6(b)(5),⁸ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that the proposed change would remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, protect investors and the public interest, because the use of a substantially similar hierarchy of reference prices for the application of Limit Order Price Protection when no contra-side NBO or NBB has been established is currently in effect on MIAAX Pearl and therefore is not novel.⁹ The Exchange further believes that the proposed change would enhance the Exchange's Limit Order Price Protection mechanism during the Core Trading Session, because it would apply using the best-available alternate reference price when a contra-side NBO or NBB has not been established, thereby offering market participants greater protection from aberrant prices and improving continuous trading and price discovery. In addition, the proposal to enhance Limit Order Price Protection by adding alternative reference prices to apply to the Core Trading Session would assist with the maintenance of fair and orderly markets because such mechanisms

protect investors from potentially receiving executions away from the prevailing market prices.

The Exchange also believes that it would protect investors and the public interest for the Exchange to maintain the current Limit Order Price Protection rule for the Early and Late Trading Sessions. With respect to both the Early and Late Trading Sessions, there is a higher likelihood that overnight news developments may move the market more than the percentages specified in the Limit Order Price Protection rule. If, in the absence of an NBO (NBB), such percentages were applied to the prior trading day's Official Closing Price, this might lead the Exchange to reject orders that are appropriately trying to establish a quote at the new market level. For this reason, the Exchange believes that, for the protection of investors and the public interest, the current rule should continue to govern during the Early and Late Trading Sessions, such that if there is no contra-side NBO (NBB), Limit Order Price Protection will not be applied.

Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would not address competitive issues but rather would enhance the Exchange's Limit Order Price Protection mechanism, to further protect market participants from aberrant prices and improve continuous trading and price discovery.

B. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁰ and Rule 19b-4(f)(6) thereunder.¹¹ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the

mechanism has always done; and (b) unlike the MIAAX Pearl rule, which permits an odd lot to serve as “the consolidated last sale price disseminated during the Regular Trading Hours on trade date,” the Exchange's proposal would instead use the last consolidated round-lot price of that trading day, which the Exchange believes is a better indication of actual market conditions. Both the MIAAX Pearl rule and the Exchange's proposed rule would use the prior trading day's Official Closing Price as the reference price of last resort.

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

⁹ See *supra* notes 5 and 6.

¹⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

¹¹ 17 CFR 240.19b-4(f)(6).

Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.¹²

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) ¹³ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEAMER-2024-11 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-NYSEAMER-2024-11. 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-NYSEAMER-2024-11 and should be submitted on or before March 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024-03774 Filed 2-23-24; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 20205 and # 20206; WASHINGTON Disaster Number WA-20005]

Presidential Declaration of a Major Disaster for the State of Washington

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Washington (FEMA-4759-DR), dated 02/15/2024.

Incident: Wildfires.

Incident Period: 08/18/2023 through 08/25/2023.

DATES: Issued on 02/15/2024.

Physical Loan Application Deadline Date: 04/15/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 11/15/2024.

ADDRESSES: Visit the MySBA Loan Portal at <https://lending.sba.gov> to apply for a disaster assistance loan.

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 President's major disaster declaration on 02/15/2024, applications for disaster loans may be submitted online using the MySBA Loan Portal <https://lending.sba.gov> or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at disastercustomerservice@sba.gov or by phone at 1-800-659-2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Spokane.

Contiguous Counties (Economic Injury Loans Only):

Washington: Lincoln, Pend Oreille, Stevens, Whitman

Idaho: Kootenai, Benewah, Bonner

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 202055 and for economic injury is 202060.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024-03877 Filed 2-23-24; 8:45 am]

BILLING CODE 8026-09-P

¹² 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹³ 15 U.S.C. 78s(b)(2)(B).

¹⁴ 17 CFR 200.30-3(a)(12).

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration**

[Docket No. 2023–2061]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Commercial Air Tour Operator Reports**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 3, 2023. The collection involves information from commercial air tour operators on the numbers and types of air tours over national park units. The information collected is necessary for the FAA and the National Park Service to track air tour operations over national parks and as background information in the development of air tour management plans and voluntary agreements for purposes of addressing any potential significant impacts from commercial air tour operations on the natural or cultural resources or visitor experience at the parks.

DATES: Written comments should be submitted by March 27, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Sandra Fox by email at: sandra.y.fox@faa.gov; phone 202–267–0928.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA’s performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility, and clarity of the information collection; and (d) ways that the burden could be

minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0750.*Title:* Commercial Air Tour Operator Reports.*Form Numbers:* There are no FAA forms associated with this collection of information.*Type of Review:* Renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 3, 2023 (88 FR 68271). The FAA Modernization and Reform Act of 2012 included amendments to the National Parks Air Tour Management Act (NPATMA) of 2000, which applies to commercial air tour operators who conduct tours over or within a half mile of a national park unit. One of these amendments requires commercial air tour operators conducting tours over national park units to provide the FAA and National Park Service with certain information on these operations. The information collected includes the date and time of day of the tour operation, the make and model of aircraft the tour was taken in, the name of tour route flown, and as required, flight monitoring data. The information allows the agencies to track air tour activity over national park units and provides background information that the agencies can utilize when developing an air tour management plan or voluntary agreement for a national park unit. Respondents are the commercial air tour operators currently authorized to conduct tours over national parks. Operators complete the information on a reporting template and provide nbvbnvwd6 either email it or mail it in to the agencies.

Respondents: 39 commercial air tour operators nationwide.*Frequency:* Information is collected semi-annually (twice a year), or annually for park units with 50 or fewer tours per year.*Estimated Average Burden per Response:* 25.6 hours.*Estimated Total Annual Burden:* 1,998 hours.

Issued in Washington, DC, on February 21, 2024.

Sandra Fox,

Environmental Protection Specialist, FAA Office of Environment and Energy.

[FR Doc. 2024–03880 Filed 2–23–24; 8:45 am]

BILLING CODE 4910–13–P**DEPARTMENT OF TRANSPORTATION****Federal Motor Carrier Safety Administration**

[Docket No. FMCSA–2018–0090]

Parts and Accessories Necessary for Safe Operation; Exemption Renewal for Automobile Carriers Conference and Auto Haulers Association of America; Correction**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).**ACTION:** Notice of provisional renewal of exemption; correction.

SUMMARY: In a notice of provisional renewal of exemption published in the **Federal Register** on February 21, 2024, FMCSA announced its decision to provisionally renew an exemption requested jointly by the Automobile Carriers Conference of the American Trucking Associations and the Auto Haulers Association of America to relieve motor carriers operating stinger-steered automobile transporter equipment from the requirement to place warning flags on projecting loads of new and used motor vehicles. The provisional exemption renewal contained an error in the Summary section regarding the term of the provisional exemption. The Agency corrects this error.

DATES: This correction is effective February 26, 2024. Comments on the notice of provisional renewal of exemption must still be received on or before March 22, 2024.

FOR FURTHER INFORMATION CONTACT: David Sutula, Vehicle and Roadside Operations Division, Office of Carrier, Driver, and Vehicle Safety, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; (202) 366–9209; MCPSV@dot.gov.

SUPPLEMENTARY INFORMATION:**Correction**

In FR Doc. 2024–03446 on page 13135, in the third column, in the **Federal Register** of February 21, 2024, correct the provisional renewal term cited in the last sentence of the Summary section to read:

“The exemption is renewed for 6 months, unless revoked earlier.” Issued under authority delegated in 49 CFR 1.87.

Larry W. Minor,
Associate Administrator for Policy.

[FR Doc. 2024–03830 Filed 2–23–24; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****[Docket Number FRA–2011–0104]****Central Florida Rail Corridor's Request To Amend Its Positive Train Control System****AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).**ACTION:** Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that, on February 15, 2024, the Central Florida Rail Corridor (CFRC) submitted a request for amendment (RFA) to its FRA-certified positive train control (PTC) system in order to temporarily disable its PTC system between Milepost (MP) 749.60 and MP 755.4 to perform infrastructure upgrades to better facilitate vehicular travel across a crossing. As this RFA may involve a request for FRA's approval of proposed material modifications to an FRA-certified PTC system, FRA is publishing this notice and inviting public comment on CFRC's RFA to its PTC system.

DATES: FRA will consider comments received by March 18, 2024. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to a PTC system.

ADDRESSES:

Comments: Comments may be submitted by going to <https://www.regulations.gov> and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and the applicable docket number. The relevant PTC docket number for this host railroad is Docket No. FRA–2011–0104. For convenience, all active PTC dockets are hyperlinked on FRA's website at <https://railroads.dot.gov/research-development/program-areas/train-control/ptc/railroads-ptc-dockets>. All comments received will be posted without change to <https://www.regulations.gov>; this includes any personal information.

FOR FURTHER INFORMATION CONTACT:

Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816–516–7168, email: Gabe.Neal@dot.gov.

SUPPLEMENTARY INFORMATION: In general, title 49 United States Code (U.S.C.) section 20157(h) requires FRA to certify that a host railroad's PTC system

complies with title 49 Code of Federal Regulations (CFR) part 236, subpart I, before the technology may be operated in revenue service. Before making certain changes to an FRA-certified PTC system or the associated FRA-approved PTC Safety Plan (PTCSP), a host railroad must submit, and obtain FRA's approval of, an RFA to its PTC system or PTCSP under 49 CFR 236.1021.

Under 49 CFR 236.1021(e), FRA's regulations provide that the FRA will publish a notice in the **Federal Register** and invite public comment in accordance with 49 CFR part 211, if an RFA includes a request for approval of a material modification of a signal or train control system. Accordingly, this notice informs the public that, on February 15, 2024, CFRC submitted an RFA to its PTCSP for its Interoperable Electronic Train Management System (I–ETMS), which seeks FRA's approval for a temporary outage during infrastructure upgrades to better facilitate vehicular travel across a crossing. That RFA is available in Docket No. FRA–2011–0104.

Interested parties are invited to comment on CFRC's RFA by submitting written comments or data. During FRA's review of CFRC's RFA, FRA will consider any comments or data submitted within the timeline specified in this notice and to the extent practicable, without delaying implementation of valuable or necessary modifications to a PTC system. *See* 49 CFR 236.1021; *see also* 49 CFR 236.1011(e). Under 49 CFR 236.1021, FRA maintains the authority to approve, approve with conditions, or deny a railroad's RFA at FRA's sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the commenter provides, to <https://www.regulations.gov>, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. *See* <https://www.regulations.gov/privacy-notice> for the privacy notice of www.regulations.gov. To facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2024–03875 Filed 2–23–24; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY**Community Development Financial Institutions Fund****Funding Opportunities: Bond Guarantee Program, FY 2024; Notice of Guarantee Availability**

Funding Opportunity Title: Notice of Guarantee Availability (NOGA) inviting Qualified Issuer Applications and Guarantee Applications for the Community Development Financial Institutions (CDFI) Bond Guarantee Program.

Announcement Type: Announcement of opportunity to submit Qualified Issuer Applications and Guarantee Applications.

Catalog of Federal Domestic

Assistance (CFDA) Number: 21.011.

Dates: Qualified Issuer Applications and Guarantee Applications may be submitted to the CDFI Fund starting on the date of publication of this NOGA. In order to be considered for the approval of a Guarantee in fiscal year (FY) 2024, Qualified Issuer Applications must be submitted by 11:59 p.m. Eastern Time (ET) on April 16, 2024 and Guarantee Applications must be submitted by 11:59 p.m. ET on April 23, 2024. If applicable, CDFI Certification Applications must be received by the CDFI Fund by 11:59 p.m. ET on March 23, 2024. Under FY 2024 authority, Bond Documents and Bond Loan documents must be executed, and Guarantees will be provided, in the order in which Guarantee Applications are approved or by such other criteria that the CDFI Fund may establish, in its sole discretion, and in any event by December 31, 2024.

Executive Summary: This NOGA is published in connection with the CDFI Bond Guarantee Program, administered by the Community Development Financial Institutions Fund (CDFI Fund), the U.S. Department of the Treasury (Treasury). Through this NOGA, the CDFI Fund announces the availability of up to \$500 million of Guarantee Authority in FY 2024 subject to Congressional authorization. This NOGA explains application submission and evaluation requirements and processes, and provides agency contacts and information on CDFI Bond Guarantee Program outreach. Parties

interested in being approved for a Guarantee under the CDFI Bond Guarantee Program must submit Qualified Issuer Applications and Guarantee Applications for consideration in accordance with this NOGA. Capitalized terms used in this NOGA and not defined elsewhere are defined in the CDFI Bond Guarantee Program regulations (12 CFR 1808.102) and the CDFI Program regulations (12 CFR 1805.104).

I. Guarantee Opportunity Description

A. Authority: The CDFI Bond Guarantee Program was authorized by the Small Business Jobs Act of 2010 (Pub. L. 111–240; 12 U.S.C. 4713a) (the Act). Section 1134 of the Act amended the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4701, *et seq.*) to provide authority to the Secretary of the Treasury (Secretary) to establish and administer the CDFI Bond Guarantee Program.

B. Bond Issue size; Amount of Guarantee authority: In FY 2024, the CDFI Fund expects that the Secretary may guarantee Bond Issues having a minimum Guarantee of \$100 million each, and up to an aggregate total of \$500 million, or other amounts authorized by FY 2024 Appropriations.

C. Program summary: The purpose of the CDFI Bond Guarantee Program is to support CDFI lending by providing Guarantees for Bonds issued for Eligible Community or Economic Development Purposes, as authorized by section 1134 and 1703 of the Act. The Secretary, as the Guarantor of the Bonds, will provide a 100% Guarantee for the repayment of the Verifiable Losses of Principal, Interest, and Call Premium of Bonds issued by Qualified Issuers. Qualified Issuers, approved by the CDFI Fund, will issue Bonds that will be purchased by the Federal Financing Bank. The Qualified Issuer will use 100% of Bond Proceeds to provide Bond Loans to Eligible CDFIs, which will use Bond Loan proceeds for Eligible Community and Economic Development Purposes, including providing Secondary Loans to Secondary Borrowers in accordance with the Secondary Loan Requirements. Secondary Loans may support lending in the following asset classes: CDFI-to-CDFI, CDFI to Financing Entity, Charter Schools, Commercial Real Estate, Daycare Centers, Healthcare Facilities, Rental Housing, Rural Infrastructure, Owner-Occupied Home Mortgages, Licensed Senior Living and Long-Term Care Facilities, Small Business, and Not-for-Profit Organizations, as these terms are defined in the Secondary Loan Requirements (Underwriting Review Checklist), which can be found on the

CDFI Fund's website at www.cdfifund.gov/bond.

D. Review Guarantee Applications, in general:

1. Qualified Issuer Applications submitted with Guarantee Applications will have priority for review over Qualified Issuer Applications submitted without Guarantee Applications. With the exception of the aforementioned prioritized review, all Qualified Issuer Applications and Guarantee Applications will be reviewed by the CDFI Fund on an ongoing basis, in the order in which they are received, or by such other criteria that the CDFI Fund may establish in its sole discretion.

2. Guarantee Applications that are incomplete or require the CDFI Fund to request additional or clarifying information may delay the ability of the CDFI Fund to move the Guarantee Application to the next phase of review. Submitting an incomplete Guarantee Application earlier than other applicants does not ensure first approval.

3. Qualified Issuer Applications and Guarantee Applications that were received in FY 2023 and that were neither withdrawn nor declined in FY 2023 will be considered under FY 2024 authority.

4. Pursuant to the Regulations at 12 CFR 1808.504(c), the Guarantor may limit the number of Guarantees issued per year or the number of Guarantee Applications accepted to ensure that a sufficient examination of Guarantee Applications is conducted.

E. Additional reference documents: In addition to this NOGA, the CDFI Fund encourages interested parties to review the following documents, which have been posted on the CDFI Bond Guarantee Program page of the CDFI Fund's website at <http://www.cdfifund.gov/bond>.

1. Guarantee Program Regulations. The regulations that govern the CDFI Bond Guarantee Program were published on February 5, 2013 (78 FR 8296; 12 CFR part 1808) (the Regulations), and provide the regulatory requirements and parameters for CDFI Bond Guarantee Program implementation and administration including general provisions, eligibility, eligible activities, applications for Guarantee and Qualified Issuer, evaluation and selection, terms and conditions of the Guarantee, Bonds, Bond Loans, and Secondary Loans.

2. Application materials. Details regarding Qualified Issuer Application and Guarantee Application content requirements are found in this NOGA and the respective application materials. Interested parties should review the

template Bond Documents and Bond Loan documents that will be used in connection with each Guarantee. The template documents are posted on the CDFI Fund's website for review. Such documents include, among others:

a. The Secondary Loan Requirements, which contain the minimum required criteria (in addition to the Eligible CDFI's underwriting criteria) for a loan to be accepted as a Secondary Loan or Other Pledged Loan. The Secondary Loan Requirements include the General Requirements and the Underwriting Review Checklist;

b. The Agreement to Guarantee, which describes the roles and responsibilities of the Qualified Issuer, will be signed by the Qualified Issuer and the Guarantor, and will include term sheets as exhibits that will be signed by each individual Eligible CDFI;

c. The Term Sheet(s), which describe the material terms and conditions of the Bond Loan from the Qualified Issuer to the Eligible CDFI. The CDFI Fund website includes template term sheets for the General Recourse Structure (GRS), the Alternative Financial Structure (AFS), and for the CDFI to Financing Entity Asset Class utilizing pooled tertiary loans;

d. The Bond Trust Indenture, which describes the responsibilities of the Master Servicer/Trustee in overseeing the Trust Estate and the servicing of the Bonds, which will be entered into by the Qualified Issuer and the Master Servicer/Trustee;

e. The Bond Loan Agreement, which describes the terms and conditions of Bond Loans, and will be entered into by the Qualified Issuer and each Eligible CDFI that receives a Bond Loan;

f. The Bond Purchase Agreement, which describes the terms and conditions under which the Bond Purchaser will purchase the Bonds issued by the Qualified Issuer, and will be signed by the Bond Purchaser, the Qualified Issuer, the Guarantor and the CDFI Fund; and

g. The Future Advance Promissory Bond, which will be signed by the Qualified Issuer as its promise to repay the Bond Purchaser. The template documents may be updated periodically, as needed, and will be tailored, as appropriate, to the terms and conditions of a particular Bond, Bond Loan, and Guarantee. Additionally, the CDFI Fund may impose terms and conditions that address risks unique to the Eligible CDFI's business model and target market, which may include items such as concentration risk of a specific Eligible CDFI, geography or Secondary Borrower.

The Bond Documents and the Bond Loan documents reflect the terms and conditions of the CDFI Bond Guarantee Program and will not be substantially revised or negotiated prior to execution.

F. Frequently Asked Questions: The CDFI Fund may periodically post on its website responses to questions that are asked by parties interested in applying to the CDFI Bond Guarantee Program.

G. Designated Bonding Authority: The CDFI Fund has determined that, for purposes of this NOGA, it will not solicit applications from entities seeking to serve as a Qualified Issuer in the role of the Designated Bonding Authority, pursuant to 12 CFR 1808.201, in FY 2024.

H. Noncompetitive process: The CDFI Bond Guarantee Program is a non-competitive program through which Qualified Issuer Applications and Guarantee Applications will undergo a merit-based evaluation (meaning, applications will not be scored against each other in a competitive manner in which higher ranked applicants are favored over lower ranked applicants). In the event the CDFI Bond Guarantee Program receives applications requesting more than the amount of Guarantee authority, it reserves the right to reduce the award amount to applicants as necessary in order to provide as many awards as possible.

I. Relationship to other CDFI Fund programs:

1. Award funds received under any other CDFI Fund Program cannot be used by any participant, including Qualified Issuers, Eligible CDFIs, and Secondary Borrowers, to pay principal, interest, fees, administrative costs, or issuance costs (including Bond Issuance Fees) related to the CDFI Bond Guarantee Program, or to fund the Risk-Share Pool for a Bond Issue.

2. Bond Proceeds may not be used to refinance any projects financed and/or supported with proceeds from the Capital Magnet Fund (CMF). This restriction remains in place so long as the property or project is financed or supported by a CMF award, until the end of the defined CMF award investment period, or when the loan funded by the CMF award has been replaced by a newer loan for a different phase of the project (for instance a permanent loan to replace a construction loan).

3. Bond Proceeds may not be used to refinance a leveraged loan during the seven-year NMTC compliance period. However, Bond Proceeds may be used to refinance a QLCI after the seven-year NMTC compliance period has ended, so long as all other programmatic requirements are met.

4. The terms Qualified Equity Investment, Community Development Entity, and QLCI are defined in the NMTC Program's authorizing statute, 26 U.S.C. 45D.

J. Relationship and interplay with other Federal programs and Federal funding: Eligible CDFIs may not use Bond Loans to refinance existing Federal debt or to service debt from other Federal credit programs.

1. The CDFI Bond Guarantee Program underwriting process will include a comprehensive review of the Eligible CDFI's concentration of sources of funds available for debt service, including the concentration of sources from other Federal programs and level of reliance on said sources, to determine the Eligible CDFI's ability to service the additional debt. The review of the CDFI's debt concentration could lead to covenants limiting the amount of the applicant's bond loan debt concentration in their portfolio.

2. In the event that the Eligible CDFI proposes to use other Federal funds to service Bond Loan debt or as a Credit Enhancement for Secondary Loans, the CDFI Fund may require, in its sole discretion, that the Eligible CDFI provide written assurance from such other Federal program in a form that is acceptable to the CDFI Fund and that the CDFI Fund may rely upon, that said use is permissible.

K. Contemporaneous application submission: Qualified Issuer Applications may be submitted contemporaneously with Guarantee Applications; however, the CDFI Fund will review an entity's Qualified Issuer Application and make its Qualified Issuer determination prior to approving a Guarantee Application. As noted above in D(1), review priority will be given to any Qualified Issuer Application that is accompanied by a Guarantee Application.

L. Other restrictions on use of funds: Bond Proceeds may not be used to finance or refinance any trade or business consisting of the operation of any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off-premises. Bond Proceeds may not be used to finance or refinance tax-exempt obligations or to finance or refinance projects that are also financed by tax-exempt obligations if: (a) such financing or refinancing results in the direct or indirect subordination of the Bond Loan or Bond Issue to the tax-exempt obligations, or (b) such financing or refinancing results

in a corresponding guarantee of the tax-exempt obligation. Qualified Issuers and Eligible CDFIs must ensure that any financing made in conjunction with tax-exempt obligations complies with CDFI Bond Guarantee Program Regulations.

II. General Application Information

The following requirements apply to all Qualified Issuer Applications and Guarantee Applications submitted under this NOGA, as well as any Qualified Issuer Applications and Guarantee Applications submitted under the FY 2023 NOGA that were neither withdrawn nor declined in FY 2023.

A. CDFI Certification Requirements:

1. In general. By statute and regulation, the Qualified Issuer applicant must be either a Certified CDFI (an entity that the CDFI Fund has officially notified that it meets all CDFI certification requirements as set forth in 12 CFR 1805.201) or an entity designated by a Certified CDFI to issue Bonds on its behalf. An Eligible CDFI must be a Certified CDFI as of the Bond Issue Date and must maintain its CDFI certification throughout the term of the corresponding Bond.

2. CDFI Certification requirements. Pursuant to the regulations that govern CDFI certification (12 CFR 1805.201), an entity may be certified if it is a legal entity (meaning, that it has properly filed articles of incorporation or other organizing documents with the State or other appropriate body in the jurisdiction in which it was legally established, as of the date the CDFI Certification Application is submitted) and meets the following requirements:

a. Primary Mission requirement (12 CFR 1805.201(b)(1)): To be a Certified CDFI, an entity must have a primary mission of promoting community development. In general, the entity will be found to meet the primary mission requirement if its incorporating documents or board-approved narrative statement (*i.e.*, mission statement or resolution) clearly indicate that it has a mission of purposefully addressing the social and/or economic needs of Low-Income individuals, individuals who lack adequate access to capital and/or financial services, distressed communities, and other underserved markets. An Affiliate of a Controlling CDFI, seeking to be certified as a CDFI (and therefore, approved to be an Eligible CDFI to participate in the CDFI Bond Guarantee Program), must demonstrate that it meets the primary mission requirement on its own merit, pursuant to the regulations and the CDFI Certification Application and

related guidance materials posted on the CDFI Fund's website.

b. Financing Entity requirement (12 CFR 1805.201(b)(2)): To be a Certified CDFI, an entity must demonstrate that its predominant business activity is the provision, in arms-length transactions, of Financial Products and/or Financial Services. On April 10, 2015, the CDFI Fund published a revision of 12 CFR 1805.201(b)(2), the section of the CDFI certification regulation that governs the "financing entity" requirement. The regulatory change creates a means for the CDFI Fund, in its discretion, to deem an Affiliate (meaning, in this case, an entity that is Controlled by a certified CDFI; see 12 CFR 1805.104) to have met the financing entity requirement based on the financing activity or track record of the Controlling CDFI (Control is defined in 12 CFR 1805.104), solely for the purpose of participating in the CDFI Bond Guarantee Program as an Eligible CDFI. This change is key to the creation of an AFS for the Bond Guarantee Program (see Section II(B)(2) of this NOGA for more information on the AFS). In order for the Affiliate to rely on the Controlling CDFI's financing track record, (A) the Controlling CDFI must be a Certified CDFI; (B) there must be an operating agreement that includes management and ownership provisions in effect between the two entities (prior to the submission of a CDFI Certification Application and in form and substance that is acceptable to the CDFI Fund). If applicable, CDFI Certification Applications must be received by the CDFI Fund by 11:59 p.m. ET on March 23, 2024. An applicant for an Affiliate certification must have submitted a CDFI Certification Application for an Affiliate by March 23, 2024 in order for it to be considered for CDFI certification and participation in the FY 2024 application round of the CDFI Bond Guarantee Program. This regulatory provision affects only the Affiliate's ability to meet the financing entity requirement for purposes of CDFI certification; said Affiliate must meet the other certification criteria in accordance with the existing regulations governing CDFI certification.

i. The regulation also states that, solely for the purpose of participating in the CDFI Bond Guarantee Program, the Affiliate's provision of Financial Products and Financial Services, Development Services, and/or other similar financing transactions does not need to be arms-length in nature if such transaction is by and between the Affiliate and Controlling CDFI, pursuant to an operating agreement that (a) includes management and ownership provisions, (b) is effective prior to the

submission of a CDFI Certification Application, and (c) is in form and substance that is acceptable to the CDFI Fund.

ii. An Affiliate whose CDFI certification is based on the financing activity or track record of a Controlling CDFI is not eligible to receive financial or technical assistance awards or tax credit allocations under any other CDFI Fund program until such time that the Affiliate meets the financing entity requirement based on its own activity or track record.

iii. If an Affiliate elects to satisfy the financing entity requirement based on the financing activity or track record of a Controlling CDFI, and if the CDFI Fund approves such Affiliate as an Eligible CDFI for the sole purpose of participation in the CDFI Bond Guarantee Program, said Affiliate's CDFI certification will terminate if: (A) it does not enter into Bond Loan documents with its Qualified Issuer within one (1) year of the date that it signs the term sheet (which is an exhibit to the Agreement to Guarantee); (B) it ceases to be an Affiliate of the Controlling CDFI; or (C) it ceases to adhere to CDFI certification requirements.

iv. An Affiliate electing to satisfy the financing entity requirement based on the financing activity or track record of a Controlling CDFI does not need to have completed any financing activities prior to the date the CDFI Certification Application is submitted or approved. However, the Affiliate and the Controlling CDFI must have entered into the operating agreement described in (b)(i)(B) above, prior to such date, in form and substance that is acceptable to the CDFI Fund.

c. Target Market requirement (12 CFR 1805.201(b)(3)): To be a Certified CDFI, an entity must serve at least one eligible Target Market (either an Investment Area or a Targeted Population) by directing at least 60.00% of all of its Financial Product activities (in both number and dollar volume of transactions) to one or more eligible Target Markets.

i. Solely for the purpose of participation as an Eligible CDFI in the FY 2024 application round of the CDFI Bond Guarantee Program, an Affiliate of a Controlling CDFI may be deemed to meet the Target Market requirement by virtue of serving either:

(A) an Investment Area through "borrowers or investees" that serve the Investment Area or provide significant benefits to its residents (pursuant to 12 CFR 1805.201(b)(3)(ii)(F)). For purposes of this NOGA, the term "borrower" or "investee" includes a borrower of a loan originated by the Controlling CDFI that

has been transferred to the Affiliate as lender (which loan must meet Secondary Loan Requirements), pursuant to an operating agreement with the Affiliate that includes ownership/ investment and management provisions, which agreement must be in effect prior to the submission of a CDFI Certification Application and in form and substance that is acceptable to the CDFI Fund. Loans originated by the Controlling CDFI do not need to be transferred prior to application submission; however, such loans must be transferred before certification of the Affiliate is effective. If an Affiliate has more than one Controlling CDFI, it may meet this Investment Area requirement through one or more of such Controlling CDFIs' Investment Areas; or

(B) a Targeted Population, which shall mean the individuals, who are Low Income persons or lack adequate access to Financial Products or Financial Services in the entity's Target Market meeting the requirements of 12 CFR 1805.201(b)(3)(iii) of the CDFI Program Regulations as designated in the Recipient's most recently approved CDFI certification documentation. Pursuant to 12 CFR

1805.201(b)(3)(iii)(B) if a loan originated by the Controlling CDFI has been transferred to the Affiliate as lender (which loan must meet Secondary Loan Requirements) and the Controlling CDFI's financing entity activities serve the Affiliate's Targeted Population pursuant to an operating agreement that includes ownership/investment and management provisions by and between the Affiliate and the Controlling CDFI, which agreement must be in effect prior to the submission of a CDFI Certification Application and in form and substance that is acceptable to the CDFI Fund. Loans originated by the Controlling CDFI do not need to be transferred prior to application submission; however, such loans must be transferred before certification of the Affiliate is effective. If an Affiliate has more than one Controlling CDFI, it may meet this Targeted Population requirement through one or more of such Controlling CDFIs' Targeted Populations.

An Affiliate that meets the Target Market requirement through paragraphs (ii) (A) or (B) above, is not eligible to receive financial or technical assistance awards or tax credit allocations under any other CDFI Fund program until such time that the Affiliate meets the Target Market requirements based on its own activity or track record.

ii. If an Affiliate elects to satisfy the target market requirement based on paragraphs (c)(ii)(A) or (B) above, the Affiliate and the Controlling CDFI must

have entered into the operating agreement as described above, prior to the date that the CDFI Certification Application is submitted, in form and substance that is acceptable to the CDFI Fund.

d. Development Services requirement (12 CFR 1805.201(b)(4)): To be a Certified CDFI, an entity must provide Development Services in conjunction with its Financial Products and/or Financial Services. Solely for the purpose of participation as an Eligible CDFI in the FY 2024 application round of the CDFI Bond Guarantee Program, an Affiliate of a Controlling CDFI may be deemed to meet this requirement if: (i) its Development Services are provided by the Controlling CDFI pursuant to an operating agreement that includes management and ownership provisions with the Controlling CDFI that is effective prior to the submission of a CDFI Certification Application and in form and substance that is acceptable to the CDFI Fund and (ii) the Controlling CDFI must have provided Development Services in conjunction with the transactions that the Affiliate is likely to purchase, prior to the date of submission of the CDFI Certification Application.

e. Accountability requirement (12 CFR 1805.201(b)(5)): To be a Certified CDFI, an entity must maintain accountability to residents of its Investment Area or Targeted Population through representation on its governing board and/or advisory board(s). Solely for the purpose of participation as an Eligible CDFI in the FY 2024 application round of the CDFI Bond Guarantee Program, an Affiliate of a Controlling CDFI may be deemed to meet this requirement only if it has a governing board and/or advisory board that has the same composition as the Controlling CDFI and such governing board or advisory board has convened and/or conducted Affiliate business prior to the date of submission of the CDFI Certification Application. If an Affiliate has multiple Controlling CDFIs, the governing board and/or advisory board may have a mixture of representatives from each Controlling CDFI so long as there is at least one representative from each Controlling CDFI.

f. Non-government Entity requirement (12 CFR 1805.201(b)(6)): To be a Certified CDFI, an entity can neither be a government entity nor be Controlled by one or more governmental entities.

g. for the FY 2024 application round of the CDFI Bond Guarantee Program, only one Affiliate per Controlling CDFI may participate as an Eligible CDFI. However, there may be more than one

Affiliate participating as an Eligible CDFI in any given Bond Issue.

3. Operating agreement: An operating agreement between an Affiliate and its Controlling CDFI, as described above, must provide, in addition to the elements set forth above, among other items: (i) conclusory evidence that the Controlling CDFI Controls the Affiliate, through investment and/or ownership; (ii) explanation of all roles, responsibilities and activities to be performed by the Controlling CDFI including, but not limited to, governance, financial management, loan underwriting and origination, record-keeping, insurance, treasury services, human resources and staffing, legal counsel, dispositions, marketing, general administration, and financial reporting; (iii) compensation arrangements; (iv) the term and termination provisions; (v) indemnification provisions, if applicable; (vi) management and ownership provisions; and (vii) default and recourse provisions.

4. For more detailed information on CDFI certification requirements, please review the CDFI certification regulation (12 CFR 1805.201) and CDFI Certification Application materials/guidance posted on the CDFI Fund's website. Interested parties should note that there are specific regulations and requirements that apply to Depository Institution Holding Companies, Insured Depository Institutions, Insured Credit Unions, and State-Insured Credit Unions. The above certification requirements may be revised or further explained by guidance published by the CDFI Fund. The applicant should refer to such materials to ensure it meets certification requirements that are in effect when it applies.

5. For the 2024 application round only, uncertified entities, including an Affiliate of a Controlling CDFI, that wish to apply to be certified and designated as an Eligible CDFI in the FY 2024 application round of the CDFI Bond Guarantee Program must have submitted a CDFI Certification Application to the CDFI Fund by 11:59 p.m. ET on March 23, 2024. Any CDFI Certification Application received after such date and time, as well as incomplete applications, will not be considered for the FY 2024 application round of the CDFI Bond Guarantee Program.

6. In no event will the Secretary approve a Guarantee for a Bond from which a Bond Loan will be made to an entity that is not an Eligible CDFI. The Secretary must make FY 2024 Guarantee Application decisions prior to the end of FY 2024 (September 30, 2024), and the CDFI Fund must close the

corresponding Bonds and Bond Loans, prior to the end of Calendar Year 2024 (December 31, 2024). Accordingly, it is essential that CDFI Certification Applications are submitted timely and in complete form, with all materials and information needed for the CDFI Fund to make a certification decision. Information on CDFI certification, the CDFI Certification Application, and application submission instructions may be found on the CDFI Fund's website at www.cdfifund.gov.

B. Recourse and Collateral Requirements:

1. General Recourse Structure (GRS). Under the GRS, the Bond is a nonrecourse obligation to the Qualified Issuer, and the Bond Loan is a full general recourse obligation to the Eligible CDFI.

2. Alternative Financial Structure (AFS). An AFS can be used as a limited recourse option to a Controlling CDFI or group of Controlling CDFIs. The AFS is an Affiliate of a Controlling CDFI(s) that is created for the sole purpose of participation as an Eligible CDFI in the CDFI Bond Guarantee Program. The AFS must be an Affiliate of a Controlling CDFI(s) and must be certified as a CDFI in accordance with the requirements set forth in Section II(A) of this NOGA. The AFS, as the Eligible CDFI, provides a general full recourse obligation to repay the Bond Loan, and the Bond Loan is on the balance sheet of the AFS. The requirements for the AFS are delineated in the template term sheet located on the CDFI Fund website at <https://www.cdfifund.gov/programs-training/Programs/cdfi-bond/Pages/apply-step.aspx#step2>.

C. Application Submission:

1. Electronic submission. All Qualified Issuer Applications and Guarantee Applications must be submitted through the CDFI Fund's Awards Management Information System (AMIS). Applications sent by mail, fax, or other form will not be permitted, except in circumstances that the CDFI Fund, in its sole discretion, deems acceptable. Please note that Applications will not be accepted through Grants.gov. For more information on AMIS, please visit the AMIS Landing Page at <https://amis.cdfifund.gov>.

2. Applicant identifier numbers. Please note that, pursuant to Office of Management and Budget (OMB) guidance (68 FR 38402), each Qualified Issuer applicant and Guarantee applicant must provide, as part of its Application, its Unique Entity Identifier (UEI), if applicable, as well as UEI numbers for its proposed Program

Administrator, its proposed Servicer, and each Certified CDFI that is included in the Qualified Issuer Application and Guarantee Application. In addition, each Application must include a valid and current Employer Identification Number (EIN), with a letter or other documentation from the IRS confirming the Qualified Issuer applicant's EIN, as well as EINs for its proposed Program Administrator, its proposed Servicer, and each Certified CDFI that is included in any Application. An Application that does not include such UEI numbers, EINs, and documentation is incomplete and will be rejected by the CDFI Fund. Applicants should allow sufficient time for the IRS and/or Dun and Bradstreet to respond to inquiries and/or requests for the required identification numbers.

3. System for Award Management (SAM). Registration with SAM is required for each Qualified Issuer applicant, its proposed Program Administrator, its proposed Servicer, and each Certified CDFI that is included in any Application. The CDFI Fund will not consider any Applications that do not meet the requirement that each entity must be properly registered before the date of Application submission. The SAM registration process may take one month or longer to complete. A signed notarized letter identifying the SAM authorized entity administrator for the entity associated with the UEI number is required. This requirement is applicable to new entities registering in SAM, as well as to existing entities with registrations being updated or renewed in SAM. Applicants without UEI and/or EIN numbers should allow for additional time as an applicant cannot register in SAM without those required numbers. Applicants that have previously completed the SAM registration process must verify that their SAM accounts are current and active. Each applicant must continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an Application under consideration by a Federal awarding agency. The CDFI Fund will not consider any applicant that fails to properly register or activate its SAM account and these restrictions also apply to organizations that have not yet received a UEI or EIN number. Applicants must contact SAM directly with questions related to registration or SAM account changes as the CDFI Fund does not maintain this system and has no ability to make changes or correct errors of any kind. For more information about SAM, visit <https://www.sam.gov>.

4. AMIS accounts. Each Qualified Issuer applicant, its proposed Program

Administrator, its proposed Servicer, and each Certified CDFI that is included in the Qualified Issuer Application or Guarantee Application must register User and Organization accounts in AMIS. Each such entity must be registered as an Organization and register at least one User Account in AMIS. As AMIS is the CDFI Fund's primary means of communication with applicants with regard to its programs, each such entity must make sure that it updates the contact information in its AMIS account before any Application is submitted. For more information on AMIS, please visit the AMIS Landing Page at <https://amis.cdfifund.gov>.

D. Form of Application:

1. As of the date of this NOGA, the Qualified Issuer Application, the Guarantee Application, and related application instructions for this round may be found on the CDFI Bond Guarantee Program's page on the CDFI Fund's website at <http://www.cdfifund.gov/bond>.

2. Paperwork Reduction Act. Under the Paperwork Reduction Act (44 U.S.C. chapter 35), an agency may not conduct or sponsor a collection of information, and an individual is not required to respond to a collection of information, unless it displays a valid OMB control number. Pursuant to the Paperwork Reduction Act, the Qualified Issuer Application, the Guarantee Application, and the Secondary Loan Requirements have been assigned the following control number: 1559-0044.

3. Application deadlines. In order to be considered for the issuance of a Guarantee under FY 2024 program authority, Qualified Issuer Applications must be submitted by 11:59 p.m. ET on April 16, 2024, and Guarantee Applications must be submitted by 11:59 p.m. ET on April 23, 2024. Qualified Issuer Applications and Guarantee Applications received in FY 2023 that were neither withdrawn nor declined will be considered under FY 2024 authority. If applicable, CDFI Certification Applications must be received by the CDFI Fund by 11:59 p.m. ET on March 23, 2024. Format. Detailed Qualified Issuer Application and Guarantee Application content requirements are found in the Applications and application guidance. The CDFI Fund will read only information requested in the Application and reserves the right not to read attachments or supplemental materials that have not been specifically requested in this NOGA, the Qualified Issuer, or the Guarantee Application. Supplemental materials or attachments such as letters of public support or other statements that are meant to bias or

influence the Application review process will not be read.

5. Application revisions. After submitting a Qualified Issuer Application or a Guarantee Application, the applicant will not be permitted to revise or modify the Application in any way unless authorized or requested by the CDFI Fund.

6. Material changes.

a. In the event that there are material changes after the submission of a Qualified Issuer Application prior to the designation as a Qualified Issuer, the applicant must notify the CDFI Fund of such material changes information in a timely and complete manner. The CDFI Fund will evaluate such material changes, along with the Qualified Issuer Application, to approve or deny the designation of the Qualified Issuer.

b. In the event that there are material changes after the submission of a Guarantee Application (including, but not limited to, a revision of the Capital Distribution Plan or a change in the Eligible CDFIs that are included in the Application) prior to or after the designation as a Qualified Issuer or approval of a Guarantee Application or Guarantee, the applicant must notify the CDFI Fund of such material changes information in a timely and complete manner. The Guarantor will evaluate such material changes, along with the Guarantee Application, to approve or deny the Guarantee Application and/or determine whether to modify the terms and conditions of the Agreement to Guarantee. This evaluation may result in a delay of the approval or denial of a Guarantee Application.

E. Eligibility and completeness review: The CDFI Fund will review each Qualified Issuer and Guarantee Application to determine whether it is complete and the applicant meets eligibility requirements described in the Regulations, this NOGA, and the Applications. If the CDFI Fund determines that additional information is needed to assess the Qualified Issuer's and/or the Certified CDFIs' ability to participate in and comply with the requirements of the CDFI Bond Guarantee Program, the CDFI Fund may require that the Qualified Issuer furnish additional, clarifying, confirming or supplemental information. Until such information is provided to the CDFI Fund, the Qualified Issuer Application and/or Guarantee Application will not be moved forward for the substantive review process. If the CDFI Fund requests such additional, clarifying, confirming or supplemental information, the Qualified Issuer must provide it within the timeframes requested by the CDFI Fund or the

respective Application will be deemed incomplete. An incomplete Qualified Issuer Application or Guarantee Application, or one that does not meet eligibility requirements, will be rejected.

F. Regulated entities: In the case of Qualified Issuer applicants, proposed Program Administrators, proposed Servicers, and Certified CDFIs that are included in the Qualified Issuer Application or Guarantee Application that are Insured Depository Institutions and Insured Credit Unions, the CDFI Fund will consider information provided by, and views of, the Appropriate Federal and State Banking Agencies. If any such entity is a CDFI bank holding company, the CDFI Fund will consider information provided by the Appropriate Federal Banking Agencies of the CDFI bank holding company and its CDFI bank(s). Throughout the Application review process, the CDFI Fund will consider financial safety and soundness information from the Appropriate Federal Banking Agency. Each regulated applicant must have a composite CAMELS/CAMEL rating of at least “3” and/or no material concerns from its regulator. The CDFI Fund also reserves the right to require a regulated applicant to improve safety and soundness conditions prior to being approved as a Qualified Issuer or Eligible CDFI. In addition, the CDFI Fund will take into consideration Community Reinvestment Act assessments of Insured Depository Institutions and/or their Affiliates.

G. Prior CDFI Fund recipients: All applicants must be aware that success under any of the CDFI Fund’s other programs is not indicative of success under this NOGA. Prior CDFI Fund recipients should note the following:

1. Pending resolution of default or noncompliance. If a Qualified Issuer applicant, its proposed Program Administrator, its proposed Servicer, or any of the Certified CDFIs included in the Qualified Issuer Application or Guarantee Application is a prior recipient or allocatee under any CDFI Fund program and (i) it has submitted reports to the CDFI Fund that demonstrate default or noncompliance with a previously executed agreement with the CDFI Fund, and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in default or noncompliant with its previously executed agreement, the CDFI Fund will consider the Qualified Issuer Application or Guarantee Application pending full resolution, in the sole determination of the CDFI Fund, of the default or noncompliance.

2. Previous findings of default or noncompliance. If a Qualified Issuer

applicant, its proposed Program Administrator, its proposed Servicer, or any of the Certified CDFIs included in the Qualified Issuer Application or Guarantee Application is a prior recipient or allocatee under any CDFI Fund program and the CDFI Fund has made a final determination that the entity is in default or noncompliant with a previously executed agreement with the CDFI Fund, but has not notified the entity that it is ineligible to apply for future CDFI Fund program awards or allocations, the CDFI Fund will consider the Qualified Issuer Application or Guarantee Application. However, it is strongly advised that the entity take action to address such default or noncompliance finding, as repeat findings of default or noncompliance may result in the CDFI Fund determining the entity ineligible to participate in future CDFI Fund program rounds, which could result in any pending applications being deemed ineligible for further review. The CDFI Bond Guarantee Program staff cannot resolve compliance matters; instead, please contact the CDFI Fund’s Office of Compliance Monitoring and Evaluation Unit (OCME) by AMIS Service Request if your organization has questions about its current compliance status or has been found not in compliance with a previously executed agreement with the CDFI Fund.

3. Ineligibility due to default or noncompliance. The CDFI Fund will not consider a Qualified Issuer Application or Guarantee Application if the applicant, its proposed Program Administrator, its proposed Servicer, or any of the Certified CDFIs included in the Qualified Issuer Application or Guarantee Application, is a prior recipient or allocatee under any CDFI Fund program and if, as of the date of Qualified Issuer Application or Guarantee Application submission, (i) the CDFI Fund has made a determination that such entity is in default or noncompliant with a previously executed agreement and (ii) the CDFI Fund has provided written notification that such entity is ineligible to apply for any future CDFI Fund program awards or allocations. Such entities will be ineligible to submit a Qualified Issuer or Guarantee Application, or be included in such submission, as the case may be, for such time period as specified by the CDFI Fund in writing.

H. Review of Bond and Bond Loan documents: Each Qualified Issuer and proposed Eligible CDFI will be required to certify that its appropriate senior management, and its respective legal counsel, has read the Regulations (set

forth at 12 CFR part 1808, as well as the CDFI certification regulations set forth at 12 CFR 1805.201, as amended, and the environmental quality regulations set forth at 12 CFR part 1815) and the template Bond Documents and Bond Loan documents posted on the CDFI Fund’s website including, but not limited to, the following: Bond Trust Indenture, Supplemental Indenture, Bond Loan Agreement, Promissory Note, Bond Purchase Agreement, Designation Notice, Secretary’s Guarantee, Collateral Assignment, Reimbursement Note, Opinion of Bond Counsel, Opinion of Counsel to the Borrower, Escrow Agreement, and Closing Checklist.

I. Contact the CDFI Fund: A Qualified Issuer applicant, its proposed Program Administrator, its proposed Servicer, or any Certified CDFIs included in the Qualified Issuer Application or Guarantee Application that are prior CDFI Fund recipients and/or allocatees are advised to: (i) comply with requirements specified in CDFI Fund assistance, allocation, and/or award agreement(s), and (ii) contact the CDFI Fund to ensure that all necessary actions are underway for the disbursement or deobligation of any outstanding balance of said prior award(s). Any such parties that are unsure about the disbursement status of any prior award should submit a Service Request through that organization’s AMIS Account.

All outstanding reporting and compliance questions should be directed to the Office of Compliance Monitoring and Evaluation help desk by AMIS Service Requests. The CDFI Fund will respond to applicants’ reporting, compliance, or disbursement questions between the hours of 9:00 a.m. and 5:00 p.m. ET, starting on the date of the publication of this NOGA.

J. Evaluating prior award performance: In the case of a Qualified Issuer, a proposed Program Administrator, a proposed Servicer, or Certified CDFI that has received awards from other Federal programs, the CDFI Fund reserves the right to contact officials from the appropriate Federal agency or agencies to determine whether the entity is in compliance with current or prior award agreements, and to take such information into consideration before issuing a Guarantee. In the case of such an entity that has previously received funding through any CDFI Fund program, the CDFI Fund will review the entity’s compliance history with the CDFI Fund, including any history of providing late reports, and consider such history in the context of organizational capacity and

the ability to meet future reporting requirements.

The CDFI Fund may also bar from consideration any such entity that has, in any proceeding instituted against it in, by, or before any court, governmental, or administrative body or agency, received a final determination within the three years prior to the date of publication of this NOGA indicating that the entity violated any federal civil rights laws or regulations, including, but not limited, to discrimination under (i) Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d *et seq.*), which prohibits discrimination on the basis of race, color, or national origin; (ii) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 *et seq.*), which prohibits discrimination on the basis of sex; (iii) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) or the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 *et seq.*), both of which prohibits discrimination on the basis of disability;

(iv) the Age Discrimination Act of 1975, as amended (42 U.S.C. 6101–6107), which prohibits discrimination on the basis of age; (v) the Drug Abuse Office and Treatment Act of 1972 (Pub. L. 92–255), as amended, relating to nondiscrimination on the basis of drug abuse; (vi) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (Pub. L. 91–616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (vii) Sections 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290dd–3 and 290ee–3), as amended, relating to confidentiality of alcohol and drug abuse patient records; or (viii) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*), as amended, relating to nondiscrimination in the sale, rental or financing of housing;

K. Civil Rights and Diversity: Any person who is eligible to receive benefits or services from the CDFI Fund or Recipients under any of its programs or activities is entitled to those benefits or services without being subject to prohibited discrimination. The Department of the Treasury's Office of Civil Rights and Equal Employment Opportunity enforces various Federal statutes and regulations that prohibit discrimination in financially assisted and conducted programs and activities of the CDFI Fund. If a person believes that they have been subjected to discrimination and/or reprisal because of membership in a protected group, they may file a complaint with: Director, Office of Civil Rights, and Equal Employment Opportunity, 1500

Pennsylvania Ave. NW, Washington, DC 20220 or (202) 622–1160 (not a toll-free number).

L. Statutory and national policy requirements: The CDFI Fund will manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, Federal Law, and public policy requirements: including, but not limited to, those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination.

M. Changes to review procedures: The CDFI Fund reserves the right to change its completeness, eligibility and evaluation criteria, and procedures if the CDFI Fund deems it appropriate. If such changes materially affect the CDFI Fund's decision to approve or deny a Qualified Issuer Application, the CDFI Fund will provide information regarding the changes through the NOGA or direct communication to applicants, as appropriate.

N. Decisions are final: The CDFI Fund's Qualified Issuer Application decisions are final. The Guarantor's Guarantee Application decisions are final. There is no right to appeal the decisions. Any applicant that is not approved by the CDFI Fund or the Guarantor may submit a new Application and will be considered based on the newly submitted Application. Such newly submitted Applications will be reviewed along with all other pending Applications in the order in which they are received, or by such other criteria that the CDFI Fund may establish, in its sole discretion.

III. Qualified Issuer Application

A. General: This NOGA invites interested parties to submit a Qualified Issuer Application to be approved as a Qualified Issuer under the CDFI Bond Guarantee Program.

1. Qualified Issuer. The Qualified Issuer is a Certified CDFI, or an entity designated by a Certified CDFI to issue Bonds on its behalf, that meets the requirements of the Regulations and this NOGA, and that has been approved by the CDFI Fund pursuant to review and evaluation of its Qualified Issuer Application. The Qualified Issuer will, among other duties: (i) organize the Eligible CDFIs that have designated it to serve as their Qualified Issuer; (ii) prepare and submit a complete and timely Qualified Issuer and Guarantee Application to the CDFI Fund; (iii) if the Qualified Issuer Application is approved by the CDFI Fund and the

Guarantee Application is approved by the Guarantor, prepare the Bond Issue; (iv) manage all Bond Issue servicing, administration, and reporting functions; (v) make Bond Loans; (vi) oversee the financing or refinancing of Secondary Loans; (vii) ensure compliance throughout the duration of the Bond with all provisions of the Regulations, and Bond Documents and Bond Loan Documents entered into between the Guarantor, the Qualified Issuer, and the Eligible CDFI; and (viii) ensure that the Master Servicer/Trustee complies with the Bond Trust Indenture and all other applicable regulations. Further, the role of the Qualified Issuer also is to ensure that its proposed Eligible CDFI applicants possess adequate and well performing assets to support the debt service of the proposed Bond Loan.

2. Qualified Issuer Application. The Qualified Issuer Application is the document that an entity seeking to serve as a Qualified Issuer submits to the CDFI Fund to apply to be approved as a Qualified Issuer prior to consideration of a Guarantee Application.

3. Qualified Issuer Application evaluation, general. Each Qualified Issuer Application will be evaluated by the CDFI Fund and, if acceptable, the applicant will be approved as a Qualified Issuer, in the sole discretion of the CDFI Fund. The CDFI Fund's Qualified Issuer Application review and evaluation process is based on established procedures, which may include interviews of applicants and/or site visits to applicants conducted by the CDFI Fund. Through the Application review process, the CDFI Fund will evaluate Qualified Issuer applicants on a merit basis and in a fair and consistent manner. Each Qualified Issuer applicant will be reviewed on its ability to successfully carry out the responsibilities of a Qualified Issuer throughout the life of the Bond. The Applicant must currently meet the criteria established in the Regulations to be deemed a Qualified Issuer. Qualified Issuer Applications that are forward-looking or speculate as to the eventual acquisition of the required capabilities and criteria are unlikely to be approved. Qualified Issuer Application processing will be initiated in chronological order by date of receipt; however, Qualified Issuer Applications that are incomplete or require the CDFI Fund to request additional or clarifying information may delay the ability of the CDFI Fund to deem the Qualified Issuer Application complete and move it to the next phase of review. Submitting a substantially incomplete application earlier than other applicants does not ensure first approval.

B. Qualified Issuer Application: Eligibility:

1. CDFI certification requirements. The Qualified Issuer applicant must be a Certified CDFI or an entity designated by a Certified CDFI to issue Bonds on its behalf.

2. Designation and attestation by Certified CDFIs. An entity seeking to be approved by the CDFI Fund as a Qualified Issuer must be designated as a Qualified Issuer by at least one Certified CDFI. A Qualified Issuer may not designate itself. The Qualified Issuer applicant will prepare and submit a complete and timely Qualified Issuer Application to the CDFI Fund in accordance with the requirements of the Regulations, this NOGA, and the Application. A Certified CDFI must attest in the Qualified Issuer Application that it has designated the Qualified Issuer to act on its behalf and that the information in the Qualified Issuer Application regarding it is true, accurate, and complete.

C. Substantive review and approval process:

1. Substantive review.

a. If the CDFI Fund determines that the Qualified Issuer Application is complete and eligible, the CDFI Fund will undertake a substantive review in accordance with the criteria and procedures described in the Regulations, this NOGA, the Qualified Issuer Application, and CDFI Bond Guarantee Program policies.

b. As part of the substantive evaluation process, the CDFI Fund reserves the right to contact the Qualified Issuer applicant (as well as its proposed Program Administrator, its proposed Servicer, and each designating Certified CDFI in the Qualified Issuer Application) by telephone, email, mail, or through on-site visits for the purpose of obtaining additional, clarifying, confirming, or supplemental application information. The CDFI Fund reserves the right to collect such additional, clarifying, confirming, or supplemental information from said entities as it deems appropriate. If contacted for additional, clarifying, confirming, or supplemental information, said entities must respond within the time parameters set by the CDFI Fund or the Qualified Issuer Application will be rejected.

2. Qualified Issuer criteria. All materials provided in the Qualified Issuer Application will be used to evaluate the applicant. Qualified Issuer determinations will be made based on Qualified Issuer applicants' experience and expertise, in accordance with the following criteria:

a. Organizational capability.

i. The Qualified Issuer applicant must demonstrate that it has the appropriate expertise, capacity, experience, and qualifications to issue Bonds for Eligible Purposes, or is otherwise qualified to serve as Qualified Issuer, as well as manage the Bond Issue on the terms and conditions set forth in the Regulations, this NOGA, and the Bond Documents, satisfactory to the CDFI Fund.

ii. The Qualified Issuer applicant must demonstrate that it has the appropriate expertise, capacity, experience, and qualifications to originate, underwrite, service and monitor Bond Loans for Eligible Purposes, targeted to Low-Income Areas and Underserved Rural Areas.

iii. The Qualified Issuer applicant must demonstrate that it has the appropriate expertise, capacity, experience, and qualifications to manage the disbursement process set forth in the Regulations at 12 CFR 1808.302 and 1808.307.

b. Servicer. The Qualified Issuer applicant must demonstrate that it has (either directly or contractually through another designated entity) the appropriate expertise, capacity, experience, and qualifications, or is otherwise qualified to serve as Servicer. The Qualified Issuer Application must provide information that demonstrates that the Qualified Issuer's Servicer has the expertise, capacity, experience, and qualifications necessary to perform certain required administrative duties (including, but not limited to, Bond Loan servicing functions).

c. Program Administrator. The Qualified Issuer applicant must demonstrate that it has (either directly or contractually through another designated entity) the appropriate expertise, capacity, experience, and qualifications, or is otherwise qualified to serve as Program Administrator. The Qualified Issuer Application must provide information that demonstrates that the Qualified Issuer's Program Administrator has the expertise, capacity, experience, and qualifications necessary to perform certain required administrative duties (including, but not limited to, compliance monitoring and reporting functions).

d. Strategic alignment. The Qualified Issuer applicant will be evaluated on its strategic alignment with the CDFI Bond Guarantee Program on factors that include, but are not limited to: (i) its mission's strategic alignment with community and economic development objectives set forth in the Riegle Act at 12 U.S.C. 4701; (ii) its strategy for deploying the entirety of funds that may become available to the Qualified Issuer through the proposed Bond Issue; (iii)

its experience providing up to 30-year capital to CDFIs or other borrowers in Low-Income Areas or Underserved Rural Areas as such terms are defined in the Regulations at 12 CFR 1808.102; (iv) its track record of activities relevant to its stated strategy; and (v) other factors relevant to the Qualified Issuer's strategic alignment with the program.

e. Experience. The Qualified Issuer applicant will be evaluated on factors that demonstrate that it has previous experience: (i) performing the duties of a Qualified Issuer including issuing bonds, loan servicing, program administration, underwriting, financial reporting, and loan administration; (ii) lending in Low-Income Areas and Underserved Rural Areas; and (iii) indicating that the Qualified Issuer's current principals and team members have successfully performed the required duties, and that previous experience is applicable to the current principals and team members.

f. Management and staffing. The Qualified Issuer applicant must demonstrate that it has sufficiently strong management and staffing capacity to undertake the duties of Qualified Issuer. The applicant must also demonstrate that its proposed Program Administrator and its proposed Servicer have sufficiently strong management and staffing capacity to undertake their respective requirements under the CDFI Bond Guarantee Program. Strong management and staffing capacity is evidenced by factors that include, but are not limited to: (i) a sound track record of delivering on past performance; (ii) a documented succession plan; (iii) organizational stability including staff retention; and (iv) a clearly articulated, reasonable, and well-documented staffing plan.

g. Financial strength. The Qualified Issuer applicant must demonstrate the strength of its financial capacity and activities including, among other items, financially sound business practices relative to the industry norm for bond issuers, as evidenced by reports of Appropriate Federal Banking Agencies, Appropriate State Agencies, or auditors. Such financially sound business practices will demonstrate: (i) the financial wherewithal to perform activities related to the Bond Issue such as administration and servicing; (ii) the ability to originate, underwrite, close, and disburse loans in a prudent manner; (iii) whether the applicant is depending on external funding sources and the reliability of long-term access to such funding; (iv) whether there are foreseeable counterparty issues or credit concerns that are likely to affect the applicant's financial stability; and (v) a

budget that reflects reasonable assumptions about upfront costs as well as ongoing expenses and revenues.

h. Systems and information technology. The Qualified Issuer applicant must demonstrate that it (as well as its proposed Program Administrator and its proposed Servicer) has, among other things: (i) a strong information technology capacity and the ability to manage loan servicing, administration, management, and document retention; (ii) appropriate office infrastructure and related technology to carry out the CDFI Bond Guarantee Program activities; and (iii) sufficient backup and disaster recovery systems to maintain uninterrupted business operations.

i. Pricing structure. The Qualified Issuer applicant must provide its proposed pricing structure for performing the duties of Qualified Issuer, including the pricing for the roles of Program Administrator and Servicer. Although the pricing structure and fees shall be decided by negotiation between market participants without interference or approval by the CDFI Fund, the CDFI Fund will evaluate whether the Qualified Issuer applicant's proposed pricing structure is feasible to carry out the responsibilities of a Qualified Issuer over the life of the Bond to help ensure sound implementation of the program.

j. Other criteria. The Qualified Issuer applicant must meet such other criteria as may be required by the CDFI Fund, as set forth in the Qualified Issuer Application or required by the CDFI Fund in its sole discretion, for the purposes of evaluating the merits of a Qualified Issuer Application. The CDFI Fund may request an on-site review of Qualified Issuer applicant to confirm materials provided in the written application, as well as to gather additional due diligence information. The on-site reviews are a critical component of the application review process and will generally be conducted for all applicants not regulated by an Appropriate Federal Banking Agency or Appropriate State Agency. The CDFI Fund reserves the right to conduct a site visit of regulated entities, in its sole discretion.

k. Third-party data sources. The CDFI Fund, in its sole discretion, may consider information from third-party sources including, but not limited to, periodicals or publications, publicly available data sources, or subscriptions services for additional information about the Qualified Issuer applicant, the proposed Program Administrator, the proposed Servicer, and each Certified CDFI that is included in the Qualified

Issuer Application. Any additional information received from such third-party sources will be reviewed and evaluated through a systematic and formalized process.

D. Notification of Qualified Issuer Determination: Each Qualified Issuer applicant will be informed of the CDFI Fund's decision in writing, by email using the addresses maintained in the entity's AMIS account. The CDFI Fund will not notify the proposed Program Administrator, the proposed Servicer, or the Certified CDFIs included in the Qualified Issuer Application of its decision regarding the Qualified Issuer Application; such contacts are the responsibility of the Qualified Issuer applicant.

E. Qualified Issuer Application Rejection: In addition to substantive reasons based on the merits of its review, the CDFI Fund reserves the right to reject a Qualified Issuer Application if information (including administrative errors) comes to the attention of the CDFI Fund that adversely affects an applicant's eligibility, adversely affects the CDFI Fund's evaluation of a Qualified Issuer Application, or indicates fraud or mismanagement on the part of a Qualified Issuer applicant or its proposed Program Administrator, its proposed Servicer, and any Certified CDFI included in the Qualified Issuer Application. If the CDFI Fund determines that any portion of the Qualified Issuer Application is incorrect in any material respect, the CDFI Fund reserves the right, in its sole discretion, to reject the Application.

IV. Guarantee Applications

A. This NOGA invites Qualified Issuers to submit a Guarantee Application to be approved for a Guarantee under the CDFI Bond Guarantee Program.

1. Guarantee Application.

a. The Guarantee Application is the application document that a Qualified Issuer (in collaboration with the Eligible CDFI(s) that seek to be included in the proposed Bond Issue) must submit to the CDFI Fund in order to apply for a Guarantee. The Qualified Issuer shall provide all required information in its Guarantee Application to establish that it meets all criteria set forth in the Regulations at 12 CFR 1808.501 and this NOGA and can carry out all CDFI Bond Guarantee Program requirements including, but not limited to, information that demonstrates that the Qualified Issuer has the appropriate expertise, capacity, and experience and is qualified to make, administer and service Bond Loans for Eligible Purposes. An Eligible CDFI may be an

existing certified or certifiable CDFI (the GRS), or the Eligible CDFI may be an Affiliate of a Controlling CDFI(s) that is created for the sole purpose of participation as an Eligible CDFI in the CDFI Fund Bond Guarantee Program (the AFS; see Section II(B) of this NOGA for Recourse and Collateral Requirements and Section II(A) of this NOGA for certification requirements for certifiable CDFIs and Affiliates of Controlling CDFIs).

b. The Guarantee Application comprises a Capital Distribution Plan and at least one Secondary Capital Distribution Plan, as well as all other requirements set forth in this NOGA or as may be required by the Guarantor and the CDFI Fund in their sole discretion, for the evaluation and selection of Guarantee applicants.

2. Guarantee Application evaluation, general. The Guarantee Application review and evaluation process will be based on established standard procedures, which may include interviews of applicants and/or site visits to applicants conducted by the CDFI Fund. Through the Application review process, the CDFI Fund will evaluate Guarantee applicants on a merit basis and in a fair and consistent manner. Each Guarantee applicant will be reviewed on its ability to successfully implement and carry out the activities proposed in its Guarantee Application throughout the life of the Bond. Eligible CDFIs must currently meet the criteria established in the Regulations to participate in the CDFI Bond Guarantee Program. Guarantee Applications that are forward-looking or speculate as to the eventual acquisition of the required capabilities and criteria by the Eligible CDFI(s) are unlikely to be approved. Guarantee Application processing will be initiated in chronological order by date of receipt; however, Guarantee Applications that are incomplete or require the CDFI Fund to request additional or clarifying information may delay the ability of the CDFI Fund to deem the Guarantee Application complete and move it to the next phase of review. Submitting a substantially incomplete application earlier than other applicants does not ensure first approval.

B. Guarantee Application; Eligibility:

1. Eligibility; CDFI certification requirements. If approved for a Guarantee, each Eligible CDFI must be a Certified CDFI as of the Bond Issue Date and must maintain its respective CDFI certification throughout the term of the corresponding Bond. For more information on CDFI Certification and the certification of affiliated entities, including the deadlines for submission

of certification applications, see part II of this NOGA.

2. Qualified Issuer as Eligible CDFI. A Qualified Issuer may not participate as an Eligible CDFI within its own Bond Issue, but may participate as an Eligible CDFI in a Bond Issue managed by another Qualified Issuer.

3. Attestation by proposed Eligible CDFIs. Each proposed Eligible CDFI must attest in the Guarantee Application that it has designated the Qualified Issuer to act on its behalf and that the information pertaining to the Eligible CDFI in the Guarantee Application is true, accurate and complete. Each proposed Eligible CDFI must also attest in the Guarantee Application that it will use Bond Loan proceeds for Eligible Purposes and that Secondary Loans will be financed or refinanced in accordance with the applicable Secondary Loan Requirements.

C. Guarantee Application;

Preparation: When preparing the Guarantee Application, the Eligible CDFIs and Qualified Issuer must collaborate to determine the composition and characteristics of the Bond Issue, ensuring compliance with the Act, the Regulations, and this NOGA. The Qualified Issuer is responsible for the collection, preparation, verification, and submission of the Eligible CDFI information that is presented in the Guarantee Application. The Qualified Issuer will submit the Guarantee Application for the proposed Bond Issue, including any information provided by the proposed Eligible CDFIs. In addition, the Qualified Issuer will serve as the primary point of contact with the CDFI Fund during the Guarantee Application review and evaluation process.

D. Review and approval process:

1. Substantive review.

a. If the CDFI Fund determines that the Guarantee Application is complete and eligible, the CDFI Fund will undertake a substantive review in accordance with the criteria and procedures described in the Regulations at 12 CFR 1808.501, this NOGA, and the Guarantee Application. The substantive review of the Guarantee Application will include due diligence, underwriting, credit risk review, and Federal credit subsidy calculation, in order to determine the feasibility and risk of the proposed Bond Issue, as well as the strength and capacity of the Qualified Issuer and each proposed Eligible CDFI. Each proposed Eligible CDFI will be evaluated independently of the other proposed Eligible CDFIs within the proposed Bond Issue; however, the Bond Issue must then

cumulatively meet all requirements for Guarantee approval. In general, applicants are advised that proposed Bond Issues that include a large number of proposed Eligible CDFIs are likely to substantially increase the review period.

b. As part of the substantive review process, the CDFI Fund may contact the Qualified Issuer (as well as the proposed Eligible CDFIs included in the Guarantee Application) by telephone, email, mail, or through an on-site visit for the sole purpose of obtaining additional, clarifying, confirming, or supplemental application information. The CDFI Fund reserves the right to collect such additional, clarifying, confirming or supplemental information as it deems appropriate. If contacted for additional, clarifying, confirming, or supplemental information, said entities must respond within the time parameters set by the CDFI Fund or the Guarantee Application will be rejected.

2. Guarantee Application criteria.

a. In general, a Guarantee Application will be evaluated based on the strength and feasibility of the proposed Bond Issue, as well as the creditworthiness and performance of the Qualified Issuer and the proposed Eligible CDFIs. Guarantee Applications must demonstrate that each proposed Eligible CDFI has the capacity for its respective Bond Loan to be a secured, general recourse obligation of the proposed Eligible CDFI and to deploy the Bond Loan proceeds within the required disbursement timeframe as described in the Regulations. Unless receiving significant support from a Controlling CDFI, or Credit Enhancements, Eligible CDFIs should not request Bond Loans greater than their current total asset size or which would otherwise significantly impair their net asset or net equity position. In general, an applicant requesting a Bond Loan more than 50% of its total asset size should be prepared to clearly demonstrate that it has a reasonable plan to scale its operations prudently and in a manner that does not impair its net asset or net equity position. Further, an entity with a limited operating history or a history of operating losses is unlikely to meet the strength and feasibility requirements of the CDFI Bond Guarantee Program, unless it receives significant support from a Controlling CDFI, or Credit Enhancements.

b. The Capital Distribution Plan must demonstrate the Qualified Issuer's comprehensive plan for lending, disbursing, servicing and monitoring each Bond Loan in the Bond Issue. It includes, among other information, the following components:

i. *Statement of Proposed Sources and Uses of Funds:* Pursuant to the requirements set forth in the Regulations at 12 CFR 1808.102(bb) and 1808.301, the Qualified Issuer must provide: (A) a description of the overall plan for the Bond Issue; (B) a description of the proposed uses of Bond Proceeds and proposed sources of funds to repay principal and interest on the proposed Bond and Bond Loans; (C) a certification that 100% of the principal amount of the proposed Bond will be used to make Bond Loans for Eligible Purposes on the Bond Issue Date; and (D) description of the extent to which the proposed Bond Loans will serve Low-Income Areas or Underserved Rural Areas;

ii. *Bond Issue Qualified Issuer cash flow model:* The Qualified Issuer must provide a cash flow model displaying the orderly repayment of the Bond and the Bond Loans according to their respective terms. The cash flow model shall include disbursement and repayment of Bonds, Bond Loans, and Secondary Loans. The cash flow model shall match the aggregated cash flows from the Secondary Capital Distribution Plans of each of the underlying Eligible CDFIs in the Bond Issue pool. Such information must describe the expected distribution of asset classes to which each Eligible CDFI expects to disburse funds, the proposed disbursement schedule, quarterly or semi-annual amortization schedules, interest-only periods, maturity date of each advance of funds, and assumed net interest margin on Secondary Loans above the assumed Bond Loan rate;

iii. *Organizational capacity:* If not submitted concurrently, the Qualified Issuer must attest that no material changes have occurred since the time that it submitted the Qualified Issuer Application;

iv. *Credit Enhancement (if applicable):* The Qualified Issuer must provide information about the adequacy of proposed risk mitigation provisions designed to protect the financial interests of the Federal Government, either directly or indirectly through supporting the financial strength of the Bond Issue. This includes, but is not limited to, the amount and quality of any Credit Enhancements, terms and specific conditions such as renewal options, and any limiting conditions or revocability by the provider of the Credit Enhancement. For any third-party providing a Credit Enhancement, the Qualified Issuer must provide the following information on the third-party: most recent three years of audited financial statements, a brief analysis of the such entity's creditworthiness, and

an executed letter of intent from such entity that indicates the terms and conditions of the Credit Enhancement. Any Credit Enhancement must be pledged, as part of the Trust Estate, to the Master Servicer/Trustee for the benefit of the Federal Financing Bank;

v. *Proposed Term Sheets*: The CDFI Fund website includes template term sheets for the GRS, the AFS, and the asset class CDFI to Financing Entity utilizing pooled tertiary loans. For each Eligible CDFI that is part of the proposed Bond Issue, the Qualified Issuer must submit a proposed Term Sheet using the applicable template provided on the CDFI Fund's website. The proposed Term Sheet must clearly state all relevant and critical terms of the proposed Bond Loan including, but not limited to: the Bond Loan Collateral Requirements described in Section II(B) of this NOGA, any requested prepayment provisions, unique conditions precedent, proposed covenants and exact amounts/percentages for determining the Eligible CDFI's ability to meet program requirements, and terms and exact language describing any Credit Enhancements. Terms may be either altered and/or negotiated by the CDFI Fund in its sole discretion, based on the proposed structure in the application, to ensure that adequate protection is in place for the Guarantor;

vi. *Secondary Capital Distribution Plan(s)*: Each proposed Eligible CDFI must provide a comprehensive plan for financing, disbursing, servicing and monitoring Secondary Loans, address how each proposed Secondary Loan will meet Eligible Purposes, and address such other requirements listed below that may be required by the Guarantor and the CDFI Fund. For each proposed Eligible CDFI relying, for CDFI certification purposes, on the financing entity activity of a Controlling CDFI, the Controlling CDFI must describe how the Eligible CDFI and the Controlling CDFI, together, will meet the requirements listed below:

(A) *Narrative and Statement of Proposed Sources and Uses of Funds*: Each Eligible CDFI will: (1) provide a description of proposed uses of funds, including the extent to which Bond Loans will serve Low-Income Areas or Underserved Rural Areas, and the extent to which Bond Loan proceeds will be used (i) to make the first monthly installment of a Bond Loan payment, (ii) pay Issuance Fees up to 1% of the Bond Loan, and (iii) finance Loan Loss Reserves related to Secondary Loans; (2) attest that 100% of Bond Loan proceeds designated for Secondary Loans will be used to finance or refinance Secondary

Loans that meet Secondary Loan Requirements; (3) describe a plan for financing, disbursing, servicing, and monitoring Secondary Loans; (4) indicate the expected asset classes to which it will lend under the Secondary Loan Requirements; (5) indicate examples of previous lending and years of experience lending to a specific asset class, especially with regards to the number and dollar volume of loans made in the five years prior to application submission to the specific asset classes to which an Eligible CDFI is proposing to lend Bond Loan proceeds; (6) provide a table detailing specific uses and timing of disbursements, including terms and relending plans if applicable; and (7) a community impact analysis, including how the proposed Secondary Loans will address financing needs that the private market is not adequately serving and specific community benefit metrics;

(B) *Eligible CDFI cash flow model*: Each Eligible CDFI must provide a cash flow model of the proposed Bond Loan which: (1) matches each Eligible CDFI's portion of the Qualified Issuer's cash flow model; and (2) tracks the flow of funds through the term of the Bond Issue and demonstrates disbursement and repayment of the Bond Loan, Secondary Loans, and any utilization of the Relending Fund, if applicable. Such information must describe: the expected distribution of asset classes to which each Eligible CDFI expects to disburse funds, the proposed disbursement schedule, quarterly or semi-annual amortization schedules, interest-only periods, maturity date of each advance of funds, and the assumed net interest margin on Secondary Loans above the assumed Bond Loan rate;

(C) *Organizational capacity*: Each Eligible CDFI must provide documentation indicating the ability of the Eligible CDFI to manage its Bond Loan including, but not limited to: (1) organizational ownership and a chart of affiliates; (2) organizational documents, including policies and procedures related to loan underwriting and asset management; (3) management or operating agreement, if applicable; (4) an analysis by management of its ability to manage the funding, monitoring, and collection of loans being contemplated with the proceeds of the Bond Loan; (5) information about its board of directors; (6) a governance narrative; (7) description of senior management and employee base; (8) independent reports, if available; (9) strategic plan or related progress reports; and (10) a discussion of the management and information systems used by the Eligible CDFI;

(D) *Policies and procedures*: Each Eligible CDFI must provide relevant policies and procedures including, but not limited to: a copy of the asset-liability matching policy, if applicable; and loan policies and procedures which address topics including, but not limited to: origination, underwriting, credit approval, interest rates, closing, documentation, asset management, and portfolio monitoring, risk-rating definitions, charge-offs, and loan loss reserve methodology;

(E) *Financial statements*: Each Eligible CDFI must provide information about the Eligible CDFI's current and future financial position, including but not limited to: (1) audited financial statements for the prior three (3) most recent Fiscal Years; (2) current year-to-date or interim financial statement for the immediately prior quarter end of the Fiscal Year; (3) a copy of the current year's approved budget or projected budget if the entity's Board has not yet approved such budget; and (4) a three (3) year pro forma projection of the statement of financial position or balance sheet, statement of activities or income statement, and statement of cash flows in the standardized template provided by the CDFI Fund;

(F) *Loan portfolio information*: Each Eligible CDFI must provide information including, but not limited to: (1) loan portfolio quality report; (2) pipeline report; (3) portfolio listing; (4) a description of other loan assets under management; (5) loan products; (6) independent loan review report; (7) impact report case studies; and (8) a loan portfolio by risk rating and loan loss reserves; and

(G) *Funding sources and financial activity information*: Each Eligible CDFI must provide information including, but not limited to: (1) current grant information; (2) funding projections; (3) credit enhancements; (4) historical investor renewal rates; (5) covenant compliance; (6) off-balance sheet contingencies; (7) earned revenues; and (8) debt capital statistics.

vii. Assurances and certifications that not less than 100% of the principal amount of Bonds will be used to make Bond Loans for Eligible Purposes beginning on the Bond Issue Date, and that Secondary Loans shall be made as set forth in subsection 1808.307(b); and

viii. Such other information that the Guarantor, the CDFI Fund and/or the Bond Purchaser may deem necessary and appropriate.

c. The CDFI Fund will use the information described in the Capital Distribution Plan and Secondary Capital Distribution Plan(s) to evaluate the feasibility of the proposed Bond Issue,

with specific attention paid to each Eligible CDFI's financial strength and organizational capacity. For each proposed Eligible CDFI relying, for CDFI certification purposes, on the financing entity activity of a Controlling CDFI, the CDFI Fund will pay specific attention to the Controlling CDFI's financial strength and organizational capacity as well as the operating agreement between the proposed Eligible CDFI and the Controlling CDFI. All materials provided in the Guarantee Application will be used to evaluate the proposed Bond Issue. In total, there are more than 100 individual criteria or sub-criteria used to evaluate each Eligible CDFI. Specific criteria used to evaluate each Eligible CDFI shall include, but not be limited to, the following criteria below. For each proposed Eligible CDFI relying, for CDFI certification purposes, on the financing entity activity of a Controlling CDFI, the following specific criteria will also be used to evaluate both the proposed Eligible CDFI and the Controlling CDFI:

i. *Historical financial ratios*: Ratios which together have been shown to be predictive of possible future default will be used as an initial screening tool, including total asset size, net asset or Tier 1 Core Capital ratio, self-sufficiency ratio, non-performing asset ratio, liquidity ratio, reserve over nonperforming assets, and yield cost spread;

ii. *Quantitative and qualitative attributes under the "CAMELS" framework*: After initial screening, the CDFI Fund will utilize a more detailed analysis under the "CAMELS" framework, including but not limited to the following. If a Guarantee Application receives a summary rating of materially deficient during the CAMELS review the application will be recommended for denial.

(A) *Capital Adequacy*: Attributes such as the debt-to-equity ratio, status, and significance of off-balance sheet liabilities or contingencies, magnitude, and consistency of cash flow performance, exposure to affiliates for financial and operating support, trends in changes to capitalization, and other relevant attributes;

(B) *Asset Quality*: Attributes such as the charge-off ratio, adequacy of loan loss reserves, sector concentration, borrower concentration, asset composition, security and collateralization of the loan portfolio, trends in changes to asset quality, and other relevant attributes;

(C) *Management*: Attributes such as documented best practices in governance, strategic planning and board involvement, robust policies and

procedures, tenured and experienced management team, organizational stability, infrastructure and information technology systems, and other relevant attributes;

(D) *Earnings and Performance*: Attributes such as net operating margins, deployment of funds, self-sufficiency, trends in earnings, and other relevant attributes;

(E) *Liquidity*: Attributes such as unrestricted cash and cash equivalents, ability to access credit facilities, access to grant funding, covenant compliance, affiliate relationships, concentration of funding sources (which may include BGP debt, other federal debt, and private debt), trends in liquidity, and other relevant attributes;

(F) *Sensitivity*: The CDFI Fund will stress test each Eligible CDFI's projected financial performance under scenarios that are specific to the unique circumstance and attributes of the organization. Additionally, the CDFI Fund will consider other relevant criteria that have not been adequately captured in the preceding steps as part of the due diligence process. Such criteria may include, but not be limited to, the size and quality of any third-party Credit Enhancements or other forms of credit support.

iii. *Other criteria*: (A) *Overcollateralization*: The commitment by an Eligible CDFI to over-collateralize a proposed Bond Loan with excess Secondary Loans is a criterion that may affect the viability of a Guarantee Application by decreasing the estimated net present value of the long-term cost of the Guarantee to the Federal Government, by decreasing the probability of default, and/or increasing the recovery rate in the event of default. An Eligible CDFI committing to overcollateralization may not be required to deposit funds in the Relending Account, subject to the maintenance of certain unique requirements that are detailed in the template Agreement to Guarantee and Bond Loan Agreement.

(B) *Credit Enhancements*: The provision of third-party Credit Enhancements, including any Credit Enhancement from a Controlling CDFI or any other affiliated entity, is a criterion that may affect the viability of a Guarantee Application by decreasing the estimated net present value of the long-term cost of the Guarantee to the Federal Government. Credit Enhancements are considered in the context of the structure and circumstances of each Guarantee Application.

(C) *On-Site Review*: The CDFI Fund may request an on-site review of an

Eligible CDFI to confirm materials provided in the written application, as well as to gather additional due diligence information. The on-site reviews are a critical component of the application review process and will generally be conducted for all applicants not regulated by an Appropriate Federal Banking Agency or Appropriate State Agency. The CDFI Fund reserves the right to conduct a site visit of regulated entities, in its sole discretion.

(D) *Secondary Loan Asset Classes*: Eligible CDFIs that propose to use funds for new products or lines of business must demonstrate that they have the organizational capacity to manage such activities in a prudent manner. Failure to demonstrate such organizational capacity may be factored into the consideration of Asset Quality or Management criteria as listed above in this section.

(E) *Concentration*: The CDFI Fund may, through the underwriting process, determine that an Eligible CDFI's participation in the Bond Guarantee Program creates an undue risk based on the concentration of assets, debt, or other factors with respect to the applicant's balance sheet or the distribution of commitments in the CDFI Fund's overall BGP portfolio.

3. *Credit subsidy cost*. The credit subsidy cost is the net present value of the estimated long-term cost of the Guarantee to the Federal Government as determined under the applicable provisions of the Federal Credit Reform Act of 1990, as amended (FCRA). Treasury has not received appropriated amounts from Congress to cover the credit subsidy costs associated with Guarantees issued pursuant to this NOGA. In accordance with FCRA, Treasury must consult with, and obtain the approval of, OMB for Treasury's calculation of the credit subsidy cost of each Guarantee prior to entering into any Agreement to Guarantee.

E. Guarantee Approval; Execution of documents:

1. The Guarantor, in the Guarantor's sole discretion, may approve a Guarantee, after consideration of the recommendation from the CDFI Bond Guarantee Program's Credit Review Board and/or based on the merits of the Guarantee Application.

2. The Guarantor reserves the right to approve Guarantees, in whole or in part, in response to any, all, or none of the Guarantee Applications submitted in response to this NOGA. The Guarantor also reserves the right to approve any Guarantees in an amount that is less than requested in the corresponding Guarantee Application. Pursuant to the

Regulations at 12 CFR 1808.504(c), the Guarantor may limit the number of Guarantees made per year to ensure that a sufficient examination of Guarantee Applications is conducted.

3. The CDFI Fund will notify the Qualified Issuer in writing of the Guarantor's approval or disapproval of a Guarantee Application. Bond Documents and Bond Loan documents must be executed, and Guarantees will be provided, in the order in which Guarantee Applications are approved or by such other criteria that the CDFI Fund may establish, in its sole discretion, and in any event by September 30, 2024.

4. Please note that the most recently dated templates of Bond Documents and Bond Loan documents that are posted on the CDFI Fund's website will not be substantially revised or negotiated prior to closing of the Bond and Bond Loan and issuance of the corresponding Guarantee. If a Qualified Issuer or a proposed Eligible CDFI does not understand the terms and conditions of the Bond Documents or Bond Loan documents (including those listed in Section II.H., above), it should ask questions or seek technical assistance from the CDFI Fund. However, if a Qualified Issuer or a proposed Eligible CDFI disagrees or is uncomfortable with

any term/condition, or if legal counsel cannot provide a legal opinion in substantially the same form and content of the required legal opinion, it should not apply for a Guarantee.

5. The Guarantee shall not be effective until the Guarantor signs and delivers the Guarantee.

F. Guarantee Denial: The Guarantor, in the Guarantor's sole discretion, may deny a Guarantee, after consideration of the recommendation from the Credit Review Board and/or based on the merits of the Guarantee Application. If any Guarantee Application receives a summary rating of materially deficient during the CAMELS underwriting review, the application will not be recommended for approval. In addition, the Guarantor reserves the right to deny a Guarantee Application if information (including any administrative error) comes to the Guarantor's attention that adversely affects the Qualified Issuer's eligibility, adversely affects the evaluation or scoring of an Application, or indicates fraud or mismanagement on the part of the Qualified Issuer, Program Administrator, Servicer, and/or Eligible CDFIs.

Further, if the Guarantor determines that any portion of the Guarantee Application is incorrect in any material respect, the Guarantor reserves the right,

in the Guarantor's sole discretion, to deny the Application.

V. Guarantee Administration

A. Pricing information: Bond Loans will be priced based upon the underlying Bond issued by the Qualified Issuer and purchased by the Federal Financing Bank (FFB or Bond Purchaser). As informed by CDFI Fund underwriting according to the criteria laid out in Section II "General Application Information" and Section IV "Guarantee Applications" of this NOGA, the FFB will set the liquidity premium at the time of the Bond Issue Date, based on the duration and maturity of the Bonds according to the FFB's lending policies (www.treasury.gov/ffb). Liquidity premiums will be charged in increments of 1/8th of a percent (*i.e.*, 12.5 basis points).

B. Fees and Other Payments: The following table includes some of the fees that may be applicable to Qualified Issuers and Eligible CDFIs after approval of a Guarantee of a Bond Issue, as well as Risk-Share Pool funding, prepayment penalties or discounts, and Credit Enhancements. The table is not exhaustive; additional fees payable to the CDFI Fund or other parties may apply.

Fee	Description
Agency Administrative Fee	Payable monthly to the CDFI Fund by the Eligible CDFI Equal to 10 basis points (annualized) on the amount of the unpaid principal of the Bond Issue.
Bond Issuance Fees	Amounts paid by an Eligible CDFI for reasonable and appropriate expenses, administrative costs, and fees for services in connection with the issuance of the Bond (but not including the Agency Administrative Fee) and the making of the Bond Loan. Fees negotiated between the Qualified Issuer, the Master Servicer/Trustee, and the Eligible CDFI. Up of 1% of Bond Loan Proceeds may be used to finance Bond Issuance Fees.
Servicer Fee	The fees paid by the Eligible CDFI to the Qualified Issuer's Servicer. Servicer fees are negotiated between the Qualified Issuer and the Eligible CDFI.
Program Administrator Fee	The fees paid by the Eligible CDFI to the Qualified Issuer's Program Administrator. Program Administrator fees are negotiated between the Qualified Issuer and the Eligible CDFI.
Master Servicer/Trustee Fee	The fees paid by the Qualified Issuer and the Eligible CDFI to the Master Servicer/Trustee to carry out the responsibilities of the Bond Trust Indenture. In general, the Master Servicer/Trustee fee for a Bond Issue with a single Eligible CDFI is the greater of 16 basis points per annum or \$6,000 per month once the Bond Loans are fully disbursed. Fees for Bond Issues with more than one Eligible CDFI are negotiated between the Master Servicer/Trustee, Qualified Issuer, and Eligible CDFI. Any special servicing costs and resolution or liquidation fees due to a Bond Loan default are the responsibility of the Eligible CDFI. Please see the template legal documents at https://www.cdfifund.gov/programs-training/Programs/cdfi-bond/Pages/closing-disbursement-step.aspx#step4 for more specific information.
Risk-Share Pool Funding	The funds paid by the Eligible CDFIs to cover Risk-Share Pool requirements; capitalized by pro rata payments equal to 3% of the amount disbursed on the Bond Loan from all Eligible CDFIs within the Bond Issue.
Prepayment Premiums or Discounts.	Prepayment premiums or discounts are determined by the FFB at the time of prepayment.
Credit Enhancements	Pledges made to enhance the quality of a Bond and/or Bond Loan. Credit Enhancements include, but are not limited to, the Principal Loss Collateral Provision and letters of credit. Credit Enhancements must be pledged, as part of the Trust Estate, to the Master Servicer/Trustee for the benefit of the Federal Financing Bank.

C. Terms for Bond Issuance and disbursement of Bond Proceeds: In accordance with 12 CFR 1808.302(f), each year, beginning on the one year

anniversary of the Bond Issue Date (and every year thereafter for the term of the Bond Issue), each Qualified Issuer must demonstrate that no less than 100% of

the principal amount of the Guaranteed Bonds currently disbursed and outstanding has been used to make loans to Eligible CDFIs for Eligible

Purposes. If a Qualified Issuer fails to demonstrate this requirement within the 90 days after the anniversary of the Bond Issue Date, the Qualified Issuer must repay on that portion of Bonds necessary to bring the Bonds that remain outstanding after such repayment is in compliance with the 100% requirement above.

D. Secondary Loan Requirements: In accordance with the Regulations, Eligible CDFIs must finance or refinance Secondary Loans for Eligible Purposes (not including loan loss reserves) that comply with Secondary Loan Requirements. The Secondary Loan Requirements are found on the CDFI Fund's website at <https://www.cdfifund.gov/programs-training/Programs/cdfi-bond/Pages/compliance-step.aspx#step5>. Applicants should become familiar with the published Secondary Loan Requirements (both the General Requirements and the Underwriting Review Checklist). Secondary Loan Requirements are subject to a Secondary Loan commitment process managed by the Qualified Issuer. Eligible CDFIs must execute Secondary Loan documents (in the form of promissory notes) with Secondary Borrowers as follows: (i) no later than 12 months after the Bond Issue Date, Secondary Loan documents representing at least 50% of the Bond Loan proceeds allocated for Secondary Loans, and (ii) no later than 24 months after the Bond Issue Date, Secondary Loan documents representing 100% of the Bond Loan proceeds allocated for Secondary Loans. In the event that the Eligible CDFI does not comply with the foregoing requirements of clauses (i) or (ii) of this paragraph, the available Bond Loan proceeds at the end of the applicable period shall be reduced by an amount equal to the difference between the amount required by clauses (i) or (ii) for the applicable period minus the amount previously committed to the Secondary Loans in the applicable period. Secondary Loans shall carry loan maturities suitable to the loan purpose and be consistent with loan-to-value requirements set forth in the Secondary Loan Requirements. Secondary Loan maturities shall not exceed the corresponding Bond or Bond Loan maturity date. It is the expectation of the CDFI Fund that interest rates for the Secondary Loans will be reasonable based on the borrower and loan characteristics.

E. Secondary Loan Collateral Requirements:

1. The Regulations state that Secondary Loans must be secured by a first lien of the Eligible CDFI on pledged collateral, in accordance with the

Regulations (at 12 CFR 1808.307(f)) and within certain parameters. Examples of acceptable forms of collateral may include, but are not limited to: real property (including land and structures), leasehold interests, machinery, equipment and movables, cash and cash equivalents, accounts receivable, letters of credit, inventory, fixtures, contracted revenue streams from non-Federal counterparties, provided the Secondary Borrower pledges all assets, rights and interests necessary to generate such revenue stream, and a Principal Loss Collateral Provision. Intangible assets, such as customer relationships and intellectual property rights, are not acceptable forms of collateral. Loans secured by real property that are still in a construction phase will only be permitted when backed by a letter of credit issued by a bank deemed acceptable by the CDFI Bond Guarantee Program, in a format deemed acceptable to the CDFI Bond Guarantee Program, that guarantees the full value of the pledged collateral until at minimum completion of the construction and stabilization phases.

2. The Regulations require that Bond Loans must be secured by a first lien on a collateral assignment of Secondary Loans, and further that the Secondary Loans must be secured by a first lien or parity lien on acceptable collateral.

3. Valuation of the collateral pledged by the Secondary Borrower must be based on the Eligible CDFI's credit policy guidelines and must conform to the standards set forth in the Uniform Standards of Professional Appraisal Practice (USPAP) and the Secondary Loan Requirements.

4. Independent third-party appraisals are required for the following collateral: real estate, leasehold interests, fixtures, machinery and equipment, movables stock valued in excess of \$250,000, and contracted revenue stream from non-Federal creditworthy counterparties. Secondary Loan collateral shall be valued using the cost approach, net of depreciation and shall be required for the following: accounts receivable, machinery, equipment and movables, and fixtures.

F. Qualified Issuer approval of Bond Loans to Eligible CDFIs: The Qualified Issuer shall not approve any Bond Loans to an Eligible CDFI where the Qualified Issuer has actual knowledge, based upon reasonable inquiry, that within the past five (5) years the Eligible CDFI: (i) has been delinquent on any payment obligation (except upon a demonstration by the Qualified Issuer satisfactory to the CDFI Fund that the delinquency does not affect the Eligible CDFI's creditworthiness), or has defaulted and

failed to cure any other obligation, on a loan or loan agreement previously made under the Act; (ii) has been found by the Qualified Issuer to be in default of any repayment obligation under any Federal program; (iii) is financially insolvent in either the legal or equitable sense; or (iv) is not able to demonstrate that it has the capacity to comply fully with the payment schedule established by the Qualified Issuer.

G. Credit Enhancements; Principal Loss Collateral Provision:

1. In order to achieve the statutory zero-credit subsidy constraint of the CDFI Bond Guarantee Program and to avoid a call on the Guarantee, Eligible CDFIs are encouraged to include Credit Enhancements and Principal Loss Collateral Provisions structured to protect the financial interests of the Federal Government. Any Credit Enhancement or Principal Loss Collateral Provision must be pledged, as part of the Trust Estate, to the Master Servicer/Trustee for the benefit of the Federal Financing Bank.

2. Credit Enhancements may include, but are not limited to, payment guarantees from third parties or Affiliate(s), non-Federal capital, lines or letters of credit, or other pledges of financial resources that enhance the Eligible CDFI's ability to make timely interest and principal payments under the Bond Loan.

3. As distinct from Credit Enhancements, Principal Loss Collateral Provisions may be provided in lieu of pledged collateral and/or in addition to pledged collateral. A Principal Loss Collateral Provision shall be in the form of cash or cash equivalent guarantees from non-Federal capital in amounts necessary to secure the Eligible CDFI's obligations under the Bond Loan after exercising other remedies for default. For example, a Principal Loss Collateral Provision may include a deficiency guarantee whereby another entity assumes liability after other default remedies have been exercised, and covers the deficiency incurred by the creditor. The Principal Loss Collateral Provision shall, at a minimum, provide for the provision of cash or cash equivalents in an amount that is not less than the difference between the value of the collateral and the amount of the accelerated Bond Loan outstanding.

4. In all cases, acceptable Credit Enhancements or Principal Loss Collateral Provisions shall be proffered by creditworthy providers and shall provide information about the adequacy of the facility in protecting the financial interests of the Federal Government, either directly or indirectly through supporting the financial strength of the

Bond Issue. The information provided must include the amount and quality of any Credit Enhancements, the financial strength of the provider of the Credit Enhancement, the terms, specific conditions such as renewal options, and any limiting conditions or revocability by the provider of the Credit Enhancement.

5. For Secondary Loans benefitting from a Principal Loss Collateral Provision (*e.g.*, a deficiency guarantee), the entity providing the Principal Loss Collateral Provision must be underwritten based on the same criteria as if the Secondary Loan were being made directly to that entity with the exception that the guarantee need not be collateralized.

6. If the Principal Loss Collateral Provision is provided by a financial institution that is regulated by an Appropriate Federal Banking Agency or an Appropriate State Agency, the guaranteeing institution must demonstrate performance of financially sound business practices relative to the industry norm for providers of collateral enhancements as evidenced by reports of Appropriate Federal Banking Agencies, Appropriate State Agencies, and auditors, as appropriate.

7. In the event that the Eligible CDFI proposes to use other Federal funds to service Bond Loan debt or as a Credit Enhancement, the CDFI Fund may require, in its sole discretion, that the Eligible CDFI provide written assurance from such other Federal program, in a form that is acceptable to the CDFI Fund and that the CDFI Fund may rely upon, that said use is permissible.

H. Reporting Requirements:

1. Reports.

a. General. As required pursuant to the Regulations at 12 CFR 1808.619, and as set forth in the Bond Documents and the Bond Loan documents, the CDFI Fund will collect information from each Qualified Issuer which may include, but will not be limited to: (i) quarterly and annual financial reports and data (including an OMB single audit per 2 CFR 200 Subpart F, as applicable) for the purpose of monitoring the financial health, ratios and covenants of Eligible CDFIs that include asset quality (nonperforming assets, loan loss reserves, and net charge-off ratios), liquidity (current ratio, working capital, and operating liquidity ratio), solvency (capital ratio, self-sufficiency, fixed charge, leverage, and debt service coverage ratios); (ii) annual reports as to the compliance of the Qualified Issuer and Eligible CDFIs with the Regulations and specific requirements of the Bond Documents and Bond Loan documents; (iii) Master Servicer/Trustee summary of

program accounts and transactions for each Bond Issue; (iv) Secondary Loan Certifications describing Eligible CDFI lending, collateral valuation, and eligibility; (v) financial data on Secondary Loans to monitor underlying collateral, gauge overall risk exposure across asset classes, and assess loan performance, quality, and payment history; (vi) annual certifications of compliance with program requirements; (vii) material event disclosures including any reports of Eligible CDFI management and/or organizational changes; (viii) annual updates to the Capital Distribution Plan (as described below); (ix) supplements and/or clarifications to correct reporting errors (as applicable); (x) project level reports to understand overall program impact and the manner in which Bond Proceeds are deployed for Eligible Community or Economic Development Purposes; and (xi) such other information that the CDFI Fund and/or the Bond Purchaser may require, including but not limited to demographic information of the beneficiaries of the CDFI Bond Guarantee Program, to the extent permissible by law.

b. Additional reporting by Qualified Issuers. A Qualified Issuer receiving a Guarantee shall submit annual updates to the approved Capital Distribution Plan, including an updated Proposed Sources and Uses of Funds for each Eligible CDFI, noting any deviation from the original baseline with regards to both timing and allocation of funding among Secondary Loan asset classes. The Qualified Issuer shall also submit a narrative, no more than five (5) pages in length for each Eligible CDFI, describing the Eligible CDFI's capacity to manage its Bond Loan. The narrative shall address any Notification of Material Events and relevant information concerning the Eligible CDFI's management information systems, personnel, executive leadership or board members, as well as financial capacity. The narrative shall also describe how such changes affect the Eligible CDFI's ability to generate impacts in Low-Income or Underserved Rural Areas.

c. Change of Secondary Loan asset classes. Any Eligible CDFI seeking to expand the allowable Secondary Loan asset classes beyond what was approved by the CDFI Bond Guarantee Program's Credit Review Board or make other deviations that could potentially result in a modification, as that term is defined in OMB Circulars A-11 and A-129, must receive approval from the CDFI Fund before the Eligible CDFI can begin to enact the proposed changes. The

CDFI Fund will consider whether the Eligible CDFI possesses or has acquired the appropriate systems, personnel, leadership, and financial capacity to implement the revised Capital Distribution Plan. The CDFI Fund will also consider whether these changes assist the Eligible CDFI in generating impacts in Low-Income or Underserved Rural Areas. Such changes will be reviewed by the CDFI Bond Guarantee Program and presented to the Credit Review Board for approval, and, if required, appropriate consultation will be made with OMB to ensure compliance with OMB Circulars A-11 and A-129, prior to notifying the Eligible CDFI if such changes are acceptable under the terms of the Bond Loan Agreement.

d. Reporting by Affiliates and Controlling CDFIs. In the case of an Eligible CDFI relying, for CDFI certification purposes, on the financing entity activity of a Controlling CDFI, the CDFI Fund will require that the Affiliate and Controlling CDFI provide certain joint reports, including but not limited to those listed in subparagraph 1(a) above.

e. Detailed information on specific reporting requirements and the format, frequency, and methods by which this information will be transmitted to the CDFI Fund will be provided to Qualified Issuers, Program Administrators, Servicers, and Eligible CDFIs through the Bond Loan Agreement, correspondence, and webinar trainings, and/or scheduled outreach sessions.

f. Reporting requirements will be enforced through the Agreement to Guarantee and the Bond Loan Agreement, and will contain a valid OMB control number pursuant to the Paperwork Reduction Act, as applicable.

g. Each Qualified Issuer will be responsible for the timely and complete submission of the annual reporting documents, including such information that must be provided by other entities such as Eligible CDFIs, Secondary Borrowers or Credit Enhancement providers. If such other entities are required to provide annual report information or documentation, or other documentation that the CDFI Fund may require, the Qualified Issuer will be responsible for ensuring that the information is submitted timely and complete. Notwithstanding the foregoing, the CDFI Fund reserves the right to contact such entities and require that additional information and documentation be provided directly to the CDFI Fund.

h. Annual Assessments. Each Qualified Issuer and Eligible CDFI will

be required to have an independent third-party conduct an Annual Assessment of its Bond Loan portfolio. The Annual Assessment is intended to support the CDFI Fund's annual monitoring of the Bond Loan portfolio and to collect financial health, internal control, investment impact measurement methodology information related to the Eligible CDFIs. This assessment is consistent with the program's requirements for Compliance Management and Monitoring (CMM) and Portfolio Management and Loan Monitoring (PMLM), and will be required pursuant to the Bond Documents and the Bond Loan documents. The assessment will also add to the Department of the Treasury's review and impact analysis on the use of Bond Loan proceeds in underserved communities and support the CDFI Fund in proactively managing portfolio risks and performance. The Annual Assessment criteria for Qualified Issuers and Eligible CDFIs is available on the CDFI Fund's website.

i. The CDFI Fund reserves the right, in its sole discretion, to modify its reporting requirements if it determines it to be appropriate and necessary; however, such reporting requirements will be modified only after notice to Qualified Issuers. Additional information about reporting requirements pursuant to this NOGA, the Bond Documents and the Bond Loan documents will be subject to the Paperwork Reduction Act, as applicable.

2. Accounting.

a. In general, the CDFI Fund will require each Qualified Issuer and Eligible CDFI to account for and track the use of Bond Proceeds and Bond Loan proceeds. This means that for every dollar of Bond Proceeds received from the Bond Purchaser, the Qualified Issuer is required to inform the CDFI Fund of its uses, including Bond Loan proceeds. This will require Qualified Issuers and Eligible CDFIs to establish separate administrative and accounting controls, subject to the applicable OMB Circulars.

b. The CDFI Fund will provide guidance to Qualified Issuers outlining

the format and content of the information that is to be provided on an annual basis, outlining and describing how the Bond Proceeds and Bond Loan proceeds were used.

VI. Agency Contacts

A. *General Information on Questions and CDFI Fund Support:* The CDFI Fund will respond to questions and provide support concerning this NOGA, the Qualified Issuer Application and the Guarantee Application between the hours of 9:00 a.m. and 5:00 p.m. ET, starting with the date of the publication of this NOGA. The final date to submit questions is April 9, 2024. Applications and other information regarding the CDFI Fund and its programs may be obtained from the CDFI Fund's website at <http://www.cdfifund.gov>. The CDFI Fund will post on its website responses to questions of general applicability regarding the CDFI Bond Guarantee Program.

B. The CDFI Fund's contact information is as follows:

TABLE 2—CONTACT INFORMATION

Type of question	Telephone number (not toll free)	Email addresses
CDFI Bond Guarantee Program	(202) 653-0421 Option 5	bgp@cdfi.treas.gov .
CDFI Certification	(202) 653-0423	ccme@cdfi.treas.gov .
Compliance Monitoring and Evaluation	(202) 653-0423	ccme@cdfi.treas.gov .
Information Technology Support	(202) 653-0422	AMIS@cdfi.treas.gov .

C. *Communication with the CDFI Fund:* The CDFI Fund will communicate with applicants, Qualified Issuers, Program Administrators, Servicers, Certified CDFIs and Eligible CDFIs, using the contact information maintained in their respective AMIS accounts. Therefore, each such entity must maintain accurate contact information (including contact person and authorized representative, email addresses, fax numbers, phone numbers, and office addresses) in its respective AMIS account. For more information about AMIS, please see the AMIS Landing Page at <https://amis.cdfifund.gov>.

VII. Information Sessions and Outreach

The CDFI Fund may conduct webcasts, webinars, or information sessions for organizations that are considering applying to, or are interested in learning about, the CDFI Bond Guarantee Program. The CDFI Fund intends to provide targeted outreach to both Qualified Issuer and Eligible CDFI participants to clarify the roles and requirements under the CDFI

Bond Guarantee Program. For further information, or to sign up for alerts, please visit the CDFI Fund's website at <http://www.cdfifund.gov>.

Authority: Pub. L. 111-240; 12 U.S.C. 4701, *et seq.*; 12 CFR part 1808; 12 CFR part 1805; 12 CFR part 1815.

Marcia Sigal,

Acting Director, Community Development Financial Institutions Fund.

[FR Doc. 2024-03750 Filed 2-23-24; 8:45 am]

BILLING CODE 4810-05-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Revision of an Approved Information Collection; Submission for OMB Review; Fair Housing Home Loan Data System Regulation

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning a revision to its information collection titled, "Fair Housing Home Loan Data System Regulation."

DATES: Comments must be received by March 27, 2024.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email:* prainfo@occ.treas.gov.
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557-0159, 400 7th Street

SW, Suite 3E-218, Washington, DC 20219.

- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E-218, Washington, DC 20219.

- *Fax:* (571) 293-4835.

Instructions: You must include "OCC" as the agency name and "1557-0159" in your comment. In general, the OCC will publish comments on www.reginfo.gov without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Written comments and recommendations for the proposed information collection should also be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. You can find this information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

You may review comments and other related materials that pertain to this information collection following the close of the 30-day comment period for this notice by the method set forth in the next bullet.

- *Viewing Comments Electronically:* Go to www.reginfo.gov. Hover over the "Information Collection Review" tab and click on "Information Collection Review" from the drop-down menu. From the "Currently under Review" drop-down menu, select "Department of Treasury" and then click "submit." This information collection can be located by searching OMB control number "1557-0159" or "Fair Housing Home Loan Data System Regulation." Upon finding the appropriate information collection, click on the related "ICR Reference Number." On the next screen, select "View Supporting Statement and Other Documents" and then click on the link to any comment listed at the bottom of the screen.

- For assistance in navigating www.reginfo.gov, please contact the Regulatory Information Service Center at (202) 482-7340.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649-5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf,

hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor.

"Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC asks OMB to approve this revised collection.

Title: Fair Housing Home Loan Data System Regulation.

OMB Control No.: 1557-0159.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Estimated Frequency of Response: On occasion.

Description: Part 27 requires certain national banks to record certain information and all national banks to retain certain information.¹ Specifically, national banks must record certain home loan data if they: (1) are otherwise required to maintain and report data pursuant to Regulation C,² which implements the Home Mortgage Disclosure Act (HMDA),³ in which case they are HMDA reporters or (2) receive more than 50 home loan applications annually. Specifically, national banks that are HMDA reporters meet the part 27 requirement by recording HMDA data along with the reasons for denying any loan application on the HMDA Loan Application/Register (LAR).⁴ A national bank that is not a HMDA reporter but that receives more than 50 home loan applications annually must comply with part 27 by either: (1) recording and reporting HMDA data and denial reasons on the LAR as if they were a HMDA reporter,⁵ or (2) recording and maintaining part 27-specified activity data relating to aggregate numbers of certain types of loans by geography and action taken.⁶ Part 27 also requires that all national banks, including those not subject to the recording requirements, to

maintain certain application and loan information in loan files. Part 27 further provides that the OCC may require national banks to maintain and submit additional information if there is reason to believe that the bank engaged in discrimination.

The requirements in part 27 are as follows:

Section 27.3(a)(1) requires provision of the data that national banks are required to collect on home loans pursuant to Regulation C.⁷

Sections 27.3(a)(2) and (3) require national banks that receive more than 50 applications but are not HMDA reporters to collect certain information quarterly.

Section 27.3(a) also lists exceptions to the HMDA-LAR recordkeeping requirements.

Section 27.3(b) lists the information national banks must attempt to obtain from an applicant as part of a home loan application and sets forth the information that banks must disclose to an applicant.

Section 27.3(c) sets forth additional information national banks must maintain in each of their home loan files.

Section 27.4 states that the OCC may require a national bank to maintain a Fair Housing Inquiry/Application Log found in Appendix III to part 27 including if: (1) there is reason to believe that the bank is prescreening, or otherwise engaging in discriminatory practices on a prohibited basis, (2) complaints filed with the Comptroller or letters in the Community Reinvestment Act file are found to be substantive in nature, indicating that the bank's home lending practices are, or may be, discriminatory, or (3) analysis of the data compiled by the bank under HMDA and Regulation C indicates a pattern of significant variation in the number of home loans between census tracts with similar incomes and home ownership levels differentiated only by race or national origin.

Section 27.5 requires a national bank to maintain the information required by § 27.3 for 25 months after the bank notifies the applicant of action taken on an application or after withdrawal of an application.

Section 27.7 requires a national bank to submit to the OCC, upon request prior to a scheduled examination, the information required by §§ 27.3(a) and 27.4. Non-HMDA reporters with more than 50 applications are required to

¹ The OCC issued part 27 as part of a settlement agreement in a case in which the plaintiffs alleged that Federal agencies, including the OCC, were obligated to exercise supervisory and regulatory powers to prevent discrimination in home mortgage lending under Title VIII of the Civil Rights Act of 1968 (Fair Housing Act). See *National Urban League, et al. v. Office of the Comptroller of the Currency, et al.*, 78 F.R.D. 543, 544 (D.D.C. May 3, 1978). See also 44 FR 63084, November 2, 1979.

² 12 CFR part 1003.

³ 12 U.S.C. 2801 *et seq.*

⁴ 12 CFR 27.3(a)(1)(i).

⁵ 12 CFR 27.3(a)(5).

⁶ 12 CFR 27.3(a)(2).

⁷ The quarterly recordkeeping requirements under 12 CFR 27.3(a) do not add any burden because they are duplicative of the recordkeeping requirements under 12 CFR 1003.4(f). See OMB control number 1557-0345.

submit this data using the Monthly Home Loan Activity Format form in Appendix I to part 27 and the Home Loan Data Submission Form in Appendix IV to part 27 except that there is an additional exclusion for national banks with fewer than 75 applications. Specifically, § 27.7(c)(3) states that a bank with fewer than 75 home loan applications in the preceding year is not required to submit such forms unless the home loan activity is concentrated in the few months preceding the request for data, indicating the likelihood of increased activity over the subsequent year, or there is cause to believe that a bank is not in compliance with the fair housing laws based on prior examinations and/or complaints, among other factors.

Section 27.7(d) provides that if there is cause to believe that a national bank is in noncompliance with fair housing laws, the Comptroller may require submission of additional Home Loan Data Submission Forms. The Comptroller may also require submission of the information maintained under § 27.3(a) and Home Loan Data Submission Forms at more frequent intervals than specified.

Burden Estimates:

Estimated Number of Respondents: 702.

Estimated Total Annual Burden: 12,632 hours.

Comments: On December 15, 2023, the OCC published a 60-day notice for this information collection, 88 FR 87052. No comments were received.

Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC'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 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.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2024-03855 Filed 2-23-24; 8:45 am]

BILLING CODE 4810-33-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of its information collection titled, "OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches." The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be received by March 27, 2024.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email:* prainfo@occ.treas.gov.
- *Mail:* Chief Counsel's Office,

Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557-0321, 400 7th Street SW, Suite 3E-218, Washington, DC 20219.

- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E-218, Washington, DC 20219.

- *Fax:* (571) 293-4835.

Instructions: You must include "OCC" as the agency name and "1557-0321" in your comment. In general, the OCC will publish comments on www.reginfo.gov without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public

disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Written comments and recommendations for the proposed information collection should also be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. You can find this information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

You may review comments and other related materials that pertain to this information collection following the close of the 30-day comment period for this notice by the method set forth in the next bullet.

- *Viewing Comments Electronically:* Go to www.reginfo.gov. Hover over the "Information Collection Review" tab and click on "Information Collection Review" from the drop-down menu. From the "Currently under Review" drop-down menu, select "Department of Treasury" and then click "submit." This information collection can be located by searching OMB control number "1557-0321" or "OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches." Upon finding the appropriate information collection, click on the related "ICR Reference Number." On the next screen, select "View Supporting Statement and Other Documents" and then click on the link to any comment listed at the bottom of the screen.

- For assistance in navigating www.reginfo.gov, please contact the Regulatory Information Service Center at (202) 482-7340.

FOR FURTHER INFORMATION CONTACT:

Shaquita Merritt, Clearance Officer, (202) 649-5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC

asks the OMB to extend its approval of the collection in this notice.

Title: OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches.

OMB Control No.: 1557–0321.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Description: The OCC's guidelines, codified in 12 CFR part 30, appendix D, establish minimum standards for the design and implementation of a risk governance framework for insured national banks, insured Federal savings associations, and insured Federal branches of a foreign bank (banks). The guidelines apply to covered banks. A covered bank is a bank with average total consolidated assets: (i) equal to or greater than \$50 billion; (ii) less than \$50 billion if that bank's parent company controls at least one insured national bank or insured Federal savings association that has average total consolidated assets of \$50 billion or greater; or (iii) less than \$50 billion, if the OCC determines such bank's operations are highly complex or otherwise present a heightened risk as to warrant the application of the guidelines. The guidelines also establish minimum standards for a board of directors in overseeing the framework's design and implementation. These guidelines were finalized on September 11, 2014.¹ The OCC is now seeking to renew the information collection associated with these guidelines. The standards contained in the guidelines are enforceable under section 39 of the Federal Deposit Insurance Act (FDIA),² which authorizes the OCC to prescribe operational and managerial standards for insured national banks, insured Federal savings associations, and insured Federal branches of a foreign bank.

The guidelines formalize the OCC's heightened expectations program. The guidelines also further the goal of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to strengthen the financial system by focusing management and boards of directors on improving and strengthening risk management practices and governance, thereby minimizing the probability and impact of future financial crises. The standards for the design and implementation of

the risk governance framework, which contain collections of information, are as follows:

Standards for Risk Governance Framework

Covered banks should establish and adhere to a formal, written risk governance framework designed by independent risk management. The framework should include delegations of authority from the board of directors to management committees and executive officers and risk limits for material activities. The framework should be approved by the board of directors or the board's risk committee, and it should be reviewed and updated, at least annually, by independent risk management.

Front Line Units

Front line units should take responsibility and be held accountable by the chief executive officer (CEO) and the board of directors for appropriately assessing and effectively managing the risks associated with their activities. In fulfilling this responsibility, each front line unit should, either alone or in conjunction with another organizational unit that has the purpose of assisting a front line unit: (i) assess, on an ongoing basis, the material risks associated with its activities and use such risk assessments as the basis for fulfilling its responsibilities and for determining if actions need to be taken to strengthen risk management or reduce risk given changes in the unit's risk profile or other conditions; and (ii) establish and adhere to a set of written policies that include front line unit risk limits. Such policies should ensure that risks associated with the front line unit's activities are effectively identified, measured, monitored, and controlled, consistent with the covered bank's risk appetite statement, concentration risk limits, and all policies established within the risk governance framework. Front line units should also establish and adhere to procedures and processes, as necessary to maintain compliance with the policies described in (ii). Furthermore, front line units should adhere to all applicable policies, procedures, and processes established by independent risk management. Front line units should also develop, attract, and retain talent and maintain staffing levels required to carry out the unit's role and responsibilities effectively; establish and adhere to talent management processes; and establish and adhere to compensation and performance management programs.

Independent Risk Management

Independent risk management should oversee the covered bank's risk-taking activities and assess risks and issues independent of the front line units. In fulfilling these responsibilities, independent risk management should: (i) take responsibility and be held responsible by the CEO and the board of directors for designing a comprehensive written risk governance framework that meets the guidelines and is commensurate with the size, complexity, and risk profile of the covered bank; (ii) identify and assess, on an ongoing basis, the covered bank's material aggregate risks and use such risk assessments as the basis for fulfilling its responsibilities and for determining if actions need to be taken to strengthen risk management or reduce risk given changes in the covered bank's risk profile or other conditions; (iii) establish and adhere to enterprise policies that include concentration risk limits that state how aggregate risks within the covered bank are effectively identified, measured, monitored, and controlled, consistent with the covered bank's risk appetite statement and all policies and processes established within the risk governance framework; (iv) establish and adhere to procedures and processes, as necessary, to ensure compliance with policies in (iii); (v) identify and communicate to the CEO and either the board of directors or the board's risk committee any material risks and significant instances where the independent risk management's assessment of risk differs from that of a front line unit and any significant instances where a front line unit is not adhering to the risk governance framework; (vi) identify and communicate to the board of directors or the board's risk committee material risks and significant instances where independent risk management's assessment of risk differs from that of the CEO and significant instances where the CEO is not adhering to, or not holding front line units accountable for adhering to, the risk governance framework; and (vii) develop, attract, and retain talent and maintain the staffing levels required to carry out the unit's role and responsibilities effectively while establishing and adhering to talent management processes and compensation and performance management programs.

Internal Audit

Internal audit should ensure that the covered bank's risk governance framework complies with the guidelines and is appropriate for the size,

¹ 79 FR 54518.

² 12 U.S.C. 1831p–1. Section 39 was enacted as part of the Federal Deposit Insurance Corporation Improvement Act of 1991, Public Law 102–242, section 132(a), 105 Stat. 2236, 2267–70.

complexity, and risk profile of the covered bank. It should maintain a complete and current inventory of the covered bank's material processes, product lines, services, and functions and assess the risks, including emerging risks, associated with each. These risks collectively provide a basis for the audit plan. Internal audit should establish and adhere to an audit plan that: (i) is periodically reviewed and updated; (ii) takes into account the covered bank's risk profile, emerging risks, and issues; and (iii) establishes the frequency with which activities should be audited. The audit plan should require internal audit to evaluate the adequacy of and compliance with policies, procedures, and processes established by front line units and independent risk management under the risk governance framework. Significant changes to the audit plan should be communicated to the board's audit committee. Internal audit should report, in writing, conclusions, material issues, and recommendations from audit work carried out under the audit plan to the board's audit committee. Reports should identify the root cause of any material issues and include: (i) a determination of whether the root cause creates an issue that has an impact on one or more organizational units within the covered bank; and (ii) a determination of the effectiveness of front line units and independent risk management in identifying and resolving issues in a timely manner. Internal audit should establish and adhere to processes for independently assessing the design and ongoing effectiveness of the risk governance framework on at least an annual basis. The independent assessment should include a conclusion on the covered bank's compliance with the standards set forth in the guidelines. Internal audit should identify and communicate to the board's audit committee significant instances where front line units or independent risk management are not adhering to the risk governance framework. Internal audit should establish a quality assurance program that ensures internal audit's policies, procedures, and processes: (i) comply with applicable regulatory and industry guidance; (ii) are appropriate for the size, complexity, and risk profile of the covered bank; (iii) are updated to reflect changes to internal and external risk factors, emerging risks, and improvements in industry internal audit practices; and (iv) are consistently followed. Internal audit should develop, attract, and retain talent and maintain staffing levels required to effectively carry out its role and responsibilities.

Internal audit should establish and adhere to talent management processes and compensation and performance management programs that comply with the guidelines.

Strategic Plan

The CEO, with input from front line units, independent risk management, and internal audit, should be responsible for the development of a written strategic plan that covers, at a minimum, a three-year period. The board of directors should evaluate and approve the plan and monitor management's efforts to implement the strategic plan at least annually. The plan should: (i) include a comprehensive assessment of risks that currently impact the covered bank or that could have an impact on the covered bank during the period covered by the strategic plan; (ii) articulate an overall mission statement and strategic objectives for the covered bank with an explanation of how the covered bank will update the risk governance framework to account for changes to its risk profile projected under the strategic plan; and (iii) be reviewed, updated, and approved due to changes in the covered bank's risk profile or operating environment that were not contemplated when the plan was developed.

Risk Appetite Statement

A covered bank should have a comprehensive written statement that articulates its risk appetite and serves as the basis for the risk governance framework. The statement should contain both qualitative components that describe a safe and sound risk culture and how the covered bank will assess and accept risks and quantitative limits that include sound stress testing processes and address earnings, capital, and liquidity.

Risk Limit Breaches

A covered bank should establish and adhere to processes that require front line units and independent risk management to: (i) identify breaches of the risk appetite statement, concentration risk limits, and front line unit risk limits; (ii) distinguish breaches based on the severity of their impact; (iii) establish protocols for when and how to inform the board of directors, front line unit management, independent risk management, internal audit, and the OCC regarding a breach; (iv) provide a written description of the breach resolution; and (v) establish accountability for reporting and resolving breaches that include consequences for risk limit breaches

that take into account the magnitude, frequency, and recurrence of breaches.

Concentration Risk Management

The risk governance framework should include policies and supporting processes appropriate for the covered bank's size, complexity, and risk profile for effectively identifying, measuring, monitoring, and controlling the covered bank's concentrations of risk.

Risk Data Aggregation and Reporting

The risk governance framework should include a set of policies, supported by appropriate procedures and processes, designed to provide risk data aggregation and reporting capabilities appropriate for the covered bank's size, complexity, and risk profile and to support supervisory reporting requirements. Collectively, these policies, procedures, and processes should provide for: (i) the design, implementation, and maintenance of a data architecture and information technology infrastructure that support the covered bank's risk aggregation and reporting needs during normal times and during times of stress; (ii) the capturing and aggregating of risk data and reporting of material risks, concentrations, and emerging risks in a timely manner to the board of directors and the OCC; and (iii) the distribution of risk reports to all relevant parties at a frequency that meets their needs for decision-making purposes.

Talent and Compensation Management

A covered bank should establish and adhere to processes for talent development, recruitment, and succession planning. The board of directors or appropriate committee should review and approve a written talent management program. A covered bank should also establish and adhere to compensation and performance management programs that comply with any applicable statute or regulation.

Board of Directors Training and Evaluation

The board of directors of a covered bank should establish and adhere to a formal, ongoing training program for all directors. The board of directors should also conduct an annual self-assessment.

Burden Estimates:

Estimated Number of Respondents: 27.

Estimated Burden per Respondent: 3,776 hours.

Estimated Total Annual Burden: 101,952 hours.

Comments: On December 13, 2023, the OCC published a 60-day notice for

this information collection, (88 FR 86445). No comments were received.

Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC'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 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.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2024-03816 Filed 2-23-24; 8:45 am]

BILLING CODE 4810-33-P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of the Beneficial Ownership Requirements for Legal Entity Customers

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, FinCEN invites comment on a renewal, without change, of existing information collection requirements related to beneficial ownership requirements for legal entity customers. Under Bank Secrecy Act regulations, covered financial institutions are required to collect, and to maintain records of, the information used to identify and verify the identity of each beneficial owner of their legal entity customers, subject to certain exclusions and exemptions. This request for comment is made pursuant to the Paperwork Reduction Act of 1995 (PRA).

DATES: Written comments are welcome and must be received on or before April 26, 2024.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Refer to Docket Number FINCEN-2024-0008 and the specific Office of Management and Budget (OMB) control number 1506-0070.

- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN-2024-0008 and OMB control number 1506-0070.

Please submit comments by one method only. Comments will be reviewed consistent with the PRA and applicable OMB regulations and guidance. All comments submitted in response to this notice will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT:

FinCEN's Regulatory Support Section at 1-800-767-2825 or electronically at frc@fincen.gov.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Provisions

The legislative framework generally referred to as the Bank Secrecy Act (BSA) consists of the Currency and Foreign Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)¹ and other legislation, including the Anti-Money Laundering Act of 2020 (AML Act).² The BSA is codified at 12 U.S.C. 1829b and 1951-1960 and 31 U.S.C. 5311-5314 and 5316-5336, and notes thereto, with implementing regulations at 31 CFR Chapter X.

The BSA authorizes the Secretary of the Treasury (Secretary) to, *inter alia*, require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, or regulatory matters, risk assessments or proceedings, or in the conduct of intelligence or counter-intelligence activities to protect against terrorism, and to implement anti-money laundering (AML) programs and compliance procedures.³ The authority

¹ USA PATRIOT Act, Public Law 107-56.

² The AML Act was enacted as Division F, sections 6001-6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, 134 Stat. 3388 (NDAA).

³ Section 358 of the USA PATRIOT Act expanded the purpose of the BSA by including a reference to reports and records "that have a high degree of

of the Secretary to administer the BSA has been delegated to the Director of FinCEN.⁴

Subject to certain exclusions and exemptions, 31 CFR 1010.230 requires covered financial institutions⁵ to establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of new accounts opened by legal entity customers and to include such procedures in their AML programs. Covered financial institutions may obtain the required identifying information by either obtaining a prescribed certification form from the individual opening the account on behalf of the legal entity customer, or by obtaining from the individual the information required by the form by another means, provided the individual certifies to the best of the individual's knowledge the accuracy of the information. Covered financial institutions must verify the identity of each beneficial owner identified according to risk-based procedures and may rely on the information supplied by the legal entity customer regarding the identity of its beneficial owner or owners, provided that it has no knowledge of facts that would reasonably call into question the reliability of such information.

Covered financial institutions must also maintain a record of the identifying information obtained, and a description of any document relied on for verification, including a description of any non-documentary methods and results of any measures undertaken, and the resolutions of substantive discrepancies. Covered financial institutions must retain records used to identify each beneficial owner for five years after the date the account is closed and must also retain records used to verify the identity of each beneficial owner for five years after the record is made.

As required by section 6403(d) of the Corporate Transparency Act (CTA), which was enacted as part of the AML Act, FinCEN intends to revise the requirements of 31 CFR 1010.230 to bring them into conformance with the

usefulness in intelligence or counterintelligence activities to protect against international terrorism." See 12 U.S.C. 1829b(a). Section 6101 of the AML Act further expanded the purpose of the BSA to cover such matters as preventing money laundering, tracking illicit funds, assessing risk, and establishing appropriate frameworks for information sharing. See 31 U.S.C. 5311.

⁴ Treasury Order 180-01 (Jan. 14, 2020).

⁵ Covered financial institutions include certain banks, brokers or dealers in securities, mutual funds, futures commission merchants, and introducing brokers in commodities. See 31 CFR 1010.230(f), 1010.605(e)(1).

CTA and address other considerations that FinCEN is required to take into account.⁶ As part of the revisions to 31 CFR 1010.230, FinCEN intends to further assess the PRA burden of these requirements.

II. Paperwork Reduction Act of 1995⁷

Title: Beneficial Ownership Requirements for Legal Entity Customers (31 CFR 1010.230).

OMB Control Number: 1506–0070.

Form Number: Appendix A to § 1010.230—Certification Regarding Beneficial Owners of Legal Entity Customers.

Abstract: FinCEN is issuing this notice to renew the OMB control number for the beneficial ownership requirements for legal entity customers regulations contained in 31 CFR 1010.230.

Affected Public: Business and other for-profit institutions and non-profit institutions.

Type of Review: Renewal without change of a currently approved information collection.

Frequency: As required.

Estimated Number of Respondents: 15,221 covered financial institutions.⁸

RESPONDENT COVERED FINANCIAL INSTITUTIONS BY CATEGORY

Financial institution type	Number of entities
Banks	⁹ 9,250
Brokers or dealers in securities	¹⁰ 3,477
Mutual funds	¹¹ 1,495
Futures commission merchants	¹² 62
Introducing brokers in commodities	¹³ 937
Total	15,221

Estimated Recordkeeping Burden per Response:

⁶ The CTA is Title LXIV of the NDAA.

⁷ Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

⁸ FinCEN's estimate accounts for all covered U.S. financial institutions. There are approximately 15,221 covered financial institutions.

⁹ Bank data is as of December 14, 2023, from Federal Deposit Insurance Corporation (FDIC) BankFind. See FDIC, BankFind, available at <https://banks.data.fdic.gov/bankfind-suite/bankfind>. Credit union data is as of September 30, 2023, from the National Credit Union Administration (NCUA) Quarterly Data Summary Reports. See NCUA, Quarterly Data Summary Reports, available at <https://ncua.gov/analysis/credit-union-corporate-call-report-data/quarterly-data-summary-reports>.

¹⁰ According to the Securities and Exchange Commission (SEC), there are 3,477 broker-dealers in securities as of December 2023. See SEC, Data, Company Information About Active Broker-Dealers, available at <https://www.sec.gov/help/foiadocsbdfioa>.

¹¹ According to the SEC, as of the third quarter of 2023, there are 1,495 open-end registered investment companies that report on Form N-CEN. SEC, Data, Form N-CEN Data Sets, available at <https://www.sec.gov/dera/data/form-ncen-data-sets>.

a. Update and maintain beneficial ownership identification procedures: 20 minutes.¹⁴

b. Customer identification, verification, and review and recordkeeping of the beneficial ownership information: 80 minutes. A range of 40 to 120 minutes per legal entity customer (an average of 80 minutes per legal entity customer).¹⁵

Estimated Total Annual Responses: 5,723,096.¹⁶

Estimated Total Annual Recordkeeping Burden: 7,615,574 hours.¹⁷

¹² According to the Commodity Futures Trading Commission (CFTC), there are 62 futures commission merchants as of October 31, 2023. See CFTC, Financial Data for FCMs, available at <https://www.cftc.gov/MarketReports/financialfcmdata/index.htm>.

¹³ According to National Futures Association, there are 937 introducing brokers in commodities as of November 30, 2023.

¹⁴ See FinCEN, Customer Due Diligence Requirements for Financial Institutions Final Rule, 81 FR 29398 (May 11, 2016). The final rule recognized a burden of 56 hours to develop the initial procedures (40 hours for small entities). Once procedures are developed, an annual burden of 20 minutes is recognized for revisions to and maintenance of such procedures. Covered financial institutions were required to comply with this rule by May 11, 2018, so no burden hours are included in this analysis for the initial development of procedure.

¹⁵ See FinCEN, Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of the Beneficial Ownership Requirements for Legal Entity Customers, 84 FR 72137 (Dec. 30, 2019). On December 30, 2019, FinCEN published a notice to renew the Beneficial Ownership Requirements for Legal Entity Customers (the 2019 Notice). In response to the 2019 Notice, a public policy, research and advocacy group, whose membership includes a broad range of U.S. and U.S.-based banks, provided a comment noting that the estimate for customer identification, verification, and review and recordkeeping of beneficial ownership information should be increased to a range of 40 to 120 minutes. Because of its broad membership of banks impacted by the regulations, FinCEN chose to take the average of the range of 40 to 120 minutes to estimate a new burden of 80 minutes per new account opened by a legal entity customer. When the OMB control number was renewed in 2020, that 80 minutes estimate was incorporated. For the rationale for the increase in the burden estimate to 80 minutes per new account opened by a legal entity customer, see Office of Management and Budget, Supporting Statement for OMB Control Number 1506–0070, available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202003-1506-001.

¹⁶ See FinCEN, Customer Due Diligence Requirements for Financial Institutions Final Rule, 81 FR 29398 (May 11, 2016). Based on research conducted as part of the final rule, it was estimated that each covered financial institution will open, on average, 1.5 new legal entity accounts per business day. There are 250 business days per year. (15,221 covered financial institutions × 1.5 accounts per day × 250 business days per year = 5,707,875 legal entity accounts opened per year). 5,723,096 responses (5,707,875 accounts to verify plus 15,221 covered financial institution's programs to update).

¹⁷ 5,707,875 new legal entity accounts multiplied by 80 minutes per account established and divided by 60 minutes per hour equals 7,610,500 burden

Estimated Total Annual Reporting and Recordkeeping Cost:

\$372,782,347.30 (7,615,574 hours multiplied by \$48.95).¹⁸

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. Records required to be retained under the BSA must be retained for five years.

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.

Jimmy L. Kirby, Jr.,

Deputy Director, Financial Crimes Enforcement Network.

[FR Doc. 2024–03965 Filed 2–23–24; 8:45 am]

BILLING CODE 4810–02–P

hours to identify and verify beneficial owners of new legal entity accounts per year. 20 minutes to update and maintain beneficial ownership identification and verification procedures within a covered financial institution's AML program multiplied by 15,221 covered financial institutions and divided by 60 minutes equals 5,074 burden hours annually. The total annual burden hours estimate for this information collection is (7,610,500 + 5,074) 7,615,574 hours.

¹⁸ The average hourly wage rate is calculated from the May 2022 U.S. Bureau of Labor Statistics (BLS) median hourly wage for “13–1041 Compliance Officer” of \$34.47. See BLS, Occupational Employment and Wages Statistics (May 2022), available at <https://www.bls.gov/oes/tables.htm>. The ratio between benefits and wages for private industry workers is \$12.19 (hourly benefits)/\$29.34 (hourly wages) = 0.42, as of September 2023. The benefit factor is 1 plus the benefit/wages ratio, or 1.42. See BLS, Employee Costs for Employee Compensation (Sept. 2023), available at <https://www.bls.gov/ecec/home.htm#:~:text=Employer%20costs%20for%20private%20industry,percent%20of%20total%20compensation%20costs>. The fully-loaded wage rate is \$48.95 (\$34.47 multiplied by 1.42).

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Low Income Taxpayer Clinic Grant Program; Availability of 2024 Supplemental Grant Opportunity**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Solicitation of grant applications.

SUMMARY: This document contains a notice that the IRS has provided a supplemental grant opportunity in www.grants.gov for organizations interested in applying for a Low Income Taxpayer Clinic (LITC) matching grant. Supplemental grant funds may be awarded for start-up expenditures incurred by new clinics during 2024. The budget and the period of performance for the grant will be July 1, 2024–December 31, 2024. The application period runs from February 26, 2024, through April 10, 2024. Organizations currently receiving a grant for 2024 are not eligible to apply for this supplemental grant opportunity.

DATES: All applications for funding pursuant to this supplemental funding notice must be filed electronically by 11:59 p.m. (eastern time) on April 10, 2024. All organizations must use the funding number of TREAS–GRANTS–052024–002, and the Catalog of Federal Domestic Assistance program number is 21.008, see www.sam.gov. The IRS is scheduling two optional webinars, where it will provide information about the LITC Program and the supplemental application process. Details on the dates and times of the webinars are available at www.taxpayeradvocate.irs.gov/about-us/litc-grants/. Note that the selection process for these part-year grants may not be complete before the beginning of the application period for the 2025 grant year; thus, applicants for a grant for the period July 1, 2024–December 31, 2024, will be expected to submit an application for full-year funding for the 2025 grant year during the 2025 grant application period when announced later this year.

FOR FURTHER INFORMATION CONTACT: Karen Tober at (202) 317–9590 or by email at karen.tober@irs.gov. The IRS office that provides oversight of the LITC grant program is the LITC Program Office, located at: IRS, Taxpayer Advocate Service, LITC Program Office, TA:LITC, 1111 Constitution Avenue NW, Room 1026, Washington, DC 20224. Copies of the IRS Publication 3319 (Rev. 5–2024), *2024 Grant Application Package and Guidelines*, can be downloaded at [\[taxpayeradvocate.irs.gov/about-us/litc-grants/\]\(http://taxpayeradvocate.irs.gov/about-us/litc-grants/\) or ordered by calling the IRS Distribution Center toll-free at 1–800–829–3676. See <https://youtu.be/6kRrjN-DNYQ> for a short informational video about the LITC Program. *Note:* To assist organizations in applying for funding, the “Reminders and Tips for Completing Form 13424–M” available at <https://www.taxpayeradvocate.irs.gov/about-us/litc-grants> includes instructions for which questions an organization should complete if requesting funding only for the English as a second language \(ESL\) Education Pilot Program described in this notice.](https://www.</p></div><div data-bbox=)

SUPPLEMENTARY INFORMATION:**Background**

Pursuant to 26 U.S.C. 7526, the IRS will annually award up to \$6,000,000 (unless otherwise provided by specific Congressional appropriation) to qualified organizations, subject to the limitations in the statute. Grants are for the development, expansion, or continuation of an LITC.

For FY 2023, pursuant to the Consolidated Appropriations Act, 2023, Congress doubled both the overall LITC grant funding level from \$13 million in fiscal year (FY) 2022 to \$26 million and the maximum amount that may be awarded to any clinic from \$100,000 to \$200,000. See Public Law 117–328, Division E. For FY 2024, the IRS is currently operating under a Continuing Resolution that expires on March 8, 2024. The President’s 2024 budget request includes a continuation of the overall LITC grant funding level at \$26 million and the increased funding cap of \$200,00 per clinic. Thus, the IRS remains hopeful that the funding will remain at \$26 million when an appropriation for FY 2024 is enacted, and that the increased per clinic cap of \$200,000 will also continue. Consequently, the IRS is allowing applicants to request up to \$200,000 for the 2024 supplemental grant period. The IRS will also continue the ESL Education Pilot Program that was rolled out as part of the February 2023 supplemental funding opportunity. See 88 FR 13864–13866 (March 6, 2023). If Congress ultimately does not continue the LITC Program’s funding at \$26 million and/or the increased per-clinic funding cap of \$200,000, the IRS will adjust each supplemental grant recipient’s award to reflect any limitations in the appropriation for FY 2024.

At least 90 percent of the taxpayers represented by the clinic must have incomes which do not exceed 250 percent of the Federal poverty level as determined under criteria established by

the Department of Health and Human Services. See 89 FR 2961–63 (Jan. 17, 2024). In addition, the amount in controversy for the tax year to which the controversy relates generally cannot exceed the amount specified in Internal Revenue Code (IRC) section 7463 (\$50,000) for eligibility for special small tax case procedures in the United States Tax Court. IRC section 7526(c)(5) requires clinics to provide dollar-for-dollar matching funds, which may consist of funds from other non-Federal sources or contributions of volunteer time. See IRS Pub. 3319 for additional details.

Mission Statement

Low Income Taxpayer Clinics ensure the fairness and integrity of the tax system for taxpayers who are low-income or ESL by providing *pro bono* representation on their behalf in tax disputes with the IRS; educating them about their rights and responsibilities as taxpayers; and identifying and advocating for issues that impact these taxpayers.

Expansion of the Type of Qualified Services an Organization Can Provide

IRC section 7526(b)(1)(A) authorizes the IRS to award grants to organizations that represent low-income taxpayers in controversies before the IRS and/or provide education to ESL taxpayers regarding their taxpayer rights and responsibilities.

To achieve maximum access to justice for low-income and ESL taxpayers, the IRS has expanded the eligibility criteria for a grant by removing the requirement for eligible organizations to provide direct controversy representation. In addition, pursuant to the new ESL Education Pilot Program started in 2023 and continuing for 2024, a supplemental grant may be awarded to an organization to operate a program to inform ESL taxpayers about their taxpayer rights and responsibilities under the IRC without the requirement to also provide tax controversy representation to low-income taxpayers. See IRS Pub. 3319 for examples of what constitutes a “clinic.”

Selection Consideration

Despite the IRS’s efforts to foster parity in availability and accessibility in choosing organizations receiving LITC matching grants and the continued increase in clinic services nationwide, there remain communities that are underserved by clinics. The states of Hawaii, Kansas, Nevada, North Dakota, South Dakota, and West Virginia, and the territory of Puerto Rico currently do not have an LITC.

Although each application for the 2024 supplemental grant will be given due consideration, the IRS is especially interested in receiving applications from organizations providing services in these underserved geographic areas. For organizations that intend to refer low-income taxpayers in controversies with the IRS to other qualified representatives rather than providing representation directly to low-income taxpayers, priority will be given to established organizations that can help provide coverage to underserved geographic areas. For the ESL Education Pilot Program, special consideration will be given to established organizations with existing community partnerships that can swiftly implement and deliver services to the target audiences.

As in prior years, the IRS will consider a variety of factors in determining whether to award a supplemental grant, including: (1) the number of taxpayers who will be assisted by the organization, including the number of ESL taxpayers in that geographic area; (2) the existence of other LITCs assisting the same population of low-income and ESL taxpayers; (3) the quality of the program offered by the organization, including the qualifications of its administrators and qualified representatives, and its record in providing services to low-income taxpayers; (4) the quality of the organization, including the reasonableness of the proposed budget; (5) the organization's compliance with all Federal tax obligations (filing and payment); (6) the organization's compliance with all Federal nontax obligations (filing and payment); (7) whether debarment or suspension (31 CFR part 19) applies or whether the organization is otherwise excluded from or ineligible for a Federal award; and (8) alternative funding sources available to the organization, including amounts received from other grants and contributors and the endowment and resources of the institution sponsoring the organization.

For programs where all or the majority of cases will be placed with volunteers, we will also consider the following: (1) the qualifications of the representatives (attorneys, certified public accountants, or enrolled agents) who have agreed to accept taxpayer case referrals from an LTC and provide representation or consultation services free of charge; and (2) the ability of the organization to monitor referrals and ensure that the *pro bono* representatives are handling the cases properly, including taking timely case actions and ensuring services are offered for free.

The final funding decisions are made by the National Taxpayer Advocate, unless recused. The costs of preparing and applying for the grant are the responsibility of each applicant. Applications may be released in response to Freedom of Information Act requests after any necessary redactions are made. Therefore, applicants must not include any individual taxpayer information. The IRS will notify each applicant in writing once funding decisions have been made.

Erin Collins,

National Taxpayer Advocate.

[FR Doc. 2024-03791 Filed 2-23-24; 8:45 am]

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DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; State Small Business Credit Initiative

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Written comments must be received on or before March 27, 2024 to be assured of consideration.

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: Copies of the submissions may be obtained from Spencer W. Clark by emailing PRA@treasury.gov, calling (202) 927-5331, or viewing the entire information collection request at www.reginfo.gov.

SUPPLEMENTARY INFORMATION:

Title: State Small Business Credit Initiative.

OMB Control Number: 1505-0227.

Type of Review: Revision of a currently approved collection.

Description: This information collection captures information related

to the State Small Business Credit Initiative (SSBCI). The American Rescue Plan Act of 2021 (ARPA) reauthorized and amended the Small Business Jobs Act of 2010 (SSBCI statute) to fund the SSBCI as a response to the economic effects of the COVID-19 pandemic.ⁱ SSBCI is a Federal program administered by the U.S. Department of the Treasury (Treasury) that was created to strengthen the programs of jurisdictions (*i.e.*, States, the District of Columbia, Territories, Tribal governments) that support private financing for small businesses. SSBCI includes the Capital Program, through which Treasury provides funding to jurisdictions to expand access to capital for small businesses, and the Technical Assistance (TA) Program, through which jurisdictions provide legal, accounting, and financial advisory services (TA services) to very small and underserved businesses that are applying for SSBCI Capital Program funding and other governmental programs that support small businesses (eligible beneficiaries). The TA Program includes an allocation-formula based TA Grant Program, as well as the competitive grant SSBCI Investing in America Small Business Opportunity Program (SBOP), which Treasury recently announced via a Notice of Funding Opportunity (NOFO). Treasury is updating the burden estimate for OMB Control Number 1505-0227 to better account for applications received under the SBOP, as well as proposed SBOP reporting requirements.ⁱⁱ

Form: Treasury's portal, various templates.

Affected Public: State, Territorial and Tribal governments, small businesses.

Estimated Number of Respondents: 100 for application submission; 15 for reporting.

ⁱ ARPA, Public Law 117-2, sec. 3301, codified at 12 U.S.C. 5701 *et seq.* SSBCI was originally established in title III of the Small Business Jobs Act of 2010.

ⁱⁱ The draft SSBCI Investing in America SBOP application, including related templates and other application materials, is available on Treasury's website at <https://home.treasury.gov/policy-issues/small-business-programs/state-small-business-credit-initiative-ssbci/2021-ssbci/program-materials/application-materials>. If awarded a grant under the SBOP, Treasury anticipates that SBOP recipients will be required to submit progress performance reports annually and financial reports via Form SF-425 semi-annually, in accordance with 2 CFR 200.328 and 200.329 and the terms and conditions of the grant. For progress performance reporting, SBOP recipients will be required to track and submit data on Treasury-specific data elements. Treasury proposes to require reports for the SSBCI Investing in America SBOP in substantially the form of the reporting guidance used for the formula-based TA Grant Program, which may be found on Treasury's website at <https://home.treasury.gov/system/files/136/SSBCI-Technical-Assistance-Reporting-Guidance.pdf>.

Frequency of Response: For application submission: one time; for grant award modifications: on occasion; for reporting: annually and semiannually.

Estimated Total Number of Annual Responses: The current estimate for OMB Control Number 1505–0227 is 112,376. Treasury estimates the SSBCI Investing in America SBOP will increase this estimate by 6,115 to 118,491.

Estimated Time per Response: For the SSBCI Investing in America SBOP, depending on the type of collection Treasury estimates that responses will take 9 minutes up to 6 hours.

Estimated Total Annual Burden Hours: The current estimate for OMB Control Number 1505–0227 is 24,877. Treasury estimates the SSBCI Investing in America SBOP will increase this estimate by 1,530 hours to 26,407.

Authority: 44 U.S.C. 3501 *et seq.*

Spencer W. Clark,
Treasury PRA Clearance Officer.

[FR Doc. 2024–03847 Filed 2–23–24; 8:45 am]

BILLING CODE 4810–AK–P

UNIFIED CARRIER REGISTRATION PLAN

Sunshine Act Meetings

TIME AND DATE: February 29, 2024, 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: 997 0103 4622, to listen and participate in this meeting. The website to participate via Zoom Meeting and Screenshare is <https://kellen.zoom.us/j/99701034622>.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the “Board”) 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. Welcome and Call to Order—UCR Board Chair

The UCR Board Chair will welcome attendees, call the meeting to order, call roll for the Board, confirm the presence of a quorum, and facilitate self-introductions.

II. Verification of Publication of Meeting Notice—UCR Executive Director

The UCR Executive Director will verify publication of the meeting notice on the UCR website and distribution to the UCR contact list via email, followed by subsequent publication of the notice in the **Federal Register**.

III. Review and Approval of Board Agenda—UCR Board Chair

For Discussion and Possible Board Action

The proposed Agenda will be reviewed. The Board will consider action to adopt.

Ground Rules

➤ Board actions taken only in designated areas on the agenda.

IV. Approval of Minutes of the January 18, 2024 UCR Board Meeting—UCR Board Chair

For Discussion and Possible Board Action

Draft Minutes from the January 18, 2024, UCR Board meeting will be reviewed. The Board will consider action to approve.

V. Approval of Minutes of the February 1, 2024 UCR Board Meeting—UCR Board Chair

For Discussion and Possible Board Action

Draft Minutes from the February 1, 2024, UCR Board meeting will be reviewed. The Board will consider action to approve.

VI. Report of FMCSA—FMCSA Representative

The Federal Motor Carrier Safety Administration (FMCSA) will provide a report on any relevant agency activity, including the status of the FMCSA’s Notice of Proposed Rulemaking concerning the 2025 UCR Fee Rulemaking and its publication in the **Federal Register**.

VII. Engagement Letter Between the UCR Plan and the Bradley Arant Law Firm—UCR Board Chair and UCR Executive Director

For Discussion and Possible Board Action

An engagement letter between the UCR Plan and the Bradley Arant law firm will be presented to the Board for consideration and approval covering legal services provided by the Bradley Arant law firm in representing the UCR Plan before the United States Patent and Trademark Office in the trademark

cancellation proceeding filed by the Small Business in Transportation Coalition. The Board may take action to approve the engagement letter on the terms outlined in the engagement letter.

VIII. UCR Plan Legal Counsel Report—UCR Plan Legal Counsel

UCR Plan Legal Counsel will report on his activities as UCR Plan Legal Counsel since the last Board of Directors meeting including, the issuance of trademark licenses to participating states, developing a procedure to amend the UCR Agreement and responding to comments received by the FMCSA in connection with the 2025 UCR Fee Rule making.

IX. Subcommittee Reports

Audit Subcommittee—UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair

A. Updates to the UCR Handbook—UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair

For Discussion and Possible Board Action

The UCR Audit Subcommittee Chair and Vice Chair will lead a discussion on steps to update the UCR Handbook in order to reduce confusion and eliminate conflicting guidance in the Handbook. The proposed amendments relate to the following sections of the Handbook:

- “Leasing Companies” page 10
- “Effect of IRP Registration” page 27
- “Entities Performing More Than One Function” “Businesses Operating More Than One Motor Carrier” pages 10 and 11

The Board may take action to amend the UCR Handbook in the sections listed above.

Finance Subcommittee—UCR Finance Subcommittee Chair and UCR Depository Manager

A. Financial Update—UCR Depository Manager

The UCR Depository Manager will provide an update on the financial status of the administrative fund. An update on fees collected for the 2024 registration year will also be provided.

B. The Finance Subcommittee Recommendation to the UCR Board for the Selection of External Auditor To Audit the Unified Carrier Registration Plan Depository for the Year Ended December 31, 2022—UCR Finance Subcommittee Chair

For Discussion and Possible Board Action

The UCR Finance Subcommittee Vice-Chair and the UCR Depository Manager

will give an update on the selection of an audit firm to conduct the 2022 external audit. The UCR Finance Subcommittee recommends the appointment of Williams Benator and Libby, LLP (“WBL”) to serve as the external auditors of the 2022 financial year. The Board may take action to engage the services of an external auditor for the Unified Carrier Registration Plan Depository for the year ended December 31, 2022.

Education and Training Subcommittee—UCR Education and Training Subcommittee Chair

No significant action to report.

Industry Advisory Subcommittee—UCR Industry Advisory Subcommittee Chair

No significant action to report.

Enforcement Subcommittee—UCR Enforcement Subcommittee Chair

Update on Current Initiatives—UCR Enforcement Subcommittee Chair

The UCR Enforcement Subcommittee Chair will provide an update on current and planned initiatives to include a review of enforcement rates, enforcement as against under-registered carriers, how enforcement can support and contribute to inspection audits, presentation on reports available through the NRS to enforcement staff, an update on PowerPoint training, creation of standards for annual UCR enforcement awards, and conducting biannual enforcement blitzes.

Dispute Resolution Subcommittee—UCR Dispute Resolution Subcommittee Chair

A. Update on the Status of the Three Pending Complaints Before the Dispute Resolution Subcommittee Filed by the Small Business in Transportation Coalition (“SBTC”)—UCR Dispute Resolution Subcommittee Chair and UCR Plan Counsel

The UCR Dispute Resolution Subcommittee Chair and UCR Plan Counsel will discuss the status of the three pending complaints before the Dispute Resolution Subcommittee Filed by the Small Business in Transportation Coalition (“SBTC”).

B. Possible Change to the Policy for Resolving Disputes Under the Unified Carrier Registration Agreement—UCR Dispute Resolution Subcommittee Chair and UCR Executive Director

For Discussion and Possible Subcommittee Action

The UCR Dispute Resolution Subcommittee Chair and UCR Executive Director will present the motion passed

by the Dispute Resolution Subcommittee to amend the Policy for Resolving Disputes Under the Unified Carrier Registration Agreement, under Section IV, “Public Notice”, to make clear that a notice of hearing before the Board is now submitted directly to the **Federal Register** for publication by the UCR Plan, and not as previously was the case, through a request to the Federal Motor Carrier Safety Administration. The Board may take action to approve this change in the Policy for Resolving Disputes Under the Unified Carrier Registration Agreement.

X. Contractor Reports—UCR Board Chair

UCR Executive Director Report

The UCR Executive Director will provide a report covering his recent activity for the UCR Plan including any changes in the dates of UCR meetings in 2024.

UCR Administrator Report (Kellen)

The UCR Chief of Staff will provide a management update covering recent activity for the Depository, Operations, and Communications.

DSL Transportation Services, Inc.

DSL Transportation Services, Inc. will report on the latest data from the FARs program, Tier 5 and 6 unregistered motor carriers, and other matters.

Seikosoft

Seikosoft will provide an update on its recent/new activity related to the UCR’s National Registration System.

XI. Other Business—UCR Board Chair

The UCR Board Chair will call for any other business, old or new, from the floor.

XII. Adjournment—UCR Board Chair

The UCR Board Chair will adjourn the meeting.

The agenda will be available no later than 5:00 p.m. Eastern time, February 21, 2024, 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. 2024–04014 Filed 2–22–24; 4:15 pm]

BILLING CODE 4910–YL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0668]

Agency Information Collection Activity: Supplemental Income Questionnaire (For Philippine Claims Only)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 26, 2024.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at www.Regulations.gov or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to nancy.kessinger@va.gov. Please refer to “OMB Control No. 2900–0668” in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email maribel.aponte@va.gov. Please refer to “OMB Control No. 2900–0668” in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA’s functions, including whether the information will have practical utility;

(2) the accuracy of VBA'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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Title 38 U.S.C. 1506, 1521, 1541, and 1542.

Title: Supplemental Income Questionnaire (For Philippine Claims Only).

OMB Control Number: 2900–0668.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21P–0784 is primarily used to gather income information that is necessary to determine eligibility for Pension benefits. Entitlement to pension cannot be determined without complete information about a claimant's family income and net worth. Claimants residing in the Philippines have different types of income than claimants residing in the United States, and this form better captures those types of income than other VA Pension forms.

Affected Public: Individuals and households.

Estimated Annual Burden: 30 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 120.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024–03764 Filed 2–23–24; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0545]

Agency Information Collection Activity: Report of Medical, Legal, and Other Expenses Incident to Recovery for Injury or Death

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain

information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 26, 2024.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at www.Regulations.gov or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to nancy.kessinger@va.gov. Please refer to “OMB Control No. 2900–0545” in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT:

Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email maribel.aponte@va.gov. Please refer to “OMB Control No. 2900–0545” in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA'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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 1503, 28 CFR 3.262, 3.271, and 3.272.

Title: Report of Medical, Legal, and Other Expenses Incident to Recovery for Injury or Death.

OMB Control Number: 2900–0545.

Type of Review: Revision of a currently approved collection.

Abstract: VA Form 21P–8416b is used to gather information about certain expenses related to securing compensation based on personal injury or death. The form is used by claimants for VA income-based benefits to determine the amount of countable income. Without this information, the VA would be unable to properly determine entitlement to income-based benefits and the rate payable. There have been no changes from the previously approved collection. This is a revision of a currently approved collection as the respondent burden has decreased.

Affected Public: Individuals and households.

Estimated Annual Burden: 75 hours.

Estimated Average Burden per Respondent: 45 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 100.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024–03770 Filed 2–23–24; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0101]

Agency Information Collection Activity: Eligibility Verification Reports (EVRs)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 26, 2024.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at www.Regulations.gov or to

Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to nancy.kessinger@va.gov. Please refer to “OMB Control No. 2900–0101” in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT:

Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email maribel.aponte@va.gov. Please refer to “OMB Control No. 2900–0101” in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA’s functions, including whether the information will have practical utility; (2) the accuracy of VBA’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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Information is requested by this form under the authority of 38 U.S.C. 1506, regulatory authority is found in 38 CFR 3.277.

Title: Eligibility Verification Reports (EVRs) VA Forms: 21P–0510, 21P–0510 (Spanish), 21P–0512S–1, 21P–0512S–1 (Spanish), VA Form 21P–0512V–1, 21P–0513–1, 21P–0513–1 (Spanish), 21P–0514–1, 21P–0514–1 (Spanish), 21P–0516–1, 21P–0516–1 (Spanish), 21P–0517–1, 21P–0517 (Spanish), 21P–0518–1, 21P–0518–1 (Spanish), 21P–0519C–1, 21P–0519C–1 (Spanish), 21P–0519S–1, 21P–0519S–1 (Spanish).

OMB Control Number: 2900–0101.

Type of Review: Extension of a currently/previously approved collection.

Abstract: A claimant’s eligibility for Pension is determined, in part, by countable family income and net worth. Any individual who has applied for, or receives, VA Pension or Parents’ Dependency and Indemnity

Compensation (DIC) must promptly notify the VA in writing of any change in entitlement factors. VBA uses Eligibility Verification Reports (EVRs) to receive income and net worth information from Pension and Parents DIC claimants and beneficiaries to evaluate eligibility for benefits. The reported information can result in increased or decreased benefits. Typically, the claimants and beneficiaries utilize the form to notify the VA of changes in income and net worth, though the forms could be used to reopen a claim for benefits in limited circumstances. This is a request for an extension of the EVR collections with no substantive changes.

Affected Public: Individuals and households.

Estimated Annual Burden: 34,500 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 69,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024–03771 Filed 2–23–24; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0556]

Agency Information Collection Activity Under OMB Review: Advance Directive: Durable Power of Attorney for Health Care and Living Will

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/

PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Refer to “OMB Control No. 2900–0556.”

FOR FURTHER INFORMATION CONTACT:

Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Avenue NW, Washington, DC 20420, (202) 266–4688 or email maribel.aponte@va.gov. Please refer to “OMB Control No. 2900–0556” in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–3521.

Title: Durable Power of Attorney for Health Care and Living Will, VA Form 10–0137.

OMB Control Number: 2900–0556.

Type of Review: Extension of a currently approved collection.

Abstract: Section 7331 of title 38, United States Code (U.S.C.), requires, in relevant part, that the Secretary of Veterans Affairs, upon the recommendation of the Under Secretary for Health, prescribe regulations to ensure, to the maximum extent practicable, that all Department of Veterans Affairs (VA) patient care be carried out only with the full and informed consent of the patient, or in appropriate cases, a representative thereof. Based on VA’s interpretation of this statute and our mandate in 38 U.S.C. 7301(b) to provide a complete medical and hospital service, we recognize that patients with decision-making capacity have the right to state their treatment preferences in a VA or other valid advance directive.

VA Form 10–0137, *VA Advance Directive: Durable Power of Attorney for Health Care and Living Will*, is the VA recognized legal document that permits VA patients to designate a health care agent and/or specify preferences for future health care. The VA Advance Directive is invoked if a patient becomes unable to make health care decisions for himself or herself. Use of the VA Advance Directive is specified in VHA Handbook 1004.02, *Advance Care Planning and Management of Advance Directives*. Veterans’ rights to designate a health care agent and specify health care preferences in advance are codified in 38 CFR 17.32. This regulation also obligates VA to recognize advance directives and to use the information contained therein when health care decisions must be made for a patient that has lost decision making capacity.

VA Form 10–0137 (both English and Spanish-English language versions) has a current OMB Paperwork Reduction Act (PRA) clearance under OMB Control

Number 2900–0556. In addition, 2900–0556 now includes the collection of a “Close Personal Friend Statement” for incapacitated Veterans who have not completed an Advance Directive and are in need of health care. When a Veteran is incapacitated and does not have an Advance Directive, the VA regulations allow a statement to be submitted from a “Close Personal Friend” who will be responsible for making health care decisions on behalf of the Veteran. It is estimated that 300 such statements will be collected annually. VA seeks to renew the PRA clearance for the information collection under OMB Control Number 2900–0556.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection

of information was published at 88 FR 241 on December 18, 2023, page 87500.

VA Form 10–0137

Affected Public: Individuals and households.
Estimated Annual Burden: 171,811 hours.
Estimated Average Burden per Respondent: 30 minutes.
Frequency of Response: Once annually.
Estimated Number of Respondents: 343,622.

Close Personal Friend Statement

Affected Public: Individuals and households.
Estimated Annual Burden: 50 hours.
Estimated Average Burden per Respondent: 10 minutes.
Frequency of Response: Once annually.
Estimated Number of Respondents: 300.

By direction of the Secretary.

Maribel Aponte,
VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.
[FR Doc. 2024–03787 Filed 2–23–24; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on the Readjustment of Veterans, Notice of Meeting, Amended

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. ch. 10., that the Advisory Committee on the Readjustment of Veterans will hold a meeting virtually. The meeting will begin, and end as follows:

Date	Time	Open session
March 5, 2024	2:30 p.m. to 3 p.m. eastern standard time (EST).	Yes.

The meeting is open to the public.

The purpose of the Committee is to advise the Department of Veterans Affairs (VA) regarding the provision by VA of benefits and services to assist Veterans in the readjustment to civilian life. In carrying out this duty, the Committee shall take into account the needs of Veterans who served in combat theaters of operation. The Committee assembles, reviews, and assesses information relating to the needs of Veterans readjusting to civilian life and the effectiveness of VA services in assisting Veterans in that readjustment.

The Committee, comprised of 14 subject matter experts, advises the Secretary, through the VA Readjustment Counseling Service, on the provision by VA of benefits and services to assist Veterans in the readjustment to civilian life. In carrying out this duty, the Committee assembles, reviews, and assesses information relating to the

needs of Veterans readjusting to civilian life and the effectiveness of VA services in assisting Veterans in that readjustment, specifically taking into account the needs of Veterans who served in combat theaters of operation.

On March 5, 2024, the agenda will include review of the 24th report, a calendar forecast and discussion over subject matter experts to consider presenting at the next full Committee meeting. The Committee will meet from 2:30 p.m.–3 p.m. EST, for public members wishing to provide oral comments or join the meeting, please use the following Microsoft Teams link: https://teams.microsoft.com/l/meetup-join/19%3ameeting_OTgxZGM5OGQtYTJhZi00ZGRILTk3MjgtZTYyZTZQ2YzEzZWZEW%40thread.v2/0?context=%7b%22Tid%22%3a%22e95f1b23-abaf-45ee-821d-b7ab251ab3bf%22%2c%22Oid%22%3a%228aa

[84165-5b4e-40e7-8e32-63a80c0bd33a%22%7d](#).

The Committee will also accept written comments from interested parties on issues outlined in the meeting agenda or other issues regarding the readjustment of Veterans. Parties should contact Mr. Richard Barbato via email at VHARCSStratAnalysis@va.gov, by mail at Department of Veterans Affairs, Readjustment Counseling Service (10RCS), 810 Vermont Avenue, Washington, DC 20420, or (202) 461–6525. Any member of the public seeking additional information should contact Mr. Barbato at the phone number or email addressed noted above.

Dated: February 20, 2024.

Jelessa M. Burney,
Federal Advisory Committee Management Officer.
[FR Doc. 2024–03785 Filed 2–23–24; 8:45 am]

BILLING CODE P



FEDERAL REGISTER

Vol. 89

Monday,

No. 38

February 26, 2024

Part II

Securities and Exchange Commission

17 CFR Parts 210, 229, 230, 232, 239, 240, and 249

Special Purpose Acquisition Companies, Shell Companies, and Projections;
Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 229, 230, 232, 239, 240, and 249

[Release Nos. 33–11265; 34–99418; IC–35096; File No. S7–13–22]

RIN 3235–AM90

Special Purpose Acquisition Companies, Shell Companies, and Projections

AGENCY: Securities and Exchange Commission.

ACTION: Final rules; guidance.

SUMMARY: The Securities and Exchange Commission (“Commission”) is adopting rules intended to enhance investor protections in initial public offerings by special purpose acquisition companies (commonly known as SPACs) and in subsequent business combination transactions between SPACs and private operating companies (commonly known as de-SPAC transactions). Specifically, we are adopting disclosure requirements with respect to, among other things, compensation paid to sponsors, conflicts of interest, dilution, and the determination, if any, of the board of directors (or similar governing body) of a SPAC regarding whether a de-SPAC transaction is advisable and in the best interests of the SPAC and its security holders. We are adopting rules that require a minimum dissemination period for the distribution of security holder communication materials in connection with de-SPAC transactions. We are adopting rules that require the re-determination of smaller reporting company (“SRC”) status in connection with de-SPAC transactions. We are also adopting rules that address the scope of the safe harbor for forward-looking statements under the Private Securities Litigation Reform Act of 1995. Further, we are adopting a rule that would deem any business combination transaction involving a reporting shell company, including a SPAC, to be a sale of securities to the reporting shell company’s shareholders and are adopting amendments to a number of financial statement requirements applicable to transactions involving shell companies. In addition, we are providing guidance on the status of potential underwriters in de-SPAC transactions and adopting updates to our guidance regarding the use of projections in Commission filings as well as requiring additional disclosure regarding projections when used in connection with business combination

transactions involving SPACs. Finally, we are providing guidance for SPACs to consider when analyzing their status under the Investment Company Act of 1940.

DATES: *Effective date:* The final rules are effective on July 1, 2024.

Compliance date: The compliance date for the final rules, other than 17 CFR 229.1610, is July 1, 2024. The compliance date for 17 CFR 229.1610 is June 30, 2025.

FOR FURTHER INFORMATION CONTACT:

Mark Saltzburg, Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430; with respect to 17 CFR 230.145a (Rule 145a under the Securities Act of 1933), the Office of Chief Counsel, Division of Corporation Finance, at (202) 551–3500; with respect to 17 CFR 210.15–01 (Rule 15–01 of Regulation S–X), Ryan Milne, Office of Chief Accountant, Division of Corporation Finance, at (202) 551–3400; with respect to amendments relating to projections disclosure and tender offer rules, Daniel Duchovny, Office of Mergers & Acquisitions, Division of Corporation Finance, at (202) 551–3440; and with respect to guidance under the Investment Company Act of 1940, Rochelle Kauffman Plesset, Seth Davis, or Taylor Evenson, Senior Counsels; or Lisa Reid Ragen, Branch Chief, Chief Counsel’s Office, Division of Investment Management, at (202) 551–6825; U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting new 17 CFR 210.15–01, new 17 CFR 229.1601 through 229.1610 (Item 1600 series of Regulation S–K), and new 17 CFR 230.145a. We are also adopting amendments to:

Commission reference	CFR citation (17 CFR)
Securities Act of 1933	
Rule 405	§ 230.405.
Form S–1	§ 239.11.
Form F–1	§ 239.31.
Form S–4	§ 239.25.
Form F–4	§ 239.34.
Securities Exchange Act of 1934	
Rule 12b–2	§ 240.12b–2.
Rule 14a–6	§ 240.14a–6.
Rule 14c–2	§ 240.14c–2.
Schedule 14A	§ 240.14a–101.
Schedule TO	§ 240.14d–100.
Form 20–F	§ 249.220f.
Form 8–K	§ 249.308.
Regulation S–K	§§ 229.10 through 229.1406.
Item 10	§ 229.10.
Item 601	§ 229.601.
Regulation S–T	§§ 232.10 through 232.903.
Rule 405	§ 232.405.
Regulation S–X	§§ 210.1–01 through 210.13–02.
Rule 1–02	§ 210.1–02.

Commission reference	CFR citation (17 CFR)
Rule 3–01	§ 210.3–01.
Rule 3–05	§ 210.3–05.
Rule 3–14	§ 210.3–14.
Rule 8–02	§ 210.8–02.
Rule 10–01	§ 210.10–01.

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I. Introduction

Special purpose acquisition companies, or SPACs, first began to emerge in the 1990s as an alternative to blank check companies after blank check companies began to be regulated more strictly pursuant to 17 CFR 230.419 (“Rule 419”¹ under the Securities Act of 1933 (“Securities Act”)),² a rule the Commission adopted following the enactment of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (“Penny Stock Reform Act”).³ SPACs are shell companies⁴ organized and managed by a sponsor for the purpose of merging with or acquiring one or more unidentified private operating companies, commonly known as a de-SPAC transaction, within a certain time frame.⁵ The de-SPAC transaction is a hybrid transaction that contains elements of both an initial public offering (“IPO”) and a merger and acquisition (“M&A”) transaction.⁶ While structured as an M&A

transaction, the de-SPAC transaction also is the functional equivalent of the private target company’s IPO, because it results in the target company becoming part of a combined company that is a reporting company and provides the private target company with access to cash proceeds that the SPAC had previously raised from the public. As part of this process, the shareholders of the SPAC go from owning shares in a shell company to owning shares in a combined company that conducts the business of the private target. As a result, the de-SPAC transaction implicates disclosure and liability concerns associated with both IPOs and M&A transactions. Additionally, parties involved in the SPAC process, such as the SPAC sponsor, may have incentives to consummate a de-SPAC transaction that are not present in a traditional IPO or M&A transaction. Further, as discussed in the Proposing Release,⁷ the shareholders and management of a private operating company may believe there to be certain advantages of combining with a SPAC compared with conducting an underwritten IPO.

To have the necessary context for the concerns unique to SPACs and de-SPAC transactions, it is critical to understand the structure and lifecycle of a SPAC. Once formed, a SPAC will conduct its IPO in the form of a firm commitment underwritten IPO of \$5 million or more in units consisting of redeemable shares and of warrants. The underwriting fees for a SPAC IPO typically approximate 5% to 5.5% of the offering proceeds, and a significant portion of those fees (around 3% of the IPO proceeds) are conditioned on the completion of a de-SPAC transaction.⁸ The SPAC sponsor is usually compensated through a “promote” or “founder’s shares”—i.e., discounted SPAC shares received prior to the SPAC’s IPO that generally only have value if a de-SPAC transaction occurs.⁹

Following its IPO, a SPAC places all or substantially all of the IPO proceeds into a trust or escrow account. The SPAC typically registers its shares and warrants under section 12(b) of the Securities Exchange Act of 1934 (“Exchange Act”)¹⁰ and lists the units (typically consisting of a common share

and a fraction of a warrant) for trading on a national securities exchange.¹¹

Next, the SPAC seeks to identify a target company for a de-SPAC transaction within the time frame specified in its governing documents.¹² If the SPAC does not complete a de-SPAC transaction within that time frame, it may seek an extension (often requiring approval from its shareholders) or dissolve and liquidate.¹³ If the SPAC enters into a business combination agreement with a target company, the SPAC files a Form 8-K (or Form 6-K if the SPAC is a foreign private issuer (“FPI”)) that reports on Form 20-F¹⁴ announcing the transaction that includes certain information on the material terms of the business combination agreement.¹⁵ The parties structure the de-SPAC transaction in different forms that may have tax or other regulatory advantages.¹⁶ Prior to the closing of the de-SPAC transaction, the shareholders of the SPAC typically have the

¹ The regulation at 17 CFR 230.419(a)(2) defines the term “blank check company” as a development stage company that has no specific business plan or purpose or that has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies and that is issuing “penny stock,” as defined in 17 CFR 240.3a51–1 (“Rule 3a51–1” under the Securities Exchange Act of 1934).

² 15 U.S.C. 77a et seq.

³ Public Law 101–429, 104 Stat. 931 (Oct. 15, 1990). See *Blank Check Offerings*, Release No. 33–6932 (Apr. 13, 1992) [57 FR 18037 (Apr. 28, 1992)]. A SPAC is not a “blank check company” because, given that it raises more than \$5 million in a firm commitment underwritten initial public offering, it is not selling “penny stock.” See *Penny Stock Definition for Purposes of Blank Check Rule*, Release No. 33–7024 (Oct. 25, 1993) [58 FR 58099 (Oct. 29, 1993)]. To that end, SPACs often have provisions in their governing instruments that prohibit them from being “penny stock” issuers.

⁴ The term “shell company” is defined in Securities Act Rule 405 and Exchange Act Rule 12b–2 as a registrant, other than an asset-backed issuer, that has: (1) no or nominal operations; and (2) either: (i) no or nominal assets; (ii) assets consisting solely of cash and cash equivalents; or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets.

⁵ The descriptions included in this release of common features and fees currently seen in SPACs and SPAC transaction structures are based, in part, on reviews by the Commission staff of SPAC filings with the Commission. Based on review by the Commission staff of SPAC filings, in the majority of transactions, SPACs typically combine with private operating companies. In some cases, however, SPACs may combine with other public companies. See, e.g., Bailey Lipschultz, *Re-SPACs Gain Steam as Arrival Finds New Sponsor*, Bloomberg News (Apr. 10, 2023), available at <https://news.bloomberglaw.com/mergers-and-acquisitions/re-spacs-gain-steam-as-arrival-shares-sink-new-sponsor-steps-up>.

⁶ We use the terms “initial public offering” or “IPO” to refer to a securities offering registered under the Securities Act by an issuer that was not subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 immediately prior to the registration.

⁷ *Special Purpose Acquisition Companies, Shell Companies, and Projections*, Release No. 33–11048 (Mar. 30, 2022) [87 FR 29458 (May 13, 2022)] (“Proposing Release”), at 29461, nn.22–25 and accompanying text. See *infra* section VIII.A.1.ii.

⁸ See *infra* section VIII.A.1.iii.

⁹ The sponsor’s compensation usually amounts to around 20% of the total shares of a SPAC after its IPO.

¹⁰ 15 U.S.C. 78a et seq.

¹¹ The shares and warrants usually begin trading as a unit, with a unit frequently consisting of a common share and a fraction of a warrant, and are traded separately after a certain period. The warrants often become exercisable at a price that is higher (often \$11.50) than the IPO price for common shares (which is often \$10) upon the later of the passage of a certain time period following the SPAC’s IPO (often one year) or a certain time period following the completion of a de-SPAC transaction (often 30 days). Many warrants have limitations on their potential upside as a result of the right of the issuer to call the warrant under certain conditions, which commonly include a condition that the underlying common stock have traded at or above a certain price (often \$18) for a specified period of time. The redemption price in those call situations can vary based on the specific warrant agreement provisions, so investors commonly pay close attention to those pricing provisions.

¹² The governing documents often provide for a time frame of 24 months, but it can be as long as 36 months. Exchange listing rules generally require a SPAC to complete a business combination within three years (or such shorter period specified in its registration statement or applicable governing documents). See, e.g., NYSE Listed Company Manual Section 102.06 and Nasdaq Listing Rule IM–5101–2.

¹³ SPAC shareholders typically also have a redemption right in connection with any votes to extend the duration of the SPAC.

¹⁴ See definition of “foreign private issuer,” *infra* note 442.

¹⁵ A SPAC is required to file a Form 8-K that provides certain disclosures regarding the business combination agreement if the agreement is a material definitive agreement not made in the ordinary course of business. See Item 1.01 of Form 8-K.

¹⁶ Three examples of common de-SPAC transaction structures are: (i) the SPAC is the surviving company in a merger and the target company merges into the SPAC, (ii) the target company is the surviving company in a merger and the SPAC merges into the target company, and (iii) a new holding company is created and the SPAC and target company merge into that new holding company. The holding company structure referred to in (iii) above includes “double-dummy” structure transactions.

opportunity to either: (1) require the SPAC to redeem their shares prior to the de-SPAC transaction¹⁷ and receive a pro rata share of the amount in the IPO proceeds and related assets subject to the trust or escrow arrangements (including interest thereon and commonly less amounts released to pay income and franchise taxes), or (2) remain a shareholder of the surviving company after the business combination.¹⁸ To offset shareholder redemptions or to fund larger de-SPAC transactions, SPACs often conduct additional private capital-raising transactions, typically in the form of private investment in public equity (PIPE) transactions.¹⁹

Regardless of its form, a de-SPAC transaction often is accompanied by the need to attain shareholder approval for certain items (e.g., amendments to the governing documents of the SPAC, or authorization of additional securities for issuance), and, in such cases, a SPAC provides its shareholders with a proxy statement on Schedule 14A or an information statement on Schedule 14C.²⁰ If the SPAC, the target company, or a holding company²¹ must register the offer and sale of its securities to be issued in the de-SPAC transaction, the entity typically files a registration statement on Form S-4 or F-4 to do so.²² If no registration statement or proxy or information statement is

required, the SPAC may disseminate a tender offer statement (i.e., a Schedule TO) for the redemption offer to its security holders with information about the target company.²³

Finally, after the completion of the de-SPAC transaction, the combined company must file a Form 8-K within four business days that includes information about the target company equivalent to the information that a new reporting company would be required to provide when filing a Form 10 under the Exchange Act.²⁴

In recent years, the U.S. securities market experienced a significant increase in the number of SPAC IPOs, as shown in Table 1²⁵ below.

TABLE 1—NUMBER OF SPAC IPOs IN THE U.S. SECURITIES MARKET FROM 2012–2023

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Number of Offerings												
SPAC IPOs	9	10	12	20	13	34	46	59	248	613	86	31
IPOs (including SPAC IPOs)	147	220	258	173	111	189	225	213	450	968	118	72
Percentage from SPACs	6%	5%	5%	12%	12%	18%	20%	28%	55%	63%	73%	43%
Total Proceeds (in billions of dollars)												
SPAC IPOs	0.5	1.4	1.8	3.9	3.5	10.0	10.8	13.6	83.4	162.5	13.4	3.8
IPOs (including SPAC IPOs)	50.1	70.8	93.0	39.2	25.8	50.3	63.9	72.2	179.4	334.7	22.9	25.1

¹⁷ Until they become exercisable, warrants issued by the SPAC do not typically provide a right to require the redemption of the warrant by any party.

¹⁸ De-SPAC transactions often result in the former SPAC shareholders owning a minority interest in the combined company. According to one study of the 47 de-SPAC transactions that occurred between Jan. 2019 and June 2020, SPAC shareholders, including the SPAC sponsor, held a median of 35% of the combined company after a de-SPAC transaction and the sponsor alone held a median of 12% of the combined company. Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 Yale J. Reg., 228, 239–240 (2022).

¹⁹ The parties to a de-SPAC transaction often negotiate a minimum cash condition pursuant to which a SPAC must have a specified minimum amount of cash at the closing of the de-SPAC transaction, which could include funds in the trust or escrow account, the proceeds from PIPE transactions, and other sources. When a SPAC conducts a PIPE transaction in connection with a de-SPAC transaction, the post-business combination company generally files a Securities Act registration statement following the de-SPAC transaction to register the resale of the securities purchased in the PIPE transaction.

²⁰ 17 CFR 240.14a–2; Exchange Act Rule 14c–2. The regulation at 17 CFR 240.3a12–3(b) provides an exemption from the proxy and information statement rules for FPIs, providing that “[s]ecurities registered by a foreign private issuer, as defined in Rule 3b–4. . . , shall be exempt from sections 14(a), 14(b), 14(c), 14(f) and 16 of the Act.”

²¹ In certain de-SPAC structures, a holding company is formed to acquire both the private operating company and the SPAC.

²² As noted above, SPACs currently use a variety of legal structures to effect de-SPAC transactions, and the particular transaction structure and the consideration used can affect (1) the Commission filings required for the transaction, (2) the entity that will have a continuing Exchange Act reporting obligation following the transaction, and (3) the disclosures provided in connection with the transaction.

²³ The Commission has promulgated rules under the Exchange Act setting forth filing, disclosure, and dissemination requirements in connection with tender offers. See, e.g., 17 CFR 240.14d–1 through 240.14d–103, 17 CFR 240.14e–1 through 240.14e–8 (“Regulation 14E” under the Exchange Act), and 17 CFR 240.13e–4 (“Rule 13e–4” under the Exchange Act). When an issuer conducts a tender offer, the issuer may be required to file and disseminate a Schedule TO pursuant to Rule 13e–4. Because the redemption rights in a SPAC context generally have indicia of a tender offer, such as a limited period of time for the SPAC security holders to request redemption of their securities, SPACs will generally file a Schedule TO in circumstances where, in connection with a de-SPAC transaction, the parties are neither soliciting votes or consents nor registering the offer or sale of securities. The Commission staff has not objected if a SPAC does not comply with the tender offer rules when the SPAC files a required Schedule 14A or 14C in connection with the approval of a de-SPAC transaction or an extension of the timeframe to complete a de-SPAC transaction and conducts the solicitation in accordance with 17 CFR 240.14a–1 through 240.14b–2 (“Regulation 14A” under the Exchange Act) or 240.14c–1 through 240.14c–101 (“Regulation 14C” under the Exchange Act), as the Federal proxy rules mandate substantially similar disclosures and applicable procedural protections as required by the tender offer rules. However, this staff position does not apply to a SPAC that does not file a required Schedule 14A or 14C in connection with the de-SPAC transaction or an extension. In these circumstances, SPACs have generally filed and disseminated Schedules TO, and the staff has taken the position that the Schedule TO should include the same financial and other information as is required in Schedule 14A or 14C for a de-SPAC transaction. See *infra* section II.H for a discussion of 17 CFR 229.1608 (“Item 1608” of Regulation S–K) that we are adopting in this release and section IV.A for a discussion of Rule 145a under the Securities Act that we are adopting in this release, which will affect when a SPAC may be required to file a registration statement in

connection with a de-SPAC transaction. For exchange-listed SPACs, exchange rules may require a SPAC to file tender offer documents with the Commission in some circumstances. See, e.g., Nasdaq Listing Rule IM–5101–2; NYSE Listed Company Manual Section 102.06. The staff position discussed in this footnote and any other staff guidance or statements referenced in this release, including staff legal bulletins, staff compliance and disclosure interpretations, and the Division of Corporation Finance’s Financial Reporting Manual (“FRM”), represent the views of Commission staff and are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the views reflected in these staff positions or the content of these staff statements and, like all staff positions or statements, they have no legal force or effect, do not alter or amend applicable law, and create no new or additional obligations for any person.

²⁴ Form 10 is the long-form registration statement to register a class of securities under section 12(b) or 12(g) of the Exchange Act. See Items 2.01(f), 5.01(a)(8), and 9.01(c) of Form 8–K. If the shell company is an FPI then a Form 20–F should be filed no later than four business days after the consummation of the acquisition that includes all of the information for the target company that Form 20–F requires for registration of securities. By the time the Form 8–K with Form 10 information is filed, the securities of the combined company have often already begun trading on a national securities exchange with a new ticker symbol because the securities of the SPAC generally trade on an exchange until the consummation of the de-SPAC transaction and the securities of the combined company generally commence trading on the following business day.

²⁵ Estimates of SPAC IPO and IPO data in Table 1 are based on SPAC Analytics, *SPAC and US IPO Activity*, available at <https://www.spacanalytics.com>. Estimates of de-SPAC transactions in Table 1 are based on data from Dealogic for SPACs registered with the Commission and where year is based on M&A Completion Date.

TABLE 1—NUMBER OF SPAC IPOs IN THE U.S. SECURITIES MARKET FROM 2012–2023—Continued

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Percentage from SPACs	1%	2%	2%	10%	14%	20%	17%	19%	46%	49%	59%	15%
Number of Completed De-SPAC Transactions	6	11	5	10	9	13	23	28	64	199	101	89

As shown above in Table 1, SPAC IPOs represent a significant share of the U.S. IPO market in recent years. While we recognize that, like overall IPO activity, the SPAC IPO market has declined recently, SPAC IPOs nonetheless constituted over half of all U.S. IPOs respectively in 2020, 2021, and 2022, and constituted 43% of all U.S. IPOs in 2023.²⁶ The number of de-SPAC transactions has also been significant relative to the number of non-SPAC U.S. IPOs.

A similar trend has occurred when considering total proceeds for SPAC IPOs as a percentage of total proceeds raised in all U.S. IPOs over this period. SPAC IPO proceeds represented 46%, 49%, and 59% of total proceeds raised in all U.S. IPOs respectively in 2020, 2021, and 2022. This percentage declined to 15% in 2023.²⁷

During the years of increase in SPAC IPOs, many market observers raised concerns about various aspects of the SPAC structure and the hybrid nature of the de-SPAC transaction.²⁸ Among other things, commentators expressed concerns about SPAC sponsor compensation and other costs that can have a dilutive effect on a SPAC's shareholders,²⁹ potential conflicts of interest in the SPAC structure and de-SPAC transactions (e.g., the SPAC sponsors' compensation being contingent on the completion of the de-

SPAC transaction could lead sponsors to enter into de-SPAC transactions that are unfavorable to unaffiliated shareholders),³⁰ and SPAC governing documents and stock exchange listing rules under which SPAC shareholders can vote in favor of a proposed de-SPAC transaction yet redeem their shares prior to the closing of the transaction.³¹

³⁰ See, e.g., Klausner, Ohlrogge & Ruan, *supra* note 18; Usha Rodrigues & Michael A. Stegemoller, *Redeeming SPACs* (2021), U. of Ga. Sch. of L. Legal Stud. Res. Paper No. 2021-09, available at <https://ssrn.com/abstract=3906196> or <http://dx.doi.org/10.2139/ssrn.3906196> (in the Proposing Release, a working paper of this article was cited as Usha R. Rodrigues and Michael Stegemoller, *SPACs: Insider IPOs* (SSRN Working Paper, 2021), with the short form citation "Rodrigues and Stegemoller"); Minmo Gahng, Jay R. Ritter & Donghang Zhang, *SPACs*, 36 The Rev. of Financial Stu. 3463 (2023), available at <https://doi.org/10.1093/rfs/hhad019>; letter dated Feb. 16, 2021, from Americans for Financial Reform and Consumer Federation of America to the House Financial Services Committee ("AFR Letter"); Deane Testimony; Testimony of Andrew Park, Americans for Financial Reform, before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee of the U.S. House Committee on Financial Services, May 24, 2021 ("Park Testimony"), <https://financialservices.house.gov/uploadedfiles/hhrg-117-ba16-wstate-parka-20210524.pdf>.

³¹ See Mira Ganor, *The Case for Non-Binary, Contingent, Shareholder Action*, 23 U. Pa. J. Bus. L. 390 (2021); Rodrigues & Stegemoller, *supra* note 30. We note that exchange listing rules only explicitly require that, when a shareholder vote on a business combination is held, the public shareholders voting against a business combination have a right to redeem shares. See, e.g., Nasdaq Listing Rule IM-5101-2 (stating, in part, that "public Shareholders voting against a business combination must have the right to convert their shares of common stock into a pro rata share of the aggregate amount then in the deposit account (net of taxes payable and amounts distributed to management for working capital purposes) if the business combination is approved and consummated"). In April 2022, the Commission's Investor Advocate issued a recommendation to the NYSE and Nasdaq that their respective listing standards should prohibit consummation of a business combination when public SPAC shareholders exercise their conversion rights for a majority of the shares. See Memorandum, dated April 21, 2022, from Rick A. Fleming, Investor Advocate, U.S. Securities and Exchange Commission, to Adena T. Friedman, President & Chief Executive Officer, and John Zecca, EVP & Global Chief Legal and Regulatory Officer, Nasdaq, Inc., available at <https://www.sec.gov/about/offices/investorad/recommendation-of-the-investor-advocate-nasdaq-spac-listing-standards-042122.pdf>; and Memorandum, dated April 21, 2022, from Rick A. Fleming, Investor Advocate, U.S. Securities and Exchange Commission, to Lynn Martin, President, and Jaime L. Klima, Chief Regulatory Officer, The NYSE Group, Inc., available at <https://www.sec.gov/about/offices/investorad/recommendation-of-the-investor-advocate-nyse-spac-listing-standards-042122.pdf>.

Some commentators have expressed concerns regarding the adequacy of the disclosures provided to investors in SPAC IPOs and de-SPAC transactions³² in terms of explaining the potential risks and effects for investors related to these transactions and the potential benefits for the SPAC sponsor and other affiliates of the SPAC.³³ For example, even though the de-SPAC transaction essentially serves as the IPO of the target company in the form of an M&A transaction, investors may not receive the same information about the target company as they would in a registration statement for a traditional IPO, because a filing for an M&A transaction has different disclosure requirements.³⁴

There are also additional disclosure and liability concerns that stem from the hybrid nature of the de-SPAC transaction. For example, some commentators have criticized the use of projections in de-SPAC transactions that, in their view, have appeared to be unreasonable, unfounded, or potentially misleading, particularly where the target company is an early stage company with no or limited sales, products, and/or operations and have expressed concern that some SPACs have taken the

³² Throughout this release, when we discuss "SPAC transactions," we are referencing both SPAC IPOs and de-SPAC transactions.

³³ See, e.g., AFR Letter; Testimony of Professor Usha R. Rodrigues, University of Georgia School of Law, before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee of the U.S. House Committee on Financial Services, May 24, 2021 ("Rodrigues Testimony"), <https://financialservices.house.gov/uploadedfiles/hhrg-117-ba16-wstate-rodriquesu-20210524.pdf>. A number of recent Commission actions have highlighted disclosures about the private operating company that are allegedly materially misleading, among other things. See, e.g., *In the Matter of Momentum, Inc., Stable Road Acquisition Corp., SRC-NI Holdings, LLC, and Brian Kabot*, Release No. 33-10955, 34-92391 (July 13, 2021) (settled order); *In the Matter of Nikola Corp.*, Release No. 33-11018, 34-93838 (Dec. 21, 2021) (settled order); *SEC v. Akazoo S.A.*, Case No. 1:20-cv-e08101 (S.D.N.Y. filed Sept. 30, 2020); *SEC v. Hurgin, et al.*, Case No. 1:19-cv-05705 (S.D.N.Y. filed June 18, 2019).

³⁴ For example, a traditional IPO requires a more comprehensive description of the business of a prospective registrant than is required of a private target operating company in an M&A transaction. Compare Item 11(a) of Form S-1, with Item 17(b)(1) of Form S-4, and Item 14(b)(3) of Schedule 14A. Additionally, a description of property and material legal proceedings is required for a prospective registrant in a traditional IPO, but these disclosure requirements do not apply to a private target operating company in an M&A transaction. See Item 11(b)-(c) of Form S-1.

²⁶ *Id.*

²⁷ *Id.*

²⁸ For example, in May 2021, the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets of the House Financial Services Committee held a hearing on "Going Public: SPACs, Direct Listings, Public Offerings, and the Need for Investor Protections," which included testimony on, among other things, misaligned incentives in the SPAC structure, disclosure issues with respect to SPACs, and the use of projections in de-SPAC transactions. A webcast of the hearing is available at <https://financialservices.house.gov/events/eventsingle.aspx?EventID=407753>. In addition, as discussed in the Proposing Release, the Commission's Investor Advisory Committee issued recommendations and expressed certain concerns regarding SPACs. See Proposing Release, *supra* note 7, at 29462, nn.36–38 and accompanying text.

²⁹ See Testimony of Stephen Deane, CFA Institute, before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee of the U.S. House Committee on Financial Services, May 24, 2021 ("Deane Testimony"), <https://financialservices.house.gov/uploadedfiles/hhrg-117-ba16-wstate-deanes-20210524.pdf>; see also Amrith Ramkumar, *SPAC Insiders Can Make Millions Even When the Company They Take Public Struggles*, Wall St. J. (Apr. 25, 2021).

position that the Private Securities Litigation Reform Act of 1995 (“PSLRA”)³⁵ safe harbor applies to forward-looking statements made by SPACs in connection with de-SPAC transactions.³⁶ The target company also is often not required to sign a registration statement filed for a de-SPAC transaction (except in transaction structures where the target company survives the de-SPAC transaction) and, by extension, would not take on section 11 liability even though, similar to a traditional IPO, reliable information about the business of the target company is critical to investors when deciding whether to approve the transaction and to invest in the combined company through their redemption decision. Finally, commentators have noted that, unlike a traditional IPO, a registered de-SPAC transaction lacks a named underwriter that would typically perform traditional gatekeeping functions, such as due diligence on the target company, and would be subject to liability under section 11 of the Securities Act for the registration statement.³⁷

In response to a number of these and other concerns, the Commission staff provided guidance relating to SPACs on five occasions between December 2020 and April 2021.³⁸ Then, in March 2022, the Commission proposed new rules and rule amendments to enhance existing disclosure requirements and investor protections in SPAC IPOs and in de-SPAC transactions.³⁹ On July 13,

2022, the U.S. Securities and Exchange Commission Small Business Capital Formation Advisory Committee (“Small Business Capital Formation Advisory Committee”) issued recommendations related to this proposal.⁴⁰

received in response to the Proposing Release, and are available at <https://www.sec.gov/comments/s7-13-22/s71322.htm>. On March 30, 2022, the Commission published the Proposing Release on its website. The comment period for the Proposing Release was open for 30 days from publication in the **Federal Register** and ended on June 13, 2022. Four commenters stated that the comment period was inadequate and/or recommended extending the comment period. See letters from Christopher Iacovella, Chief Executive Officer, American Securities Association (June 7, 2022) (“American Securities Association”); Jennifer Schulp, Director of Financial Regulation Studies, Center for Monetary and Financial Alternatives, Cato Institute (June 13, 2022) (“Cato Institute”); Bobby Franklin, President & CEO, National Venture Capital Association (June 13, 2022); Rod Miller, Chair, Securities Regulation Committee, New York City Bar Association (June 13, 2022) (“NYC Bar”). In Oct. 2022, the Commission reopened the comment period for the Proposing Release and other rulemakings because certain comments on the Proposing Release and other rulemakings were potentially affected by a technological error in the Commission’s internet comment form. See *Resubmission of Comments and Reopening of Comment Periods for Several Rulemaking Releases Due to a Technological Error in Receiving Certain Comments*, Release No. 33–11117 (Oct. 7, 2022) [87 FR 63016 (Oct. 18, 2022)] (“Reopening Release”). The Reopening Release was published on the Commission’s website on Oct. 7, 2022, and in the **Federal Register** on Oct. 18, 2022, and the reopened comment period ended on Nov. 1, 2022. We have considered all comments received since Mar. 30, 2022, and do not believe an additional extension of the comment period is necessary.

⁴⁰ The Small Business Capital Formation Advisory Committee recommendations on the Proposing Release are available at <https://www.sec.gov/spotlight/sbcfac/sbcfac-spac-recommendation-050622.pdf>. The Small Business Capital Formation Advisory Committee made the following five recommendations, in summary: (1) SPACs should remain a viable path for companies to pursue as a means of getting access to public market capital and the committee is concerned the proposed rules, as written, might render SPACs unusable as an alternative to IPOs, (2) the committee is generally supportive of improving disclosures for SPACs, particularly in the period of time between the announcement of the merger and the closing of the de-SPAC transaction, (3) the Commission should clearly identify which participants would have underwriter liability and participants should be held accountable to the same extent they would be in traditional IPOs, (4) projections in de-SPAC transactions should be covered by the liability safe harbor provisions of the PSLRA, because management projections are an important part of the rationale for companies in determining whether to engage in a merger with a SPAC and they are necessary when financial intermediaries provide fairness opinions related to de-SPAC transactions, and (5) the Commission should expand or eliminate the 18-month and 24-month timelines provided in the Investment Company Act safe harbor for SPACs, because the requirement to engage in a de-SPAC transaction within 18 months after a SPAC IPO and complete a de-SPAC transaction within 24 months could incentivize SPAC sponsors to engage in riskier acquisitions to complete the merger process within artificially short periods. With respect to the Small Business Capital Formation Advisory Committee’s first recommendation—that SPACs remain a viable

While we recognize that the number of SPAC IPOs has declined since 2021, the investor protection concerns regarding SPACs and the hybrid nature of the de-SPAC transaction identified in the Proposing Release do not depend on market fluctuations. In addition, as noted above, notwithstanding the recent decline, SPAC transactions have become a much larger part of the U.S. securities markets over the last decade and could continue to grow as macroeconomic and other factors change. Accordingly, after considering comments received on the proposal, we are adopting final rules that will provide for greater transparency and more robust investor protections in SPAC IPOs and de-SPAC transactions. The final rules will enhance the completeness, usefulness, and comparability of the disclosures provided by SPACs and target companies at the SPAC IPO and de-SPAC transaction stages and will provide other important protections for investors in this market, all of which may promote market efficiency. Further, given that the de-SPAC transaction essentially is an IPO of the target company in the form of an M&A transaction, the final rules also will ensure that investors receive similar information about the target company and similar protections as in a traditional IPO in connection with the de-SPAC transaction. The final rules also will provide investors with information about, and protections with respect to, the M&A elements of de-SPAC transactions, particularly regarding the transaction approval process and conflicts of interest.

To these ends, we are adopting new subpart 229.1600 of 17 CFR part 229 (“subpart 1600” of Regulation S–K) that sets forth specialized disclosure requirements for SPAC IPOs and de-SPAC transactions. New subpart 1600 contains provisions that, among other things:

path to access public market capital—we do not believe the final rules will vitiate this access or render SPACs unusable as an alternative to IPOs. On the contrary, we believe the final rules will support the SPAC market by enhancing SPAC disclosures and enhancing investor protection in ways that help investor decision-making and increase investor confidence that they have the necessary information to invest in the SPAC market. With respect to the Small Business Capital Formation Advisory Committee’s second recommendation—supporting improved disclosures for SPACs, particularly in the period of time between the announcement of the merger and the closing of the de-SPAC transaction—we believe the final rules collectively will enhance such disclosure. We address the other specific recommendations of the Small Business Capital Formation Advisory Committee in the specific sections of this release related to those recommendations.

³⁵ Public Law 104–67, 109 Stat. 737 (1995).

³⁶ See, e.g., Michael Dambra, Omri Even-Tov & Kimberlyn George, *Should SPAC Forecasts Be Sacked?* (SSRN Working Paper, 2022), available at https://www.utah-wac.org/2022/Papers/even-tov_UWAC.pdf; AFR Letter; Park Testimony; Rodrigues & Stegemoller, *supra* note 30; see also Heather Somerville & Eliot Brown, *SPAC Startups Made Lofty Promises. They Aren’t Working Out.*, Wall St. J., Feb. 25, 2022.

³⁷ See AFR Letter; Deane Testimony; Rodrigues Testimony. For a general discussion of the role of gatekeepers in securities markets, see also John C. Coffee Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B. U. L. Rev. 301 (2004); John C. Coffee, Jr., *Gatekeepers: The Professions and Corporate Governance* (2006).

³⁸ See *CF Disclosure Guidance: Topic No. 11—Special Purpose Acquisition Companies* (Division of Corporation Finance, Dec. 22, 2020); *Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies* (Division of Corporation Finance, Mar. 31, 2021); *Public Statement on Financial Reporting and Auditing Considerations of Companies Merging with SPACs* (Office of Chief Accountant, Mar. 31, 2021); *Public Statement on SPACs, IPOs and Liability Risk under the Securities Laws* (Division of Corporation Finance, Apr. 8, 2021); *Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies (“SPACs”)* (Division of Corporation Finance and Office of Chief Accountant, Apr. 12, 2021).

³⁹ In this release, unless otherwise indicated, comment letters cited refer to comment letters

- Require additional disclosures about the SPAC sponsor, potential conflicts of interest, and dilution;

- Require certain disclosures on the prospectus outside front cover page and in the prospectus summary of registration statements filed in connection with SPAC IPOs and de-SPAC transactions; and

- Require additional disclosures regarding de-SPAC transactions, including (1) if the law of the jurisdiction in which the SPAC is organized requires its board of directors (or similar governing body) to determine whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its shareholders, or otherwise make any comparable determination, disclosure of that determination, and (2) if the SPAC or SPAC sponsor has received any outside report, opinion, or appraisal materially relating to the de-SPAC transaction, certain disclosures concerning the report, opinion, or appraisal.

In addition, we are adopting amendments to provide procedural protections and to align the disclosures provided to investors, as well as the legal obligations of companies, in de-SPAC transactions more closely with those in traditional IPOs. Specifically, we are adopting final rules that:

- Amend the registration statement forms and schedules filed in connection with de-SPAC transactions to require additional disclosures about the target company;

- Provide that a target company in a registered de-SPAC transaction is a co-registrant on the registration statement used for the de-SPAC transaction such that the target company will be subject to liability under section 11 of the Securities Act;

- Make the PSLRA safe harbor unavailable to SPACs (including with respect to projections of target companies seeking to access the public markets through a de-SPAC transaction), by defining “blank check company” to encompass SPACs (and other companies that would be blank check companies but for the fact that they do not sell penny stock); and

- Require re-determination of SRC status following a de-SPAC transaction.

We also are providing guidance regarding potential underwriter status under section 2(a)(11) of the Securities Act in de-SPAC transactions.

In addition, to provide reporting shell company shareholders, including SPAC shareholders, with more consistent Securities Act liability protections regardless of transaction structure, we are adopting new Rule 145a that

specifies that any business combination of a reporting shell company, other than a business combination related shell company, involving another entity that is not a shell company involves a sale of securities to the reporting shell company’s shareholders.⁴¹ We are also adopting new 17 CFR 210.15–01 (“Article 15” of Regulation S–X), as well as related amendments, to more closely align the financial statement reporting requirements in business combinations involving a shell company and a target company with those in traditional IPOs.

With respect to effectiveness and compliance with the final rules, in response to commenters,⁴² we have set an extended effective date for the new rules (*i.e.*, July 1, 2024, which is 125 days after the date of publication of this release in the **Federal Register**). This extended period before the final rules are effective will provide sufficient time for an initial public filing to be made under the existing rules for any transactions that are currently pending or planned. Any filings made on or after the effective date must comply with the final rules.

We are also issuing guidance regarding the status of SPACs under the Investment Company Act of 1940 (“Investment Company Act”).⁴³ We have decided not to adopt proposed 17 CFR 270.3a–10 (“Rule 3a–10” under the Investment Company Act) which would have provided a safe harbor from the definition of investment company under section 3(a)(1)(A) to SPACs that complied with the rule’s conditions. Whether a SPAC is an investment company as defined in the Investment Company Act is a question of facts and circumstances. Given the individualized nature of this analysis, and because, depending on the facts and circumstances, a SPAC could be an investment company at any stage of its operations such that a specific duration limitation may not be appropriate, we have decided not to adopt proposed Rule 3a–10. We are, however, providing guidance as to the type of activities that

would likely raise serious questions about a SPAC’s status as an investment company under the Investment Company Act.

II. New Subpart 1600 of Regulation S–K

The Commission is adopting final rules to add new subpart 1600 to Regulation S–K. The new subpart sets forth disclosure requirements applicable to SPACs regarding, among other things, the sponsor, potential conflicts of interest, and dilution and requires certain disclosures on the prospectus cover page and in the prospectus summary.⁴⁴ The Commission is also adopting final rules to amend a number of forms and schedules used by SPACs for IPOs and de-SPAC transactions to require the information set forth in subpart 1600.⁴⁵ To the extent that the disclosure requirements in subpart 1600 address the same subject matter as the existing disclosure requirements of the forms or schedules, the requirements of subpart 1600 are controlling.⁴⁶

⁴⁴ The requirements in new subpart 1600 will codify and standardize some of the disclosures already commonly provided by SPACs.

⁴⁵ See the amendments to Forms S–1, F–1, S–4, F–4 and 8–K and Schedules 14A and TO. While the Commission did not propose amendments to Schedule 14C, the disclosure required by subpart 1600 will be required in Schedule 14C pursuant to Item 1 of Schedule 14C, which states that a Schedule 14C must include the information called for by all of the items of Schedule 14A, with limited exceptions, to the extent each item would be applicable to any matter to be acted upon at a shareholder meeting if proxies were to be solicited in connection with the meeting. If the securities to be issued in a de-SPAC transaction are registered on a form other than Form S–4 or F–4, such as Form S–1 or F–1 the requirements of Form S–4 or F–4 that the Commission is adopting, as applicable, in regard to de-SPAC transactions would apply in that context. Also, in both Form S–4 and Form F–4, we made technical changes from the proposal to clarify that the new Regulation S–K Item 1600 series of disclosures should be located in the prospectus part of these forms. As a result Form S–4 provides: “If securities to be registered on this Form will be issued in a de-SPAC transaction, as defined in Item 1601(a) of Regulation S–K (17 CFR 229.1601(a)), then the disclosure provisions of Items 1603 through 1607 and 1609 of Regulation S–K (17 CFR 229.1603 through 229.1607 and 229.1609) apply in addition to the provisions of this Form and disclosure thereunder must be provided in the prospectus, and the structured data provisions of Item 1610 of Regulation S–K (17 CFR 229.1610) apply to those disclosures.” We made similar changes to Form F–4. For purposes of consistency across forms and schedules, we made similar changes as well to Schedule 14A and Schedule TO, although there is no requirement in these forms to locate the disclosure in the prospectus portion of these schedules. In both Schedule 14A and Schedule TO, we made technical changes from the proposal to clarify that Item 1604(a) does not apply since these disclosure documents do not include an outside front cover page similar to a prospectus and Item 1604(b) disclosure should be included in the front part of the disclosure document instead of the prospectus summary referred to in Item 1604(b).

⁴⁶ General Instruction L.1. to Form S–4; General Instruction I.1. to Form F–4; Item 14(f)(1) to

⁴¹ Throughout this release, for readability, we use “shell company” in lieu of the phrase “shell company, other than a business combination related shell company.” The term “business combination related shell company” is defined in Securities Act Rule 405 and Exchange Act Rule 12b–2. We similarly use “reporting shell company” in lieu of the phrase “reporting shell company, other than a business combination related shell company” throughout this release.

⁴² Some commenters indicated that some or all of the new rules should not apply to existing SPACs and/or should apply only prospectively. See, e.g., letters from American Securities Association; Cato Institute; Freshfields Bruckhaus Deringer US LLP (June 13, 2022) (“Freshfields”); Don Nguyen (Apr. 20, 2022); Nicholas Wilson (June 9, 2022).

⁴³ 15 U.S.C. 80a–1 *et seq.*

A. Definitions

1. Proposed Definition: “De-SPAC Transaction”

The Commission proposed to define the term “de-SPAC transaction” as a business combination such as a merger, consolidation, exchange of securities, acquisition of assets, or similar transaction involving a SPAC and one or more target companies (contemporaneously, in the case of more than one target company).⁴⁷

2. Comments: Definition of “De-SPAC Transaction”

One commenter recommended we add the term “reorganization” to the non-exhaustive list of transactions set out in the proposed definition of de-SPAC transaction.⁴⁸

One commenter recommended the definition of de-SPAC transaction refer to “initial business combination” not “business combination.”⁴⁹ Another commenter recommended the definition be named “initial business combination” instead of “de-SPAC transaction.”⁵⁰

In response to a request for comment,⁵¹ one commenter said there was no need to tie the definition of de-SPAC transaction to transactions that are permitted under exchange listing standards, particularly if the definition of SPAC includes non-listed shell companies.⁵²

3. Final Definition: “De-SPAC Transaction”

After considering the comments received, we are adopting the definition of de-SPAC transaction as proposed with a modification discussed below.⁵³ Under the final rules, the term de-SPAC transaction means a business combination, such as a merger, consolidation, exchange of securities, acquisition of assets, reorganization, or similar transaction, involving a special purpose acquisition company and one or more target companies

(contemporaneously, in the case of more than one target company).

We agree with one commenter’s recommendation⁵⁴ to add the term “reorganization” to the non-exhaustive list of transactions set out in the definition of de-SPAC transaction. It is our understanding some transactions commonly considered to be de-SPAC transactions may be considered reorganizations. Hence, we have added the suggested term to the final definition.

A few commenters suggested the definition of de-SPAC transaction should use the phrase “initial business combination.”⁵⁵ We recognize the phrase “initial business combination” may be used interchangeably with “business combination” or “de-SPAC transaction” in the marketplace today, but we believe the simpler proposed term “business combination” used in the body of the de-SPAC transaction definition will be clearer to market participants. One of these commenters suggested the term “initial business combination” should be used because “[s]ubsequent acquisitions by the former SPAC after Closing should not be considered a De-SPAC Transaction.”⁵⁶ We note that a company that is no longer a SPAC would not be subject to the disclosure items in subpart 1600 of Regulation S-K.⁵⁷

We agree with the commenter who said there was no need to tie the definition of de-SPAC transaction to transactions that are permitted under exchange listing standards, particularly if the definition of SPAC includes non-listed shell companies.⁵⁸ A narrower definition may inappropriately exclude transactions that should be included, such as those involving over-the-counter-traded SPACs. We continue to believe, as indicated in the Proposing Release,⁵⁹ that the definition of de-SPAC transaction should include less common transactions that may or may not be permitted under exchange listing rules but for which the enhanced disclosure and procedural requirements in the final rules may be appropriate because they raise the same investor protection concerns.⁶⁰

4. Proposed Definition: “Special Purpose Acquisition Company (SPAC)”

The Commission proposed Item 1601 to define the term “special purpose acquisition company (SPAC)” to mean a company that has indicated that its business plan is to (1) register a primary offering of securities that is not subject to the requirements of Rule 419;⁶¹ (2) complete a de-SPAC transaction within a specified time frame; and (3) return all remaining proceeds from the registered offering and any concurrent offerings to its shareholders if the company does not complete a de-SPAC transaction within the specified time frame.⁶²

5. Comments: Definition of “Special Purpose Acquisition Company (SPAC)”

One commenter indicated they saw no need for a definition of the term “SPAC,” as the commenter saw “no reason why the Proposed Rules should not apply to all shell companies, other than business combination shell companies, inclusive of blank check companies” and also indicated the proposed definitions of “SPAC” and “de-SPAC transaction” were circular, stating, “The proposed definition of ‘de-SPAC transaction’ should be revised to eliminate the reference to ‘a special purpose acquisition company’ in order to eliminate circularity.”⁶³

A few commenters did not support including the requirement that a SPAC “return all remaining proceeds from the registered offering and any concurrent offerings to its shareholders” in the proposed SPAC definition.⁶⁴ One of these commenters said this aspect of the definition is “unnecessary and should be eliminated or revised to only refer to the plan to return proceeds from the registered offering” because “SPACs often hold a modest amount of working capital outside of their trust accounts that they use to fund operating expenses.”⁶⁵ According to the commenter, “[i]f a shell company had such cash remaining at the point when the public shareholders exercise their redemption rights, it would be inappropriate to exclude such shell company from the [p]roposed [r]ules

Schedule 14A; General Instruction L to Schedule TO.

⁴⁷ Proposed Item 1601(a).

⁴⁸ Letter from Jay Knight, Chair of the Committee on Federal Regulation of Securities of the Section of Business Law of the American Bar Association (June 17, 2022) (“ABA”).

⁴⁹ Letter from ABA.

⁵⁰ Letter from Kirkland & Ellis LLP (June 15, 2022) (“Kirkland & Ellis”).

⁵¹ Proposing Release, *supra* note 7, at 29466 (request for comment number 2) (“Should we define ‘de-SPAC transaction’ as proposed? Should the scope of the proposed definition instead be tied to de-SPAC transactions that are permitted under exchange listing standards?”).

⁵² Letter from Vinson & Elkins (June 13, 2022) (“Vinson & Elkins”).

⁵³ Item 1601(a) of Regulation S-K.

⁵⁴ Letter from ABA.

⁵⁵ Letters from ABA, Kirkland & Ellis.

⁵⁶ Letter from ABA.

⁵⁷ See also *infra* note 94 and accompanying text concerning SPAC status after a de-SPAC transaction.

⁵⁸ Letter from Vinson & Elkins.

⁵⁹ Proposing Release, *supra* note 7, at 29466.

⁶⁰ In adopting this definition of de-SPAC transaction, we do not intend to indicate that such transactions are or should be permitted under the exchanges’ SPAC listing rules or that exchange listing requirements should not apply to SPACs seeking an exchange listing.

⁶¹ Blank check companies subject to Rule 419 must comply with a comprehensive set of disclosure and investor protection requirements under the rule and were not proposed to be subject to the requirements applicable to SPACs under the proposed rules.

⁶² Proposed Item 1601(b).

⁶³ Letter from Vinson & Elkins (noting that “as proposed, a special purpose acquisition company has a business plan to complete a de-SPAC transaction, and a de-SPAC transaction involves a special purpose acquisition company.”).

⁶⁴ Letters from ABA, Vinson & Elkins.

⁶⁵ Letter from Vinson & Elkins.

based solely on retaining such cash.”⁶⁶ Another commenter recommended that we change this aspect of the definition to use the phrase “redeem the equity securities issued in the registered offering if the company does not complete a de-SPAC transaction within the specified time frame.”⁶⁷

One commenter recommended we narrow the definition of SPAC to only “a blank check company as defined in § 230.419(a)(2).”⁶⁸ Another commenter, who opposed defining “SPAC,” noted that the proposed definition “is not limited to companies listed on a national securities exchange” and “would include shell companies traded in over-the-counter markets, which are not what would generally be considered to be ‘SPACs.’”⁶⁹ That commenter noted that a “logical distinction could be drawn based on exchange listing, rather than on whether the offering is by a blank check company and therefore subject to Rule 419.”⁷⁰ The same commenter recommended that, if we adopt a new definition, we clarify that a company “ceases to be a SPAC for purposes of the rules after consummation of a de-SPAC transaction.”⁷¹

In response to requests for comment,⁷² one commenter said that “it is clear what entities are SPACs, without the need for additional boxes to check.”⁷³

6. Final Definition: “Special Purpose Acquisition Company (SPAC)”

After considering the comments received, we are adopting the definition of special purpose acquisition company (or SPAC) as proposed, with certain modifications discussed below.⁷⁴ Under the final rules, the term special purpose acquisition company (SPAC) means a company that has: (1) indicated that its business plan is to: (i) conduct a primary offering of securities that is not subject to the requirements of § 230.419 (Rule 419 under the Securities Act); (ii) complete a business combination, such as a merger, consolidation, exchange of securities, acquisition of assets, reorganization, or similar transaction,

with one or more target companies within a specified time frame; and (iii) return proceeds from the offering and any concurrent offering (if such offering or concurrent offering intends to raise proceeds) to its security holders if the company does not complete a business combination, such as a merger, consolidation, exchange of securities, acquisition of assets, reorganization, or similar transaction, with one or more target companies within the specified time frame; or (2) represented that it pursues or will pursue a special purpose acquisition company strategy.

One commenter did not see a need for a new defined term “SPAC,”⁷⁵ because, in the commenter’s view, enhanced disclosures should apply to all shell companies (other than business combination shell companies) and not only to those companies defined as SPACs.⁷⁶ Several of the rules being adopted in this release will enhance disclosures for investors in non-SPAC shell companies.⁷⁷ However, the proposed individual disclosure items in the Item 1600 series of Regulation S-K were largely tailored to SPAC transactions. For the reasons we discuss in this release below in connection with the specific rules we are adopting, we believe it is appropriate at this time to apply enhanced disclosure in connection with companies meeting the definition of SPAC. However, we will continue to consider whether enhanced disclosure in other shell company transactions, such as reverse mergers with public shell companies, would be appropriate or necessary in the future.⁷⁸

This commenter further observed there was circularity in the proposed definitions of “SPAC” and “de-SPAC transaction.”⁷⁹ We agree the final rules should eliminate this circularity. Although the commenter made the suggestion to revise the definition of “de-SPAC transaction” rather than addressing the issue by revising the definition of “SPAC,” we believe it would be clearer to avoid circularity by revising the definition of “SPAC.” We have replaced the term “de-SPAC

transaction” in the definition of “SPAC” with “business combination, such as a merger, consolidation, exchange of securities, acquisition of assets, reorganization, or similar transaction, with one or more target companies.”

Several comments focused on the aspect of the proposed SPAC definition regarding the return of proceeds and suggested that special purpose acquisition companies may not return “all remaining proceeds.”⁸⁰ We agree with commenters that the proposed term “return all remaining proceeds” could inappropriately exclude companies that take some portion of cash out of trust for anticipated expenses and therefore do not return “all” proceeds at the time of redemption.⁸¹ To avoid excluding such companies, we have revised the definition to use the term “return proceeds” instead of “return all remaining proceeds.” We have also added a parenthetical reference “(if such offering or concurrent offering intends to raise proceeds)” that qualifies the term “offering and any concurrent offering” to account for the fact there may be some SPAC offerings that do not raise proceeds.

We do not believe it is necessary to revise the definition to refer only to the plan to return proceeds from the primary offering, rather than the primary offering and any concurrent offering. We understand SPACs typically place proceeds of concurrent offerings in trust and return these proceeds if the SPAC does not complete a de-SPAC transaction within the specified time frame.⁸²

We are not adopting the recommendation that we should replace the terms related to the return of proceeds with alternative terms related to the redemption of equity securities. We continue to believe, as the Commission indicated in the Proposing Release, that the definition should not include certain criteria, including the issuance of redeemable securities, that

⁶⁶ *Id.*
⁶⁷ Letter from ABA.
⁶⁸ Letter from ABA.
⁶⁹ Letter from Vinson & Elkins.
⁷⁰ *Id.*
⁷¹ *Id.*

⁷² Proposing Release, *supra* note 7, at 29466 (request for comment number 6) (“For example, should we amend Form S-1, Form F-1, Form S-4, and/or Form F-4 to add to the registration statement cover page of these forms a check box for issuers to indicate whether they are special purpose acquisition companies?”).
⁷³ Letter from Vinson & Elkins.
⁷⁴ Item 1601(b) of Regulation S-K.

⁷⁵ Letter from Vinson & Elkins. *See supra* note 63 and accompanying text.

⁷⁶ Letter from Vinson & Elkins.

⁷⁷ *See* Rule 145a and definitions of “blank check company” in Securities Act Rule 405 and Exchange Act Rule 12b-2.

⁷⁸ According to data provided by The Deal during the years when it tracked this data, the number of reverse mergers not involving SPACs was as follows by year: (a) 48 in 2017, (b) 48 in 2018, (c) 28 in 2019, and (d) 17 in 2020. The Deal staff indicated to the Commission staff they stopped tracking the data after 2020 because of the small number of reverse mergers.

⁷⁹ Letter from Vinson & Elkins. *See supra* note 63 and accompanying text.

⁸⁰ Letters from ABA, Vinson & Elkins. *See supra* notes 64, 65, and 66 and accompanying text.

⁸¹ *See, e.g.,* letters from ABA (“In addition, SPACs are permitted to withdraw interest to pay income and franchise taxes, and, upon liquidation, pay certain liquidation costs. . . .”); Goodwin Procter LLP (June 14, 2022) (“Goodwin”) (“SPACs are permitted to withdraw interest to pay income and franchise taxes and, upon liquidation, pay certain liquidation costs. . . .”); White & Case LLP (June 17, 2022) (“White & Case”) (“In addition, SPACs are permitted to withdraw interest to pay income and franchise taxes, and, upon liquidation, pay certain liquidation costs, which would reduce overall returns.”).

⁸² *See* NYSE Listed Company Manual Section 102.06 and Nasdaq Listing Rule IM-5101-2 (providing for the placement of concurrent offering proceeds in trust).

could result in an overly narrow definition by including transactional terms that have not applied to every SPAC offering in the past or that could change as the SPAC market continues to evolve.⁸³

One commenter recommended we narrow the definition of SPAC to only “a blank check company as defined in § 230.419(a)(2).”⁸⁴ The Rule 419 definition of “blank check company” includes a requirement that the company is issuing penny stock.⁸⁵ The proposed definition of SPAC reflects the fact that special purpose acquisition company structures often are designed to avoid issuing penny stock but continue to pose disclosure and other investor protection concerns.⁸⁶ Special purpose acquisition companies frequently do not issue penny stock and, therefore, would not meet the definition in § 230.419(a)(2). Thus, the inclusion of the suggested criterion would inappropriately exclude many or all special purpose acquisition companies from the SPAC definition.

Another commenter indicated the SPAC definition should draw a distinction based on exchange listing, which would exclude shell companies traded in over-the-counter markets. In the commenter’s view, shell companies traded in over-the-counter markets are not generally considered to be SPACs.⁸⁷ While companies commonly considered to be SPACs often list on a national securities exchange, we do not believe the SPAC definition should be limited to such listed entities. While carving out companies traded over-the-counter might leave out only a few (or zero) companies today, prevailing structures may further evolve over time just as they have evolved over time in the past,⁸⁸ and we believe investors in those over-the-counter companies engaged in the same kinds of business as exchange-traded companies should have the same investor protections provided by the rules we are adopting.⁸⁹

Furthermore, we are adding a new clause to the definition that provides that the term special purpose acquisition company also includes a company that has represented it pursues or will pursue a special purpose acquisition company strategy.⁹⁰ In the Proposing Release, the Commission asked if the proposed definition provides a workable approach to determining which issuers would be subject to the requirements of proposed subpart 1600.⁹¹ In addition, the Commission asked whether there were any potential opportunities for regulatory arbitrage in shell company or SPAC transactions that the Commission should consider addressing.⁹² After further consideration of these regulatory arbitrage concerns, we have revised the final rule to include new paragraph (b)(2) to Item 1601 concerning pursuit of a special purpose acquisition company strategy. Variations on common SPAC structures could cause some companies to fall technically outside one of the three prongs of paragraph (1) of the final SPAC definition. When companies make representations they pursue or will pursue a special purpose acquisition company strategy, they may be indistinguishable to investors from companies that meet the other components of the definition. As a result, we believe investors in such companies should benefit from the enhanced disclosures applicable to SPACs. Therefore, even where a company technically does not meet one of the three prongs in paragraph (1) of the final definition of SPAC, if it represents, directly or indirectly, that it pursues or will pursue a SPAC strategy,

(July 31, 2008)] (Order Granting Approval to Proposed Rule Change, as modified by Amendment No. 1, to Adopt Additional Initial Listing Standards to List Securities of Special Purpose Acquisition Companies) (NASDAQ–2008–013); 57785 (May 6, 2008) [73 FR 27597 (May 13, 2008)] (Order Approving Proposed Rule Change to Adopt New Initial and Continued Listing Standards to List Securities of Special Purpose Acquisition Companies) (SR–NYSE–2008–17). According to data from SPACInsider, in the years 2020 through 2022, there were zero SPAC IPOs in the over-the-counter market (*i.e.*, that were not listed on an exchange in connection with the IPO).

⁹⁰ As a result of this change, the three prongs contained in the proposed definition (that had paragraph numbers (1), (2), and (3)) will be renumbered as paragraphs (1)(i), (ii), and (iii) and the clause regarding pursuit of a SPAC strategy will be numbered as paragraph (2). We have also added a parenthetical reference to the acronym “(SPAC)” in the body of the definition in the final rule as well as in the name of the defined term “special purpose acquisition company (SPAC)” to add incremental clarity that the acronym also refers to the defined term.

⁹¹ Proposing Release, *supra* note 7, at 29466 (request for comment number 1).

⁹² Proposing Release, *supra* note 7, at 29490 (request for comment number 102).

then pursuant to paragraph (2) of the final definition of SPAC, the company would meet the definition of a SPAC.

Similarly, to avoid the risk that certain varieties of SPACs may fall outside the definition because of minor technical distinctions from the prongs of the definition, we have changed the proposed term “register a primary offering” to “conduct a primary offering” to account for evolving SPAC structures that may not conduct a registered offering. We do not believe it would be appropriate for companies in de-SPAC transactions to avoid the disclosure (or any other) requirements of these final rules only because the initial SPAC transaction was not registered. As noted in the Proposing Release,⁹³ we intend this definition to be sufficiently broad to take into account potential variations in the SPAC structure and the possibility that SPACs may continue to evolve. This adjustment to the definition will ensure that appropriate disclosures are provided at the de-SPAC stage regardless of the structure of the initial SPAC transaction. In the final definition, we have also made a corresponding revision to change the proposed term “registered offering” to “offering.”

One commenter recommended we clarify that a company ceases to be a SPAC upon consummation of a de-SPAC transaction.⁹⁴ For the avoidance of doubt, we are providing guidance that, if a company that meets the SPAC definition has completed a de-SPAC transaction or, in the case of one or more target companies, contemporaneous de-SPAC transactions, then the company no longer meets the definition of a SPAC and that such companies are not required to comply with the enhanced disclosures under Regulation S–K applicable to SPACs in registration statements they file in later periods after the completion of such de-SPAC transactions.

We are not requiring a check box on form cover pages indicating SPAC status as the enhanced disclosure provided by registrants pursuant to the Item 1600 series of Regulation S–K will make clear the registrant is a SPAC.⁹⁵

7. Proposed Definition: “SPAC Sponsor”

The Commission proposed to define the term “SPAC sponsor” as the entity and/or person(s) primarily responsible

⁸³ Proposing Release, *supra* note 7, at 29465.

⁸⁴ Letter from Vinson & Elkins.

⁸⁵ See also section III.C (discussing co-registration on Forms S–4 and F–4 and the requirement to identify the target company as a registrant on the registration statement cover page).

⁸³ Proposing Release, *supra* note 7, at 29466.

⁸⁴ Letter from ABA.

⁸⁵ See *supra* notes 1 and 61 (discussion of Securities Act Rule 419). As discussed in section III.E *infra*, in the final rules, we are not amending the definition of “blank check company” in Rule 419 as proposed but are adopting a definition of “blank check company” in Securities Act Rule 405 that is exclusively for purposes of the safe harbor created by the PSLRA for forward-looking statements.

⁸⁶ Proposing Release, *supra* note 7, at 29465.

⁸⁷ Letter from Vinson & Elkins.

⁸⁸ See, e.g., Table 2 in section VIII (Economic Analysis) (statistics on over-the-counter SPACs for over a three-decade period).

⁸⁹ Prior to exchange rule changes permitting listing, shells commonly referred to as SPACs were not exchange-listed. See Securities Exchange Act Release Nos. 58228 (July 25, 2008) [73 FR 44794

for organizing, directing or managing the business and affairs of a SPAC, other than in their capacities as directors or officers of the SPAC as applicable.⁹⁶

8. Comments: Definition of “SPAC Sponsor”

One commenter said the proposal “should be revised to eliminate the need for a defined term ‘SPAC sponsor’” and, “[i]nstead, the rules should require disclosure regarding the SPAC’s directors, officers and affiliates.”⁹⁷ This commenter also said “the definition’s exclusion of directors and officers in their capacities as such would result in there being no ‘sponsor’ for many SPACs.” This commenter also said the proposal “blur[red] the lines between the roles and responsibilities of the SPAC sponsor and that of the SPAC board and officers.”

Another commenter recommended an alternative definition of “SPAC sponsor”: “the entity and/or person(s) that (1) own all or a portion of the privately placed common equity securities of the special purpose acquisition company and (2) are primarily responsible for directing and managing the business and affairs of a special purpose acquisition company other than in their capacities as (i) directors or officers of the special purpose acquisition company or (ii) third-party service providers to the special purpose acquisition company, as applicable.”⁹⁸ The commenter said that “the ‘SPAC sponsor’ should be the entity or persons who have both ownership of [s]ponsor shares and responsibility for directing and managing the SPAC.” The commenter said that their suggested definition will “identify the entity or persons that are currently identified as [s]ponsors in registration statements for the SPAC.”⁹⁹

9. Final Definition: “SPAC Sponsor”

After considering the comments received, we are adopting the definition of SPAC sponsor as proposed with certain modifications discussed below.¹⁰⁰ Under the final rules, the term SPAC sponsor means any entity and/or person primarily responsible for organizing, directing, or managing the business and affairs of a special purpose acquisition company, excluding, if an entity is a SPAC sponsor, officers and directors of the special purpose acquisition company who are not

affiliates of any such entity that is a SPAC sponsor.

The definition is designed to be sufficiently broad that appropriate entities or persons will be subject to the enhanced disclosure requirements applicable to SPAC sponsors.¹⁰¹ Although a sponsor of a SPAC may perform a variety of functions within the SPAC’s structure, we intend for the SPAC sponsor definition to encompass activities that, based on the staff’s experience reviewing SPAC filings and public commentary, are commonly understood to be sponsors of SPACs or with persons referred to as sponsors in current registration statements.

We do not believe it would provide investors with adequate information to tie the SPAC sponsor definition to persons with particular titles, because the definition and corresponding disclosure requirements are intended to capture all parties who perform certain activities that result in such parties having key substantive influence over the SPAC. The suggestion to replace “SPAC sponsor” with “directors, officers, and affiliates of the SPAC” would require disclosure from directors and officers not commonly considered to be sponsors today and, as indicated by the Commission in the Proposing Release, would overlap unnecessarily with current required disclosure concerning directors and officers.¹⁰² Also, “directors, officers, and affiliates of the SPAC” may not include external management companies and their principals that should be included in the definition on the basis of their activities. While State law may provide that directors manage the business and affairs of a corporation and may not provide that any one director has any more authority than any other director,¹⁰³ the phrase “primarily responsible” in the definition of SPAC sponsor is not limited to solely directors or solely directors and officers. Other persons, such as third-party management companies and their affiliates, frequently are primarily responsible for the organization, direction, or management of the

business and affairs of SPACs today and would be SPAC sponsors under the definition we are adopting.

One commenter recommended an alternative definition of SPAC sponsor that featured, among other things, carve-outs from that alternative definition for directors and officers of the SPAC and for third-party service providers.¹⁰⁴ This commenter also suggested that the proposed definition’s exclusion of directors and officers in their capacities as such would result in a null set of SPAC sponsors.¹⁰⁵ Having considered this comment, we have made changes to the final definition. We are not adopting the proposed term “other than in their capacities as directors or officers,” because it could be unclear under the proposed definition whether any action taken on behalf of the SPAC by a director or officer of a SPAC is “other than in that person’s capacity as an officer or director.” As the commenter noted, this could result in no such persons being considered SPAC sponsors. To address such potential ambiguities, in the final rule, we have changed the term “other than in their capacities as directors or officers of the special purpose acquisition company as applicable” to “excluding, if an entity is a SPAC sponsor, officers and directors of the special purpose acquisition company who are not affiliates of any such entity that is a SPAC sponsor.” Based on the staff’s experience, we understand that a SPAC sponsor entity is typically involved in the SPAC. However, if the SPAC sponsor is not an entity, then we want to make sure the appropriate persons are captured within the SPAC sponsor definition. An officer or director of the SPAC that is an affiliate of an entity that is a SPAC sponsor would also be a SPAC sponsor under the final definition. For example, in the case of a hypothetical SPAC where a third-party management company is a SPAC sponsor and a person is a director of both the SPAC and this third-party management company, then this person would also be a SPAC sponsor.

We are not adopting the suggestion to exclude “third-party service providers” from the definition of SPAC sponsor.¹⁰⁶ As discussed above, some third-party service providers will be “SPAC sponsors” under the definition where they are “primarily responsible for organizing, directing, or managing the business and affairs” of the SPAC. Other

¹⁰¹ See, e.g., Item 1603 (regarding SPAC sponsors).

¹⁰² See Proposing Release, *supra* note 7, at 29466, n.58 (“In regard to natural persons, we are proposing to exclude from the scope of the definition of ‘SPAC sponsor’ the activities performed by natural persons in their capacities as directors and/or officers of the SPAC to avoid overlap with existing disclosure requirements relating to directors and officers.”).

¹⁰³ See, e.g., DGCL Section 141(a) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.”).

¹⁰⁴ Letter from ABA. See *supra* note 98 and accompanying text.

¹⁰⁵ *Id.*

¹⁰⁶ Letter from ABA. See *supra* note 98 and accompanying text.

⁹⁶ Proposed Item 1601(c).

⁹⁷ Letter from Vinson & Elkins.

⁹⁸ Letter from ABA.

⁹⁹ Letter from ABA.

¹⁰⁰ Item 1601(c) of Regulation S-K.

third-party service providers, however, will not fall within the definition of SPAC sponsor where they are not “primarily responsible” for organizing, directing, or managing the business and affairs of a SPAC. For example, external legal counsel that only assists in the formation of a SPAC by drafting its certificate of incorporation and bylaws on behalf of a client would not be “primarily responsible” for “organizing . . . the business and affairs of a SPAC.”¹⁰⁷ Other third-party service providers may perform similar administrative or ministerial activities for a SPAC or provide outside legal or accounting advice neither of which would cause them to be “primarily responsible” for organizing, directing, or managing the business and affairs of the SPAC and thus they would not be SPAC sponsors.

10. Proposed Definition: “Target Company”

The Commission proposed to define the term “target company” as an operating company, business, or assets.¹⁰⁸

11. Comments: Definition of “Target Company”

One commenter asserted that “the concept of ‘assets’ being a ‘target company’ yields anomalous results under certain proposed rules (such as requiring assets to sign a registration statement) and the concept of a ‘business’ may be vague (as a business may be a product line, rather than an entity that could sign a registration statement).”¹⁰⁹ Another commenter suggested “deleting the term ‘assets’ from the definition or clarifying that a target company includes assets where the acquisition of such assets is intended to constitute the SPAC’s initial business combination.”¹¹⁰

12. Final Definition: “Target Company”

After considering the comments received, we are adopting the definition of target company as proposed.¹¹¹ Under the final rules, the term target company means an operating company, business or assets.

To address commenters’ concerns about the use of the terms “assets” and “business” in the definition of target company,¹¹² we have revised certain

registration statement form instructions, as discussed in more detail below.¹¹³ We believe these changes address the commenters’ concerns. Therefore, we do not believe it is necessary to make changes to the proposed definition of “target company.” In addition, although an asset purchase transaction may be a different form of transaction for the purposes of other legal requirements, including State law, we do not believe a SPAC combination with a target company taking the form of an asset purchase should be excluded from the definition of de-SPAC transaction merely for this reason.

B. Sponsors

1. Proposed Rules

The Commission proposed Item 1603(a) to require additional disclosure about the SPAC sponsor, its affiliates, and promoters¹¹⁴ in registration statements and schedules filed in connection with SPAC registered offerings and de-SPAC transactions,¹¹⁵ including disclosure of the following:

- The experience, material roles, and responsibilities of these parties, as well as any agreement, arrangement, or understanding (1) between the SPAC sponsor and the SPAC, its executive officers, directors, or affiliates, with respect to determining whether to proceed with a de-SPAC transaction and (2) between the SPAC sponsor and unaffiliated security holders of the SPAC regarding the redemption of outstanding securities;
- The controlling persons of the SPAC sponsor and any persons who have direct and indirect material interests in the SPAC sponsor and the nature and amount of their interests, as well as an organizational chart that shows the relationship between the SPAC, the SPAC sponsor, and the SPAC sponsor’s affiliates;
- Tabular disclosure of the material terms of any lock-up agreements with the SPAC sponsor and its affiliates; and
- The nature and amounts of all compensation that has or will be awarded to, earned by, or paid to the SPAC sponsor, its affiliates, and any promoters for all services rendered in all capacities to the SPAC and its affiliates, as well as the nature and amounts of any reimbursements to be paid to the

SPAC sponsor, its affiliates, and any promoters upon the completion of a de-SPAC transaction.¹¹⁶

2. Comments

Broadly categorized, commenters on proposed Item 1603(a) or generally on the types of SPAC sponsor issues covered by proposed Item 1603(a) focused on six areas: (1) general comments that expressed support for the proposals, (2) promoter requirements, (3) compensation, (4) transfers of SPAC ownership, (5) interests in the SPAC sponsor and the organizational chart requirement, and (6) agreements.

i. General Comments

A number of commenters generally supported the proposed enhanced disclosure requirements regarding SPAC sponsors.¹¹⁷ Commenters cited a number of benefits to investors as the reasons for their support, including the following five benefits: (a) placing investors in a better position to evaluate the merits of SPAC and de-SPAC transactions,¹¹⁸ (b) illuminating financial incentives of SPAC sponsors that may affect de-SPAC transaction outcomes,¹¹⁹ (c) providing compensation information that may promote more informed investment decisions,¹²⁰ (d) providing SPAC

¹¹⁶ In the Proposing Release, the Commission stated that this would include, for example, fees and reimbursements in connection with lease, consulting, support services, and management agreements with entities affiliated with the sponsor, as well as reimbursements for out-of-pocket expenses incurred in performing due diligence or in identifying potential business combination candidates. Proposing Release, *supra* note 7, at 29467, n.64.

¹¹⁷ Letters from ABA; Stephen W. Hall, Legal Director and Securities Specialist, and Scott Farnin, Legal Counsel, Better Markets (June 13, 2022) (“Better Markets”); Michael Ryan, Chief Executive Officer, Bullet Point Network, LP (June 13, 2022) (“Bullet Point Network”); Charles Pieper (May 13, 2022) (“Charles Pieper”); John L. Thornton, Co-Chair, Hal S. Scott, President, and R. Glenn Hubbard, Committee on Capital Markets Regulation (June 13, 2022) (“Committee on Capital Markets Regulation”); Paul Andrews, Managing Director, Research, Advocacy and Standards, CFA Institute (May 31, 2022) (“CFA Institute”); Glenn Davis, Deputy Director, Council of Institutional Investors (June 9, 2022) (“CII”); Dylan Bruce, Financial Services Counsel, Consumer Federation of America (June 13, 2022) (“Consumer Federation”); Elizabeth Warren, United States Senator (July 8, 2022) (“Senator Elizabeth Warren”); Kerrie Waring, Chief Executive Officer, International Corporate Governance Network (June 13, 2022) (“ICGN”); Melanie Senter Lubin, President, North American Securities Administrators Association, Inc. (June 13, 2022) (“NASAA”); Paul A. Swegle, Kinsel Law Offices (Apr. 9, 2022) (“Paul Swegle”).

¹¹⁸ Letter from Committee on Capital Markets Regulation.

¹¹⁹ Letter from CII.

¹²⁰ Letter from Consumer Federation.

¹⁰⁷ Item 1601(c).

¹⁰⁸ Proposed Item 1601(d).

¹⁰⁹ Letter from Vinson & Elkins.

¹¹⁰ Letter from Freshfields (“We believe there are circumstances where a SPAC may acquire some assets (such as cash) but would not yet have completed its acquisition of a target company.”).

¹¹¹ Item 1601(d) of Regulation S-K.

¹¹² Letters from Freshfields, Vinson & Elkins. See *supra* notes 65 and 66 and accompanying text.

¹¹³ See *infra* section III.C.

¹¹⁴ The term “promoter” is defined in Securities Act Rule 405 and Exchange Act Rule 12b-2.

¹¹⁵ See (a) proposed General Instruction VIII to Form S-1, (b) proposed General Instruction I.1 to Form S-4, (c) proposed General Instruction VII to Form F-1, (d) proposed General Instruction I.1 to Form F-4, (e) proposed Item 14(f)(1) of Schedule 14A, and (f) proposed General Instruction K to Schedule TO.

sponsor ownership interest information that may affect investor ability to vote on de-SPAC transactions,¹²¹ and (e) providing information about SPAC sponsor experience that may help investors assess the SPAC sponsor's ability to find a target company.¹²²

Also, several commenters suggested that proposed Item 1603(a) would codify, to an extent, existing disclosure practices.¹²³

ii. Promoters

Some commenters said Item 1603 should not apply to “promoters.”¹²⁴ One commenter asserted that application to the SPAC sponsor and its affiliates would include all significant participants in the SPAC and thus the “promoter” provision would not significantly benefit investors.¹²⁵ Another commenter said that “disclosure regarding a promoter of the SPAC's initial public offering that will have no involvement with the de-SPAC transaction would be immaterial to investors.”¹²⁶

iii. Compensation

A number of commenters suggested that the proposed disclosure requirements regarding sponsor compensation would provide useful information to investors.¹²⁷ A few commenters expressed the view that sponsor compensation is already sufficiently disclosed.¹²⁸

One commenter said the SPAC sponsor “20 percent promote is fully and fairly disclosed and has been for decades.”¹²⁹ Another commenter said

they “believe the sponsor's compensation and reimbursement are already sufficiently disclosed in response to existing disclosure requirements and that incremental disclosure requirements are thus not merited.”¹³⁰

One commenter that did not support the additional proposed disclosure requirements stated that, if the Commission were nonetheless to impose new requirements, “the reference to ‘compensation’ should be revised to refer instead to all equity and rights to cash held by the SPAC directors and officers and their affiliates, as certain equity interests may be purchased for value (*i.e.*, not be ‘compensation’) and reimbursement of advances or repayment of loans would not be compensation.”¹³¹ Another commenter said “sponsor compensation comes almost entirely in the form of capital gains associated with securities issued in the ‘promote’ resulting from stock price increases after the de-SPAC transaction, and quantifying such compensation may involve speculation or be subject to criticism as incomplete.”¹³²

Another commenter said that, “in addressing non-equity compensation and reimbursements, proposed Item 1603(a)(6) should explain its requirement to identify other compensation and reimbursements that are material, individually or in the aggregate and that the required disclosure may be qualitative and not quantitative, except where amounts are above a specified de minimis threshold, similar to the approach taken in certain respects under the existing compensation disclosure framework in Item 402 of Regulation S-K [17 CFR 229.402].”¹³³

iv. Transfer of SPAC Ownership

Several commenters recommended we adopt requirements to disclose transfers of SPAC securities by the SPAC sponsor and others. One commenter recommended, in response to request for comment,¹³⁴ adding a sentence at the end of Item 1603(a)(6) that states: “Disclose any arrangements under which the SPAC sponsor, its affiliates and any promoters have transferred ownership of any securities in the SPAC to other parties in exchange

for compensation or other benefit to the sponsor, its affiliates, any promoters, or to the SPAC.”¹³⁵ The commenter said that “SPAC sponsors at times sell off a portion of their promote or other securities to a ‘risk-capital syndicate’ as a way of cashing out early on a portion of the compensation they receive for their work on the SPAC” and that “the amount of interest that a sponsor retains in securities of the SPAC is material for investors seeking to evaluate the incentive of the sponsor in pursuing a SPAC merger.”¹³⁶ Another commenter suggested expanding current Forms 3 and 4 director and officer reporting requirements to cover SPAC sponsors and their transactions in SPAC securities after the de-SPAC transaction.¹³⁷ Similarly, another commenter recommended disclosure of post-de-SPAC transaction transfers, noting “this reporting could be time limited, for example to two years” following the de-SPAC transaction.¹³⁸

v. Interest in SPAC Sponsor and Organizational Chart

One commenter said that the proposed approach departs from the traditional approach to beneficial ownership reporting and recommended that this item should clarify that “an indirect economic interest in less than 10% of a SPAC's founder shares or warrants through ownership of equity interests in a [SPAC] [s]ponsor should not, in and of itself and absent other factors, be considered a direct or indirect material interest in the [SPAC] [s]ponsor.”¹³⁹ Another commenter said the identity of natural persons controlling the sponsor is already disclosed in response to existing 17 CFR 229.403 (“Item 403” of Regulation S-K).¹⁴⁰

vi. Agreements

One commenter recommended that the Commission should revise proposed Item 1603(a)(8) to “specify that if a SPAC, the SPAC sponsor, or any affiliated party enters into an agreement regarding the redemption of outstanding securities of the SPAC after the date of the merger registration statement or proxy, that the SPAC be required to issue a proxy amendment or similar

¹²¹ Letter from ICGN.

¹²² Letters from ICGN, NASAA.

¹²³ Letters from ABA, NASAA, Vinson & Elkins.

¹²⁴ Letters from Freshfields, Vinson & Elkins.

¹²⁵ Letter from Freshfields (stating that “the proposed rules also already require disclosure of all persons who have direct and indirect material interests in the SPAC sponsor and the amount and nature of their interests” and that “this should encompass the most relevant entities and persons”).

¹²⁶ Letter from Vinson & Elkins.

¹²⁷ Letters from Better Markets, Charles Pieper, Committee on Capital Markets Regulation, CFA Institute, Consumer Federation, Senator Elizabeth Warren, ICGN, NASAA.

¹²⁸ Letters from Samir Kapadia, Director, and Bobby Cunningham, Director, SPAC Association (June 13, 2022) (“SPAC Association”); Vinson & Elkins (expressing the view that sponsor compensation and reimbursement is already disclosed under existing disclosure requirements and the material terms of lock-up agreements are already sufficiently disclosed as a matter of industry practice).

¹²⁹ Letter from SPAC Association. We understand that the term SPAC sponsor “promote” typically refers to the acquisition by the SPAC sponsor of a significant percentage of the shares of the SPAC, typically 20%. We observe the term used to connote a meaning of “special compensation,” but it does not involve a preferred return, such as in real estate private equity investment structures that also use this terminology.

¹³⁰ Letter from Vinson & Elkins.

¹³¹ Letter from Vinson & Elkins.

¹³² Letter from Loeb & Loeb LLP (June 13, 2022) (“Loeb & Loeb”).

¹³³ Letter from ABA.

¹³⁴ Proposing Release, *supra* note 7, at 29467 (request for comment number 9) (“Should we require more or less information about the sponsor's compensation and reimbursements?”).

¹³⁵ Letter from Michael Klausner, Stanford Law School, and Michael Ohlrogge, NYU School of Law (June 13, 2022) (“Michael Klausner and Michael Ohlrogge”), included as an attachment to a letter from Michael Ohlrogge, NYU School of Law (June 13, 2022).

¹³⁶ *Id.*

¹³⁷ Letter from Paul Swegle.

¹³⁸ Letter from NASAA.

¹³⁹ Letter from ABA.

¹⁴⁰ Letter from Vinson & Elkins.

filing prior to the redemption deadline to inform SPAC shareholders of the new agreement.”¹⁴¹

Another commenter said the material terms of lock-up agreements are already disclosed as a matter of industry practice and that requiring additional disclosure would “go beyond the disclosure requirements applicable to lock-up agreements that are entered into in connection with a traditional IPO.”¹⁴² Regarding proposed requirements to disclose any exceptions to relevant lock-up agreements, one commenter recommended excluding exceptions that are not material or are customary.¹⁴³ This commenter noted that frequently these exceptions provide that the transferee agree to the lock-up agreement as a condition of the transfer.¹⁴⁴

3. Final Rules

After considering the comments received, we are adopting Item 1603(a) as proposed with certain modifications we discuss below. Additionally, for clarity and consistency throughout Item 1603, we have replaced the term “executive officers” with the term “officers.”

i. General Discussion

Item 1603(a)’s disclosure requirements will provide a SPAC’s prospective investors and existing shareholders with detailed information relating to the SPAC sponsor that could be important in understanding and analyzing a SPAC, including how the rights and interests of the SPAC sponsor, its affiliates, and any promoters may differ from, or may conflict with, those of public shareholders.¹⁴⁵ Given that a SPAC does not conduct an operating business, information about the background and experience of the SPAC sponsor is important in assessing a SPAC’s prospects for success and may be a relevant factor in the market value

of a SPAC’s securities.¹⁴⁶ Corresponding disclosure with respect to SPAC sponsor affiliates and promoters will also provide investors with important information, because the SPAC sponsor’s affiliates and any promoters of the SPAC may also carry out activities similar to those of a SPAC sponsor. Furthermore, the enhanced disclosure regarding the SPAC sponsor’s compensation and the SPAC sponsor’s agreements, arrangements, or understandings may be helpful to a SPAC’s prospective investors and existing shareholders in considering whether to acquire or redeem the SPAC’s securities and in evaluating the potential risks and merits of a proposed de-SPAC transaction, because it could highlight additional motivations for completing a de-SPAC transaction.

Several commenters suggested that proposed Item 1603(a) would codify, to an extent, existing disclosure practices.¹⁴⁷ We agree that the requirements in Item 1603 to provide detailed disclosure about the SPAC sponsor, the SPAC sponsor’s experience, and its rights and interests will codify existing disclosure practices. This will help ensure that issuers provide consistent and comprehensive information across transactions, so that investors can make more informed investment and voting decisions.

i. Promoters

We are retaining the applicability of Item 1603 to promoters.¹⁴⁸ We disagree with the commenters who asserted that Item 1603 should not apply to “promoters” and that the disclosure regarding a promoter would not significantly benefit investors or would be immaterial to investors.¹⁴⁹ Certain persons are explicitly included as a “promoter” under Securities Act Rule 405 and Exchange Act Rule 12b–2.¹⁵⁰

¹⁴⁶ See, e.g., Chen Lin, Fangzhou Lu, Roni Michaely & Shihua Qin, *SPAC IPOs and Sponsor Network Centrality* (SSRN Working Paper, 2021); Andrea Pawliczek, A. Nicole Skinner, and Sarah L.C. Zechman, *Signing Blank Checks: The Roles of Reputation and Disclosure in the Face of Limited Information* (SSRN Working Paper, 2021).

¹⁴⁷ Letters from ABA, NASAA, Vinson & Elkins.

¹⁴⁸ The proposal’s disclosure requirements related to “promoters” included the following proposed items: (1) Item 1603(a)(3) (promoter’s experience), (2) Item 1603(a)(4) (promoter’s role), (3) 17 CFR 229.1602(b)(6) (“Item 1602(b)(6)”) and Items 1603(a)(6), and 1604(a)(3) (promoter’s compensation), and (4) Items 1602(a)(5), 1602(b)(7), 1603(b)(1), 1604(a)(4), and 1604(b)(3) (promoter conflicts of interest).

¹⁴⁹ Letters from Freshfields, Vinson & Elkins. See *supra* notes 124, 125, and 126 and accompanying text.

¹⁵⁰ Securities Act Rule 405 provides: The term promoter includes: (i) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding

There may be facts and circumstances involving a SPAC where a person may be considered either a “promoter,” “SPAC sponsor,” “officer,” or “director” or may be more than one of these. As with a SPAC sponsor, the promoter’s background and experience, compensation, and conflicts of interest are material information for investors in the SPAC IPO (particularly given the absence of an operating business) and any de-SPAC transaction. Such information will enable investors to better understand promoter incentives and activities.¹⁵¹ A registrant is not required to repeat the same disclosure twice merely because a person fits in two categories (for example, both a “promoter” and a “SPAC sponsor”).

Additionally, in the final rules, we have made technical changes to ensure consistent reference to “SPAC sponsor, its affiliates, and promoters” among disclosure requirements relating to the cover page, summary, and body sections of the prospectus.¹⁵²

ii. Compensation

We are adopting the SPAC sponsor compensation disclosure largely as proposed with certain modifications in response to comments. We disagree with the commenter who suggested that—because sponsor compensation and reimbursement are already disclosed under existing disclosure requirements and current market practice provides for similar disclosure as to the material terms of lock-up agreements—the proposed additional disclosure requirements should not be

and organizing the business or enterprise of an issuer; or (ii) Any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise. Exchange Act Rule 12b–2 contains similar provisions.

¹⁵¹ Item 1603 also applies to disclosure in de-SPAC transactions. See, e.g., instructions to Form S–4 and F–4.

¹⁵² See Items 1602(a)(3) (adding term “promoter” in cover page requirements to be consistent with Item 1602(b)(6) prospectus summary requirements) and (b)(6), 1603(a)(6), and 1604(a)(3), (b)(4) (adding the term “promoter” to summary prospectus requirements to be consistent with cover page requirements in Item 1604(a)(3)), and (c)(1) (adding the terms “its affiliates, and promoters” to prospectus body requirements to be consistent with cover page and summary requirements in Item 1604(a)(3) and (b)(4)).

¹⁴¹ Letter from Michael Klausner and Michael Ohlrogge.

¹⁴² Letter from Vinson & Elkins.

¹⁴³ Letter from Freshfields (“Exceptions to lockups that are customary and not significant or material [include]: transfers to affiliates, transfers to family members, gifts and other charitable donations, transfers by will or inheritance, transfers upon dissolution of a marriage, and in-kind distributions to an entity’s members and partners”).

¹⁴⁴ Letter from Freshfields.

¹⁴⁵ Item 1603(a) will operate in addition to existing disclosure requirements that may be applicable to a SPAC’s arrangements with SPAC sponsors such as 17 CFR 229.701 (“Item 701” of Regulation S–K), which requires disclosure about, among other things, the terms of any private securities transactions between a SPAC and SPAC sponsors within the past three years, and 17 CFR 229.404 (“Item 404” of Regulation S–K), which requires disclosure about certain related party transactions.

adopted.¹⁵³ On the contrary, we believe compliance with the final rules will be minimally burdensome where disclosure of this information is already market practice and will create a uniform and transparent regime across-the-board, maintaining a minimum standard of disclosure across transactions, even if market practice were to change in the future.

We agree with comments that returns based on the price appreciation from the “promote” stake owned by the SPAC sponsor may be a significant source of potential remuneration to the SPAC sponsor that investors would want to know about in making their investment and voting decisions.¹⁵⁴ As a result, we have added terms explicitly requiring disclosure of the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates, and promoters and the price paid or to be paid for such securities.¹⁵⁵ For example, where a SPAC sponsor purchased a 20 percent ownership interest in the SPAC, this interest and the purchase price would be required to be disclosed under the revised provision and would not be excluded on the basis of not being “compensation.”

Pursuant to these changes, any mechanisms, such as an anti-dilution provision,¹⁵⁶ to keep the SPAC sponsor ownership at a certain level (or similar mechanisms for affiliates or promoters) and any potential cancellation of shares

issued or to be issued to the SPAC sponsor (or its affiliates or promoters) or increase in shares issued to the SPAC sponsor (or its affiliates or promoters) will be required to be disclosed since these features would affect shares issued or to be issued to those parties. The approach taken in the final rules will address the concerns over speculation related to quantifying compensation expressed by one commenter,¹⁵⁷ because these contractual terms are known at the time of the IPO and therefore do not require any speculation about possible stock price changes after the de-SPAC transaction.

Regarding the comments concerning reimbursement of advances and repayment of loans,¹⁵⁸ we do not believe it is necessary to modify the proposed term “reimbursement.” The term is not limited to specific types of reimbursements. Any funds outlaid by the SPAC sponsor that are later returned to the SPAC sponsor would constitute a “reimbursement” under the rule, notwithstanding that the return of the funds to the SPAC sponsor may also include other amounts (such as accrued interest).

We are not adopting another commenter’s recommendation that required disclosure be qualitative rather than quantitative unless the amounts are above a specified de minimis threshold.¹⁵⁹ Because de minimis thresholds for several categories of compensation could be significant on an aggregate basis, if quantitative disclosure were only required above a certain de minimis threshold, investors may not receive the complete set of compensation information they need to evaluate the structure of the SPAC in which they may invest. We would not object, however, to the registrant disclosing de minimis reimbursements (such as for perquisites that are de minimis) by providing an aggregate total of those de minimis reimbursements by category rather than on an item-by-item basis. We view such disclosure as consistent with the requirement in Item 1603(a)(6) to disclose the reimbursements’ “nature.”

iii. Transfer of SPAC Ownership

In response to several commenters’ recommendation to disclose transfers of SPAC securities by the SPAC sponsor and others, we are modifying Item

1603(a)(6) to require such disclosure.¹⁶⁰ We agree that disclosure of share transfers by a SPAC sponsor, its affiliates, and promoters would provide important information to investors seeking to evaluate the incentives of these parties. We believe it would also be important for investors to know if the SPAC ownership level of these parties has changed because of cancellation of the securities.¹⁶¹ Accordingly, in the final rule, we have revised proposed Item 1603(a)(6) to add the requirement: “Disclose any circumstances or arrangements under which the SPAC sponsor, its affiliates, and promoters, directly or indirectly, have transferred or could transfer ownership of securities of the SPAC, or that have resulted or could result in the surrender or cancellation of such securities.” With respect to indirect transfers, for example, if there was a transfer of ownership interests in the SPAC sponsor or ownership interests in a holding company that owns interests in the SPAC sponsor, then disclosure would be required under this item.¹⁶²

At this time, we are not making any changes to add requirements to disclose transfers after the de-SPAC transaction occurs, because we believe, for most SPACs, SPAC sponsors will already have Form 3 and 4 reporting obligations.¹⁶³

iv. Interest in SPAC Sponsor and Organizational Chart

We are adopting Item 1603(a)(7) as proposed except that we are not adopting the proposal to provide an organizational chart.

One commenter said that “proposed Item 1603(a)(7) should clarify that . . . an indirect economic interest in less than 10% of a SPAC’s founder shares or warrants through ownership of equity interests in a Sponsor should not, in and of itself and absent other factors, be considered a direct or indirect material

¹⁵³ Letter from Vinson & Elkins. See also letter from SPAC Association (asserting that “the SPAC 20% promote is fully and fairly disclosed and has been for decades”). See *supra* notes 128, 129, and 130 and accompanying text.

¹⁵⁴ Letters from Loeb & Loeb, Vinson & Elkins. See *supra* notes 131 and 132 and accompanying text.

¹⁵⁵ See Items 1602(a)(3) and (b)(6), 1603(a)(6), and 1604(a)(3), (b)(4), and (c)(1). For the avoidance of doubt, in Items 1602(a)(3) and (b)(6), 1603(a)(6), and 1604(a)(3), disclosure should be provided with respect to each person who is one of the types of named persons in those items; registrants may provide totals of those individual disclosures but the disclosure of a single lump sum covering all types of persons named in those items would be insufficient by itself.

¹⁵⁶ See, e.g., Clifford Chance, *Guide to Special Purpose Acquisition Companies* 5 (Sept. 2021), available at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/09/guide-to-special-purpose-acquisition-companies.pdf> (“However, if additional public shares or equity-linked securities are issued in connection with the de-SPAC transaction, the exchange ratio for the founder shares will typically be adjusted to maintain the 20% promote for the sponsors.”); Michael Klausner, Michael Ohlrogge & Harald Halbhuber, *Net Cash Per Share: The Key to Disclosing SPAC Dilution*, 40 Yale J. on Reg. 18, 28 (2022) (stating that “[s]ome SPACs also provide ‘anti-dilution’ protection to sponsors by giving them the right to an additional 20% of newly raised PIPE equity at the time of a merger” and stating that typically “sponsors waive their right to some or all these additional shares, though in some cases they do so in exchange for additional shares.”).

¹⁵⁷ Letter from Loeb & Loeb. See *supra* note 132 and accompanying text.

¹⁵⁸ Letter from Vinson & Elkins. See *supra* note 131 and accompanying text.

¹⁵⁹ Letter from ABA. See *supra* note 133 and accompanying text.

¹⁶⁰ Letters from Michael Klausner and Michael Ohlrogge, NASAA, Paul Swegle. See *supra* notes 135, 136, 137, and 138 and accompanying text.

¹⁶¹ Certain earn-out provisions entered into in connection with a de-SPAC transaction may involve cancellation of securities if certain targets are not met.

¹⁶² In addition, in final Item 1603(a)(6) we replaced “has or will be” with “has been or will be,” and replaced “rendered” with “rendered or to be rendered,” for clarity.

¹⁶³ See 17 CFR 240.16a–2 under the Exchange Act (Among others, any person who is the beneficial owner, directly or indirectly, of more than 10% of any class of equity securities registered pursuant to Exchange Act section 12 and any director or officer of the issuer of such securities shall be subject to the provisions of Exchange Act section 16); Exchange Act section 16(a). SPAC sponsors also may have beneficial ownership reporting obligations pursuant to sections 13(d) and 13(g) of the Exchange Act and rules thereunder.

interest in the Sponsor.”¹⁶⁴ We do not believe that the disclosures of material interests in the SPAC sponsor should be based on a bright-line absolute percentage of ownership, whether based on percentage ownership of shares of the SPAC or based on percentage ownership of shares of the SPAC sponsor. As a general matter, we note that registrants regularly apply materiality standards that are not tied to absolute percentages in connection with their disclosure under the Federal securities laws. We believe a bright-line standard would not be appropriate here because the percentage of ownership of a SPAC sponsor that is material could differ from SPAC sponsor to SPAC sponsor. Also, we note that percentage ownership is not the only way in which a material interest in the SPAC sponsor may be present.¹⁶⁵ For example, where a person has a voting interest but no economic interest in the SPAC sponsor, the required disclosure would need to be provided with respect to such voting interest.

Related to our consideration of this comment, however, we have determined not to adopt the proposed organizational chart requirement in Item 1603(a)(7). The proposed organizational chart requirement would have required graphical display of levels of ownership that are above the level of direct ownership of the SPAC sponsor (*i.e.*, tracing “upstream” through layers of interest-holders to the ultimate interest-holder). It also would have required graphical display of levels of ownership of companies other than the SPAC sponsor (but that would be under common control with the SPAC sponsor) that are below these interest-holders (*i.e.*, tracing “downstream” through layers of affiliated controlled persons). We believe, in this context at this time, particularly with respect to institutions with an interest in the SPAC sponsor that may have complex company organizational structures, the complexity of the upstream and downstream tiers of ownership discussed above may be difficult to prepare graphically. As a result, we are not adopting the organizational chart requirement.

Another commenter said the identity of natural persons controlling the sponsor is already disclosed in response to existing Item 403 of Regulation S—

K.¹⁶⁶ Item 403 requires security ownership information concerning certain beneficial owners and management, but new Item 1603(a) will elicit additional information because of its requirements concerning background, experience, and roles, among other things. Also, while current Item 403(a) requires identifying any person who is known to be the beneficial owner of more than five percent of any class of the SPAC’s voting securities, new Item 1603(a)(7) adds a requirement to name controlling persons of the SPAC sponsor. Furthermore, to the extent portions of Item 1603(a) may overlap with Item 403 as they may pertain to specific registrant facts and circumstances, registrants are not required to provide duplicative disclosure. Therefore, we do not expect that any partial overlap—depending on specific registrant facts and circumstances—in disclosure that could be required under the final rule with disclosure required under Item 403 would impose significant additional burdens on registrants.

v. Agreements

We are adopting Item 1603(a)(8) and (9), concerning agreements, as proposed. Final Item 1603(a)(8) provides that the registrant must describe any agreement, arrangement, or understanding, including any payments, between the SPAC sponsor and unaffiliated security holders of the special purpose acquisition company regarding the redemption of outstanding securities of the special purpose acquisition company. One commenter recommended that the Commission should revise proposed Item 1603(a)(8) to “specify that if a SPAC, the SPAC sponsor, or any affiliated party enters into an agreement regarding the redemption of outstanding securities of the SPAC after the date of the merger registration statement or proxy, that the SPAC be required to issue a proxy amendment or similar filing prior to the redemption deadline to inform SPAC shareholders of the new agreement.”¹⁶⁷ We do not believe it is necessary to revise the item in the manner suggested to capture events that follow the filing of a proxy statement in connection with a de-SPAC transaction, as we believe registrant obligations to amend such filings under current law, including to ensure disclosure are not misleading, are sufficient.¹⁶⁸

Final Item 1603(a)(9) provides that the registrant must disclose, in a tabular format to the extent practicable, the material terms of any agreement, arrangement, or understanding regarding restrictions on whether and when the SPAC sponsor and its affiliates may sell securities of the special purpose acquisition company, including: the date(s) on which the agreement, arrangement, or understanding may expire; the natural persons and entities subject to such an agreement, arrangement, or understanding; any exceptions under such an agreement, arrangement, or understanding; and any terms that would result in an earlier expiration of such an agreement, arrangement, or understanding.

In response to the commenter who stated that the required additional disclosure would go beyond the disclosure requirements applicable to lock-up agreements entered into in connection with a traditional IPO,¹⁶⁹ we believe that, based on Commission staff experience reviewing filings, registrants in IPOs currently provide information that is analogous to the Item 1603(a)(9) required information. To the extent Item 1603(a)(9) may incrementally require more disclosure compared to IPOs, we believe this is appropriate because investors in SPACs often focus heavily on the nature of the SPAC sponsor’s interest in the SPAC and because agreements, arrangements, or understandings regarding restrictions on whether and when the SPAC sponsor and its affiliates may sell securities of the SPAC often can be more complex than lock-up agreements in IPOs. For example, SPAC lock-up agreements often include provisions that depend on certain levels of stock price appreciation.¹⁷⁰

¹⁶⁹ Letter from Vinson & Elkins. *See supra* note 142 and accompanying text.

¹⁷⁰ *See, e.g.,* Connie Loizos, *The Year of the Disappearing Lock-up*, TechCrunch (Jan. 4, 2022) (“many related deals contain language that restricts sponsors from selling shares for a year from the day the deal is completed, but there are much faster ways out. According to one popular provision, if a SPAC’s shares trade slightly above their initial pricing for more than 20 days in a 30-day period, the lockup provision vanishes.”), available at <https://techcrunch.com/2022/01/04/the-year-of-the-disappearing-lock-up/>; *Lock-Up Periods: Regular IPOs V/S SPACS IPOs*, Legal Scale (Sept. 21, 2022), available at <https://www.legalscale.com/lock-up-periods-regular-ipos-v-s-spacs-ipos/>; Ran Ben-Tzur, Itka Safir, *Terms of IPO Lock-Up Agreements for Technology Companies Shift as Direct Listings and SPACs Gain Traction* (2020), available at <https://www.fenwick.com/insights/publications/terms-of-ipo-lock-up-agreements-for-technology-companies-shift-as-direct-listings-and-spacs-gain-traction> (out of 80 traditional IPO-companies surveyed, four (*i.e.*, 5%) used Price-based lock-up releases).

¹⁶⁴ Letter from ABA.

¹⁶⁵ *See, e.g.,* definition of “control” in Rule 405 (The term control . . . means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.).

¹⁶⁶ Letter from Vinson & Elkins.

¹⁶⁷ Letter from Michael Klausner and Michael Ohlrogge.

¹⁶⁸ *See* 17 CFR 240.14a–9 (“Rule 14a–9”). *See also* 17 CFR 240.14a–6(h).

With respect to the suggestion to exclude from this disclosure customary exceptions to lock-up agreements,¹⁷¹ we are concerned that almost all, if not all, exceptions found in any lock-up agreement could be determined to be customary by a registrant, which would mean they would not be disclosed to investors under the suggested approach. Further, even where lock-up agreements are filed as an exhibit,¹⁷² exceptions to SPAC lock-up agreements considered “customary” by industry participants may be difficult for a reasonable investor to understand, and therefore narrative disclosure in the body of the filing may help investors understand these terms.¹⁷³

In addition, we believe each such exception to a lock-up agreement is important to investors because exceptions to restrictions on transfer in lock-up agreements can result in the sale of a significant amount of shares that could affect the trading price of the SPAC or of the post-de-SPAC transaction combined company.¹⁷⁴ In addition, in connection with disclosure in a SPAC IPO, to the extent that an investor may have invested in the SPAC based in part on the experience and expertise of the SPAC sponsor and its affiliates, we believe the disclosure about exceptions to lock-up agreements could be important to these investors in understanding the extent to which the interests of the SPAC sponsor and investor are aligned.¹⁷⁵ Similarly, this

information is important in connection with disclosure in a de-SPAC transaction. For example, this information remains important in connection with a de-SPAC transaction where the SPAC sponsor will have a continuing management role at the post-de-SPAC transaction combined company. Also, for example, even where the SPAC sponsor may not have a continuing management role, this information is important where the SPAC sponsor may have the ability to express views that influence the current management of the post-de-SPAC transaction combined company—potentially due to the size of the SPAC sponsor’s ownership stake in the combined company or the value of the SPAC sponsor’s ongoing counsel based on the SPAC sponsor’s expertise. In each of these examples, we believe the disclosure about exceptions to lock-up agreements will be important because it will help the investor understand the extent to which the interests of the SPAC sponsor and investor are aligned.

While one commenter suggested that current market practice is for transferees who receive shares pursuant to an exception from a lock-up to agree to the lock-up as a condition of the transfer,¹⁷⁶ we do not believe this means information about exceptions to lock-up agreements will not be important to investors. If the SPAC sponsor or affiliates may divest their ownership of the SPAC, this may affect investor evaluation of the SPAC and the incentives of the SPAC sponsor, regardless of whether a transferee is also subject to transfer restrictions. Investors may consider the potential amounts of shares that could be transferred to be an important factor that could affect the market valuation of the issuer. Moreover, based on the Commission staff’s experience, some registrants today already discuss each exception in detail, while others discuss the exceptions in general terms.

C. Conflicts of Interest

1. Proposed Rules

SPAC sponsors and others may have material potential or actual conflicts with the interests of investors that could have adverse effects on those investors. The Commission proposed conflicts of interest disclosure requirements in certain items in proposed Item 1602,

1603, 1604, and 1605 in connection with SPAC registered offerings other than de-SPAC transactions, such as IPO transactions, and in connection with de-SPAC transactions, described in more detail below.

The Commission proposed Item 1602(a)(5) and (b)(7), which apply to registered offerings other than de-SPAC transactions, to require that some of these conflicts of interest disclosure requirements appear on the prospectus front cover page and in the prospectus summary, respectively.¹⁷⁷ The Commission also proposed prospectus cover page and prospectus summary conflict of interest disclosure requirements in connection with de-SPAC transactions in proposed Item 1604(a)(4) and (b)(3).¹⁷⁸

The Commission proposed that Item 1603 (including 1603(b) regarding conflicts of interest) apply to de-SPAC transactions, as well as other registered offerings, including SPAC IPOs.¹⁷⁹ Proposed Item 1603(b) would require disclosure of any actual or potential material conflict of interest between (1) the SPAC sponsor or its affiliates or the SPAC’s officers, directors, or promoters, and (2) unaffiliated security holders. This proposed item included any conflict of interest with respect to determining whether to proceed with a de-SPAC transaction and any conflict of interest arising from the manner in which a SPAC compensates the SPAC sponsor or the SPAC’s executive officers and directors or the manner in which the SPAC sponsor compensates its own executive officers and directors. In addition, the Commission proposed Item 1603(c) to require disclosure regarding the fiduciary duties each officer and director of a SPAC owes to other companies.

Furthermore, in connection with de-SPAC transactions, the Commission proposed Item 1605(d) to require disclosure of any material interests in the de-SPAC transaction or any related financing transaction held by the SPAC sponsor and the SPAC’s officers and directors, including fiduciary or contractual obligations to other entities

¹⁷¹ Letter from Freshfields. See *supra* notes 143 and 144 and accompanying text.

¹⁷² See 17 CFR 229.601(a) and (b)(10)(ii)(A) (requiring the filing of any contract to which directors, officers, promoters, voting trustees, security holders named in the registration statement or report are parties, with certain exceptions). See also requirements for registrant to furnish exhibits required by Item 601 of Regulation S-K in: Form S-1, Item 16; Form F-1, Item 8; Form S-4, Item 21(a); Form F-4, Item 21.

¹⁷³ When we use the term “narrative” disclosure here, we do not mean that solely qualitative information should be provided. Depending on the facts and circumstances, quantitative information may be required in connection with these lock-up disclosures. Depending on the facts and circumstances, one example of such quantitative disclosure could be where the exception to the lock-up depends on application of a formula involving a financial measure.

¹⁷⁴ See, e.g., Cooley LLP, *Blog: 10 Key Considerations for Going Public with a SPAC* (Aug. 3, 2020), available at <https://www.jdsupra.com/legalnews/blog-10-key-considerations-for-going-80315/> (“Most SPAC sponsors will be subject to a 1-year lock-up, which can create staggered releases of shares into the market after the combination and may at times try to push the target company holders to also have a 1-year lockup to align interests. Companies should be thoughtful, in discussions with their financial advisors, on how additional shares will come into the market and implications for the public company’s trading volatility.”).

¹⁷⁵ With respect to lock-up agreements generally, see Alon Brav & Paul Gompers, *The Role of Lockups*

in *Initial Public Offerings*, 16 *The Rev. of Fin. Stud.* 1 (2003), available at <https://doi.org/10.1093/rfs/16.1.0001> (finding lockup agreements serve as a commitment device to address moral hazard concerns).

¹⁷⁶ Letter from Freshfields. See *supra* note 144 and accompanying text.

¹⁷⁷ See also proposed General Instruction VIII to Form S-1, proposed General Instruction VII to Form F-1.

¹⁷⁸ See also proposed General Instruction I.1 to Form S-4, proposed General Instruction I.1 to Form F-4, proposed Item 14(f)(1) of Schedule 14A, and proposed General Instruction K to Schedule TO.

¹⁷⁹ See (a) proposed General Instruction VIII to Form S-1, (b) proposed General Instruction I.1 to Form S-4, (c) proposed General Instruction VII to Form F-1, (d) proposed General Instruction I.1 to Form F-4, (e) proposed Item 14(f)(1) of Schedule 14A, and (f) proposed General Instruction K to Schedule TO.

as well as any interest in, or affiliation with, the target company.¹⁸⁰

2. Comments

Broadly categorized, commenters on the conflicts of interest proposals focused on five areas: (1) general comments, including those with general expressions of support for or opposition to the proposals, (2) SPAC and target company officer and director conflicts of interest, (3) de-SPAC conflicts of interest, (4) addition of disclosure of “break-even” thresholds, and (5) additional responses to Commission requests for comment.

A number of commenters generally supported the proposed enhanced disclosure requirements in regard to conflicts of interest and fiduciary duties.¹⁸¹

Several commenters suggested that the proposed disclosure requirements would codify, to an extent, existing disclosure practices.¹⁸² Some commenters suggested that proposed disclosure requirements about conflicts of interest and fiduciary duties would provide useful information to investors.¹⁸³

One commenter said that “in requiring disclosure of known actual or potential material conflicts of interest, proposed Item 1603(b) should clarify that a knowledge-based standard is the appropriate standard in determining whether disclosure is required under this item.”¹⁸⁴

Another commenter recommended “that disclosures should include the names of all sponsors and their financial arrangements with SPACs” and “information on the nature of the claims the investors have on the SPAC if no de-SPAC transaction takes place” during the applicable period or they choose to exit before the de-SPAC is completed.¹⁸⁵

A few commenters discussed issues related to potential SPAC and target company officer and director conflicts of interest.¹⁸⁶ One of these commenters recommended that “there should be mandatory disclosures of conflicts of interest among SPAC directors, SPAC

officers, target company directors and target company officers.”¹⁸⁷ Another of these commenters recommended that “proposed Item 1603(c) should be limited to those situations where the fiduciary duties of an officer or director owed to other companies might reasonably be expected to present a potential conflict with respect to a potential de-SPAC transaction or the SPAC’s ability to pursue de-SPAC transaction opportunities.”¹⁸⁸

Some commenters viewed proposed Item 1605, including proposed Item 1605(d) concerning conflicts of interest in connection with de-SPAC transactions, as redundant with current rules.¹⁸⁹ One of these commenters said these disclosures are “duplicative of those already prescribed in the existing regulatory schemes for proxy materials and registration statements filed in connection with de-SPAC transactions.”¹⁹⁰ In lieu of adopting proposed Item 1605, the commenter recommended a “uniform methodology to address conflicts of interest arising from business combinations in general by revising Items 1004(a)(2) and 1013(b) of Regulation M-A [17 CFR 229.1004(a)(2) and 229.1013(b)] and Item 403 of Regulation S-K to incorporate the provisions of proposed Item 1605.”¹⁹¹ The other commenter opposed the adoption of new disclosure requirements with “respect to material interests in a prospective de-SPAC transaction or any related financing transaction held by the sponsor and the SPAC’s officers and directors,” because this “would be redundant with the existing requirements of Schedule 14A Item 5.”¹⁹²

Some commenters recommended that certain additional disclosures should be required. One commenter on the proposal said that registrants “should also provide, in an easily understandable, tabular format. . . the break-even points for non-redeeming investors under different scenarios, the break-even point for the sponsor, the ownership distribution for non-redeeming investors, the effects of outstanding warrants and sponsor shares, and the resulting ownership of the target company for non-redeeming shareholders and alternative investors.”¹⁹³ Another commenter said that registrants should provide a break-even average share price for the sponsor,

which would inform investors and, in the commenter’s opinion, the target company.¹⁹⁴ The commenter said “this will be a simple numerical representation of the effective cost basis of the sponsor and can be used to ascertain the extent to which a sponsor’s position differs from that of other investors.”¹⁹⁵ One commenter stated that “SPACs should disclose the minimum post-merger share value at which proceeding with the SPAC merger will yield a higher return to the SPAC sponsor than liquidating the SPAC.”¹⁹⁶

A few commenters responded to requests for comment in the proposal related to whether we should also require a description of any policies and procedures used to minimize potential or actual conflicts of interest.¹⁹⁷ One commenter said that “a requirement for disclosure of policies and procedures or assessment and management of conflicts of interest would result in incremental boilerplate disclosures.”¹⁹⁸ Another commenter said it would be “superfluous to require a description of any policies and procedures used or to be used to minimize potential or actual conflicts of interest in addition to what proposed Item 1603 has already prescribed.”¹⁹⁹

One commenter responded to requests for comment related to whether SPACs should be required to provide additional disclosure regarding material conflicts of interest in Exchange Act reports following their IPOs.²⁰⁰ The commenter said that, “regarding disclosure in Exchange Act reports following the SPAC IPO and the Form 8-K announcing the signing of the de-SPAC transaction, additional disclosure should be required only where the conflict of interest is material and has not been previously disclosed.”²⁰¹

3. Final Rules

We are adopting Items 1602(a)(5) and (b)(7), 1603(b), 1604(a)(4) and (b)(3), and 1605(d) substantially as proposed, except for the changes discussed below. Having considered comments received, we are adopting the final rules to provide information to investors about the material potential or actual conflicts

¹⁸⁰ See also proposed General Instruction I.1 to Form S-4, proposed General Instruction I.1 to Form F-4, proposed Item 14(f)(1) of Schedule 14A, and proposed General Instruction K to Schedule TO.

¹⁸¹ Letters from ABA, Better Markets, Bullet Point Network, CFA Institute, CII, Committee on Capital Markets Regulation, Consumer Federation, ICGN, NASAA, Paul Swegle, Public Citizen (June 10, 2022) (“Public Citizen”).

¹⁸² Letters from ABA, NASAA, Vinson & Elkins.

¹⁸³ Letters from Better Markets, CFA Institute, CII, Committee on Capital Markets Regulation, Consumer Federation, ICGN, NASAA.

¹⁸⁴ Letter from ABA.

¹⁸⁵ Letter from ICGN.

¹⁸⁶ Letters from ABA, CII.

¹⁸⁷ Letter from CII.

¹⁸⁸ Letter from ABA.

¹⁸⁹ Letters from ABA, Vinson & Elkins.

¹⁹⁰ Letter from ABA.

¹⁹¹ Letter from ABA.

¹⁹² Letter from Vinson & Elkins.

¹⁹³ Letter from NASAA.

¹⁹⁴ Letter from Jonathan Kornblatt, CMT, Fintech Institutional Advisory (June 12, 2022) (“Jonathan Kornblatt”).

¹⁹⁵ Letter from Jonathan Kornblatt.

¹⁹⁶ Letter from Michael Klausner and Michael Ohlrogge.

¹⁹⁷ Proposing Release, *supra* note 7, at 29468 (request for comment number 17).

¹⁹⁸ Letter from Vinson & Elkins.

¹⁹⁹ Letter from ABA.

²⁰⁰ Proposing Release, *supra* note 7, at 29468 (request for comment number 18).

²⁰¹ Letter from Vinson & Elkins.

that SPAC sponsors and others covered by the final rules may have with the interests of investors. These conflicts could influence the actions of the SPAC to the detriment of its unaffiliated security holders. The potential conflicts of interest of SPAC sponsors and others may be particularly relevant for investors to the extent that they arise when a SPAC and its management are deciding whether to engage in a de-SPAC transaction. The SPAC sponsor's compensation structure creates incentives to complete a de-SPAC transaction. These incentives may induce a SPAC sponsor and others to compel the SPAC to complete the de-SPAC transaction on unfavorable terms to avoid liquidation of the SPAC at the expiry of this period.

There are numerous situations that could give rise to these potential conflicts. For example, SPAC sponsors or their affiliates may have a potential conflict of interest stemming from the nature of the SPAC sponsor's compensation or security ownership (particularly where the security owned is purchased at disparate prices, often substantially lower than the price paid by public security holders). This type of potential conflict of interest may present significant financial incentives to pursue a de-SPAC transaction even in the absence of attractive target company transaction opportunities.²⁰²

SPAC sponsors and their affiliates may also sponsor multiple SPACs, which may result in decisions regarding the allocation of these persons' time and target company acquisition opportunities that may adversely affect SPAC security holders. Alternatively (or in addition), SPAC sponsors and their affiliates may owe employment, contractual, or fiduciary duties to other companies than the SPAC, which, among other things, may affect the ability of the SPAC to execute a de-SPAC transaction or may affect the terms to which a SPAC agrees in any ultimate de-SPAC transaction. In these situations, the SPAC sponsor and others covered by the final rules may not only be incentivized to take actions that benefit other entities, but they may be compelled by these other duties to do so, potentially at the expense of the SPAC and its security holders. In addition, SPAC sponsors and their affiliates may seek to enter a de-SPAC

transaction with a target company they are affiliated with when superior target company transaction opportunities may be available.

The final rules will provide investors with a more complete understanding of the conflicts of interest related to an investment in a SPAC, including in situations like the examples above. Investors will have improved information concerning interests of the SPAC sponsor and others covered by the final rule that could reduce the value of their investment or that could result in opportunities potentially available to the SPAC not being realized. In this way, the final rules will allow investors to analyze risks associated with potential conflicts of interest regarding a SPAC more accurately.

We are not including a knowledge qualifier in conflicts of interest disclosure, as suggested by one commenter,²⁰³ because we expect the SPAC and its officers and directors will be in a position to know their own conflicts and that the SPAC may obtain similar information from the SPAC sponsor, its affiliates, and promoters (who will be in a position to know their own conflicts) by virtue of the relationship between the SPAC and the SPAC sponsor and between the SPAC and any promoters.²⁰⁴ In addition, we note that registrants can rely on 17 CFR 230.409 and 240.12b-21 with respect to information unknown or not reasonably available.

Another commenter recommended the conflicts of interest disclosures should include: names of all sponsors and their financial arrangements with SPACs; claims investors have on the SPAC if no de-SPAC transaction takes place; and claims investors have on the SPAC if investors exit before the de-SPAC transaction.²⁰⁵ We note that all of those items were included in the proposal, and we are adopting them as proposed.²⁰⁶

A few commenters discussed issues related to potential SPAC and target company officer and director conflicts of interest.²⁰⁷ One of these commenters recommended the conflicts of interest disclosures cover SPAC officers, SPAC directors, target company officers, and

target company directors.²⁰⁸ In considering the comment, we observed that proposed Item 1604 was inconsistent with proposed Items 1603(b) and 1605(d) by not covering SPAC officers and directors. We do not believe there are any special factors warranting such a difference. As a result, we have modified the language in Item 1604 to require disclosure regarding SPAC officers and directors as in the other adopted items. This change to Item 1604(a)(4) (cover page) and (b)(3) (prospectus summary) will ensure the benefits of the rule that we discuss generally above will apply to these rules as well.²⁰⁹ With respect to target company officers and directors, we believe that disclosure of their conflicts of interest is consistent with co-registration requirements in connection with the final amendments to registration forms and with final Rule 145a.²¹⁰ As discussed in connection with those requirements, since the de-SPAC transaction is in substance an offering by the target company, the conflicts of interest of target company officers and directors may be important to investor investment, redemption, and voting decisions. Thus, we have amended Items 1603(b), 1604(a)(4) (prospectus cover page) and (b)(3) (prospectus summary), and 1605(d) to require this disclosure.²¹¹ We would not expect registrants to provide duplicative disclosure merely because a person falls into more than one of the categories of persons covered by the final rules.²¹²

One commenter recommended that we limit Item 1603(c) disclosure to

²⁰⁸ Letter from CII. See *supra* note 187 and accompanying text.

²⁰⁹ We are also making related minor changes for clarity in Item 1604(a)(4) and (b) to change the term "or its affiliates" to "or", SPAC affiliates." In Item 1604(b) and in a number of other places in the final rules, we also eliminated the term "shall" (e.g., by replacing it with the word "must") consistent with relevant plain English guidance.

²¹⁰ See *infra* sections III.C and IV.A.

²¹¹ In addition, in final Item 1603(b) we replaced "with respect to" with "that may arise" (in the phrase "any material conflict of interest that may arise in determining whether to proceed with a de-SPAC transaction") for clarity and consistency with Item 1602(b)(7). In final Item 1603(b) we also revised the phrase "the manner in which the special purpose acquisition company compensates a SPAC sponsor, officers, or directors" by replacing the term "and" with "or," because the requirements of Item 1603(b) should apply disjunctively where any of the named persons has a relevant material conflict of interest.

²¹² For example, if the SPAC hypothetically happened to share officers or directors with the target company, the same disclosure (that was relevant for both the SPAC and target company) for the same individual person would not need to be provided once for the person as a SPAC official and a second time for the person as a target company official. The SPAC and target should be mindful, though, that different disclosures about conflicts arising under each role may be required.

²⁰² See, e.g., Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of SPACs*, 37 Del. J. Corp. L. 849, 896 (2013) (stating that "sponsors were expected to put more and more of their own money at risk (in the form of private placements), setting themselves up for substantial losses if no acquisition occurred" as the SPAC form evolved).

²⁰³ Letter from ABA. See *supra* note 184 and accompanying text.

²⁰⁴ Similarly, current Item 404 regarding conflicts of interest does not contain such knowledge qualifier.

²⁰⁵ Letter from ICGN. See *supra* note 185 and accompanying text.

²⁰⁶ See, e.g., proposed Items: 1603(a)(1) (names of sponsors) and (a)(5) through (6) (agreements and compensation) and 1602(b)(3) and (4) (redemption rights and plans in the event no de-SPAC transaction is consummated).

²⁰⁷ Letters from ABA, CII.

those situations where officer or director fiduciary duties owed to other companies might reasonably be expected to present a potential conflict with a SPAC's de-SPAC transaction opportunities.²¹³ We do not agree with this recommendation, because we do not believe conflicts will only arise in situations where there are fiduciary duties owed to other companies that are expected to present a potential conflict with a SPAC's de-SPAC transaction opportunities. For example, a director's obligations to other companies may compete with his or her attention to the SPAC. Because we believe this information is material to investors, we are not making any changes to the proposal in this respect in the final rules we are adopting.

Some commenters expressed the view that proposed Item 1605, including proposed Item 1605(d) concerning conflicts of interest in connection with de-SPAC transactions, would be redundant with current rules.²¹⁴ The Commission is not making changes in the final rules we are adopting in response to these comments. Given the unique qualities of de-SPAC transactions, we believe registrants will benefit from the centralization of the SPAC-related requirements in the Item 1600 series of Regulation S-K rather than in a different location as suggested.²¹⁵ Regarding any potential for redundancy with other Commission rules, if there are facts and circumstances that may result in required disclosure under a current rule being the same as under any of the rules we are adopting, registrants will not be required to repeat disclosures (except where the applicable rule may require, such as by calling for the disclosure in a specific location such as the prospectus cover page or prospectus summary).

Some commenters recommended we adopt certain requirements (in addition to those proposed) involving "break-even" disclosure.²¹⁶ With respect to disclosure of a SPAC sponsor's "break-even" price per share, one commenter said this would help investors "ascertain the extent to which a sponsor's position differs from that of

other investors."²¹⁷ We believe that the other conflicts of interest disclosures required by the final rules will provide sufficient information to allow investors to understand the potential differences in incentives between them and a SPAC sponsor, and as a result we are not adopting the suggested "break-even" disclosure.

We are not requiring registrants to provide "break-even" price per share disclosure regarding non-redeeming investors as suggested by commenters because each investor would already know the basis at which they acquired the shares of the SPAC and the SPAC may not know this information for many of its investors, who could have acquired the shares at a variety of prices through the public market. We are likewise not requiring disclosure suggested by commenters that would provide a price at which the SPAC sponsor would recoup their investments in the SPAC. We believe such disclosure could be confusing for investors, as many SPAC sponsors may consider such amounts as sunk costs, which they do not consider when deciding whether to proceed with a de-SPAC transaction. As a commenter notes,²¹⁸ SPAC sponsors may be incentivized to proceed with de-SPAC transactions below the initial SPAC share price; however, that is largely because SPAC sponsors lack redemption rights. Generally, SPAC shareholders would seek de-SPAC transactions that result in share prices that exceed their redemption value. SPAC sponsor decisions to proceed with a transaction may be driven by the SPAC sponsor's expectation of their future deal flow and potential legal or reputational concerns among other factors. The "break-even" disclosure suggested by commenters would not take into account these factors. Moreover, none of these factors can be easily quantified, and the ones that can be quantified would be burdensome to produce and potentially difficult for investors to analyze and assess (given the difficulty in reliably quantifying those factors) and also would not be easily comparable across different SPACs (given the SPAC-specific and SPAC sponsor-specific nature of those factors). The rules as adopted will improve investors' ability

to understand the SPAC sponsor's conflicts of interest, and we are concerned that adding a disclosure that takes into account difficult-to-quantify factors like the ones discussed above would detract from the disclosures that we are adopting.

In the final rules, we are not requiring a description of policies and procedures used to minimize potential or actual conflicts of interest. We believe the other disclosures we are adopting regarding conflicts of interest, including new Item 1603, will appropriately address investor protection concerns in this regard. We are also not making any changes that would expand the Series 1600 of Regulation S-K disclosures regarding conflicts of interest beyond registration statements, proxy statements, information statements, and tender offer statements as proposed to other Exchange Act reports (such as to Form 10-Q, 10-K, or 8-K).²¹⁹

Finally, we are making additional minor or technical changes in the final rules. First, we are making a change to the description of persons against whose interests the conflicts must be compared against from "unaffiliated security holders" to "unaffiliated security holders of the SPAC" in Items 1603(b) and 1604(a)(4) (prospectus cover page) and (b)(3) (prospectus summary). This change will avoid any potential ambiguity or confusion regarding whether target company officers and directors must compare their interests to security holders of the target company or security holders of the SPAC.

Second, we are making a technical change in final Item 1605(d) to use "or" instead of "and" each time in the phrase "held by the SPAC sponsor and the special purpose acquisition company's officers . . . and directors." This change makes clear the disclosure should apply with respect to each named person and not only where all such persons share the same interest.

Third, we have made certain technical changes in some of the final rules regarding conflicts of interest to clarify the sets of persons being compared.²²⁰

²¹⁹ See letter from Vinson & Elkins, *supra* note 201 and accompanying text, and Proposing Release, *supra* note 7, at 29468 (request for comment number 18).

²²⁰ In final Item 1602(a)(5) and (b)(7), we have revised the punctuation and conjunctions compared to the proposal to clarify the two sets of persons that are to be compared in connection with the required potential or actual conflict of interest disclosure by changing the proposed phrase "between the SPAC sponsor or its affiliates or promoters and purchasers in the offering" to "between the SPAC sponsor, its affiliates, or promoters; and purchasers in the offering." To clarify the two sets of persons to be compared in Item 1604(a)(4), we have added the words " , on one

Continued

²¹³ Letter from ABA. See *supra* note 188 and accompanying text.

²¹⁴ Letters from ABA, Vinson & Elkins. See *supra* notes 189, 190, 191, and 192 and accompanying text.

²¹⁵ The Commission adopted a similar approach in rules regarding limited partnership roll-up transactions. See 17 CFR 229.900 through 229.915.

²¹⁶ Letters from Jonathan Kornblatt, Michael Klausner and Michael Ohlrogge, NASAA. See *supra* notes 193, 194, 195, and 196 and accompanying text.

²¹⁷ Letter from Jonathan Kornblatt.

²¹⁸ See letter from Michael Klausner and Michael Ohlrogge ("If a sponsor has committed to make no new investments in the SPAC at the time of its merger, then any post-merger share value greater than \$0 will be preferable to the sponsor than receiving nothing in a liquidation. If, however, the sponsor commits to purchase new securities in the SPAC at the time of the SPAC merger, then the share value at which a merger will be a better deal for a sponsor than a liquidation will be above \$0.").

Fourth, in final Item 1603(b), we are changing each reference to “the SPAC sponsor” to “any SPAC sponsor” because there can be more than one such sponsor.

Fifth, we have revised the phrase “State whether there may be actual or potential conflicts of interest . . .” in proposed Item 1602(a)(5) to add a materiality qualifier such that the phrase in final Item 1602(a)(5) provides “State whether there may be actual or potential material conflicts of interest. . . .” This change makes prospectus cover page disclosure requirements under Item 1602(a)(5) consistent with the similar provisions of Item 1603(b), which require disclosure in the body of the disclosure document. We believe both provisions should contain the same materiality qualifier, because the provisions are related since Item 1602(a)(5) requires the registrant to provide a cross-reference to related disclosures in the prospectus, which includes disclosures made under Item 1603(b).

D. Dilution

1. Proposed Rules

Information about dilution conveys important information to investors about factors that may affect the value of a security holder’s interest in a SPAC. Dilution in current Commission filings is typically measured by calculating changes in net tangible book value per share.²²¹ There are a number of potential sources of dilution in common SPAC structures, including: (a) shareholder redemptions, (b) SPAC sponsor compensation, (c) underwriting fees, (d) warrants, (e) convertible securities, and (f) PIPE financings.

The Commission proposed several new rules that would require additional information about SPAC dilution in connection with registered offerings by SPACs, including IPOs, and in connection with de-SPAC transactions.²²² With respect to registered offerings by SPACs (including IPOs) other than de-SPAC transactions, the Commission proposed Item

1602(a)(3) and (4), (b)(6), and (c).²²³ With respect to de-SPAC transactions, the Commission proposed Item 1604(a)(3), (b)(4), (5), and (6), and (c).²²⁴ Each of these proposed disclosure requirements is addressed in more detail below.

First, with respect to SPAC IPOs, in Item 1602(a)(3), the Commission proposed that the prospectus outside front cover page include, among other things, disclosure of whether compensation of the SPAC sponsor and its affiliates may result in a material dilution of the purchasers’ equity interests. Also, the Commission proposed Item 1602(a)(4) to require on the outside front cover page of the prospectus, disclosure in the tabular format specified below the “estimated remaining pro forma net tangible book value per share at quartile intervals up to the maximum redemption threshold,” consistent with the methodologies and assumptions used in the disclosure provided pursuant to Item 506 of Regulation S–K:

REMAINING PRO FORMA NET TANGIBLE BOOK VALUE PER SHARE

Offering Price of __	25% of maximum redemption	50% of maximum redemption	75% of maximum redemption	Maximum redemption

Instruction 1 to Item 1602(a)(4) provided that, if the offering includes an over-allotment option, separate rows must be included in the tabular disclosure showing remaining pro forma net tangible book value per share with and without the exercise of the over-allotment option.²²⁵

In addition, in Item 1602(b)(6) the Commission proposed that for SPAC IPOs, the summary prospectus include, among other things, disclosure of the extent to which compensation of the

SPAC sponsor, its affiliates, and promoters may result in a material dilution of the purchasers’ equity interests. In addition to the prospectus cover page and prospectus summary requirements for SPAC IPOs, the Commission also proposed Item 1602(c) regarding dilution. This proposed item would require, in addition to the disclosure required by § 229.506 (Item 506 of Regulation S–K), a description of material potential sources of future

dilution following the registered offering by the special purpose acquisition company. This proposed item also would require disclosure in tabular format of the amount of future dilution from the public offering price that will be absorbed by purchasers of the securities being offered, to the extent known and quantifiable.

The other dilution provisions proposed by the Commission related to de-SPAC transactions. The Commission proposed Item 1604(a)(3) to require on

hand,” before the first set of persons and the words “, on the other hand,” before the second set of persons. For clarity and consistency throughout Item 1603, we have also revised the term “executive officer(s)” in each place where it is used in Item 1603(b) and (c) to refer to “officer(s).”

²²¹ See 17 CFR 229.506 (“Item 506” of Regulation S–K). Under Item 506, a company is required to provide disclosure regarding dilution when (1) the company is not subject to the reporting requirements of the Exchange Act and is registering an offering of common equity securities where there is substantial disparity between the public offering price and the effective cash cost to officers, directors, promoters, and affiliated persons of common equity acquired by them in transactions during the past five years, or which they have the right to acquire; or (2) the company is registering an offering of common equity securities and the company has had losses in each of its last three fiscal years and there is a material dilution of the purchasers’ equity interest. In the first instance, a company must provide a comparison of the public

contribution under the proposed public offering and the effective cash contribution of such persons. In both instances, Item 506 requires disclosure of the net tangible book value per share before and after the distribution; the amount of the increase in such net tangible book value per share attributable to the cash payments made by purchasers of the shares being offered; and the amount of the immediate dilution from the public offering price which will be absorbed by such purchasers.

²²² See proposed Items 1602(a)(3) and (4), (b)(6), and (c) and 1604(a)(3), (b)(4), (5), and (6), and (c) of Regulation S–K.

²²³ See proposed General Instruction VIII to Form S–1 and proposed General Instruction VII to Form F–1.

²²⁴ See (a) proposed General Instruction VIII to Form S–1, (b) proposed General Instruction I.1 to Form S–4, (c) proposed General Instruction VII to Form F–1, (d) proposed General Instruction I.1 to Form F–4, (e) proposed Item 14(f)(1) of Schedule 14A, and (f) proposed General Instruction K to Schedule TO.

²²⁵ In this context, the Commission considers the term over-allotment option to be interchangeable with the term “greenshoe option.” For a general description of the nature of a “greenshoe” or “over-allotment option,” see, e.g., Patrick M. Corrigan, *Footloose with Green Shoes: Can Underwriters Profit from IPO Underpricing?*, 38 Yale J. on Reg. 908, 917–918 (2021) (“Underwriting agreements in firm commitment offerings also give underwriters the right, but not the obligation, to purchase an additional amount of shares [‘Option Shares’]] at the same price as the underwriter is obligated to purchase the [specified number of shares set out in the underwriting agreement (‘Firm Shares’)]. . . . Underwriters typically have 30 days following the execution of the underwriting agreement to exercise their option. The closing for the Option Shares may occur on the same closing date as for the Firm Shares, or on a later date. In modern IPOs, the size of the green shoe option is virtually always 15% of the Firm Shares, an amount that constitutes the maximum permissible under FINRA rules.”) (Footnotes omitted).

the outside front cover page of the prospectus, among other things, disclosure of whether compensation of the SPAC sponsor, its affiliates, and promoters may result in a material dilution of the equity interests of non-redeeming shareholders who hold the securities until the consummation of the de-SPAC transaction. Proposed Item 1604(a)(3) also required the provision of a cross-reference, highlighted by prominent type or in another manner, to the locations of related disclosures in the prospectus.

Three additional proposed rules with respect to de-SPAC transactions, Item 1604(b)(4) through (6), each required prospectus summary disclosure. First, proposed Item 1604(b)(4) required, among other things, tabular disclosure of whether compensation of the SPAC sponsor and its affiliates has resulted or may result in a material dilution of the equity interests of unaffiliated security holders of the special purpose acquisition company. Second, proposed Item 1605(b)(5) required, among other things, disclosure of the dilutive impact, if any, of any financing transactions that have occurred or will occur in connection with the consummation of the de-SPAC transaction on unaffiliated security holders. Third, proposed Item 1604(b)(6) required disclosure of the rights of security holders to redeem the outstanding securities of the special purpose acquisition company and the potential impact of redemptions on the value of the securities owned by non-redeeming shareholders.

For de-SPAC transactions, the Commission also proposed Item 1604(c) to require a description of each material potential source of future dilution that non-redeeming shareholders may experience by electing not to tender their shares in connection with the de-SPAC transaction. Under Item 1604(c), proposed Item 1604(c)(1) required the provision of a sensitivity analysis disclosure in tabular format that expresses the amount of potential dilution under a range of reasonably likely redemption levels. Proposed Item 1604(c)(1) also required, at each redemption level in the sensitivity analysis, quantification of the dilutive impact on non-redeeming shareholders of each source of dilution, such as the amount of compensation paid or to be paid to the SPAC sponsor, the terms of outstanding warrants and convertible securities, and underwriting and other fees. Additionally, proposed Item 1602(c)(2) required a description of the model, methods, assumptions, estimates, and parameters necessary to understand the sensitivity analysis disclosure.

2. Comments

A number of commenters generally supported some or all of the proposed enhanced dilution disclosure requirements.²²⁶ Several of these commenters suggested that proposed dilution disclosure requirements would provide useful information to investors.²²⁷ Other commenters, however, generally opposed or raised concerns regarding some or all of the proposed enhanced dilution disclosure requirements.²²⁸ Several of these commenters expressed views that the proposed disclosure requirements regarding dilution would not be helpful to investors.²²⁹ Specific comments on

²²⁶ Letters from Better Markets (“The disclosures should assist shareholders in understanding . . . potential sources of dilution of their shares. . . .”), Bullet Point Network (“We also agree with the SEC’s proposal to add sensitivity tables to show the dilution across a range of redemption scenarios. . . .”), CFA Institute (“we encourage a rapid implementation of the Proposed Rules on improving disclosures, transparency of dilution. . . .”), CII (“We generally agree . . . on the need to . . . bring greater clarity to dilution under various SPAC share redemption scenarios. . . .”), Committee on Capital Markets Regulation (“In particular, the Committee supports the proposed enhanced disclosures regarding . . . dilution. . . .”), Consumer Federation, ICGN (“Finally, the disclosure around dilution concerns . . . are also critical components for investor decision-making.”), PricewaterhouseCoopers LLP (June 10, 2022) (“PwC”) (“We believe the proposed disclosure changes will lead to greater transparency and clarity in important areas (e.g., actual or potential conflicts/misalignments of interests or actual or potential sources of dilution).”).

²²⁷ See, e.g., Consumer Federation (“more detailed information on the potential impact of dilution on the value of SPAC shares could help investors better understand the various sources of dilution and the extent to which their investments might drop in value, which they could then factor into their decision making.”), NASAA (“NASAA believes that some of the most important de-SPAC disclosures proposed are those concerning the potential for dilution and the potential impacts to returns from sponsor compensation, ‘promote’ shares, underwriting fees and warrants.”).

²²⁸ Letters from ABA; Freshfields; Loeb & Loeb; Michael Klausner, Stanford Law School, Michael Ohlrogge, NYU School of Law, and Harald Halbhüser, NYU School of Law (June 13, 2022) (“Michael Klausner, Michael Ohlrogge, and Harald Halbhüser”); Letter from Christopher J. Capuzzi, Daniel L. Forman, Adam M. Harris, David B. Hennes, Carl P. Marcellino, and Paul D. Tropp, Ropes & Gray LLP (June 13, 2022) (“Ropes & Gray”); White & Case.

²²⁹ See, e.g., Letters from ABA (“Generally, proposed Items 1602(a)(4), 1602(c) and 1604(c) require disclosures and the application of financial analysis tools that we do not believe are grounded in methodologies used by investors or financial experts in valuing a common share. . . .”), Ropes & Gray (“We respectfully submit that the information called for by these proposed rules would not provide investors or analysts with meaningful information in valuing SPAC shares at the time of a SPAC IPO.”), White & Case (“We submit that proposed Items 1602(a)(4) and 1602(c) of Regulation S-K should not be adopted . . . such proposed disclosure would not provide any useful information to investors and would produce inherently misleading disclosure.”).

various aspects of the proposal are described below.

Several commenters addressed issues related to levels of redemption in connection with proposed SPAC dilution disclosure. One commenter said that the “quantitative disclosure currently required under S-K Item 506 at IPO is not helpful for investors, as the output is largely driven by the maximum redemption scenario which can differ based on (i) different provisions of the SPAC’s constituent documents. . . and (ii) the interpretation of those constituent documents.”²³⁰ In lieu of disclosure using the methodology in existing Item 506 as was proposed, this commenter said that “SPACs should present the per share amount of cash (or securities) in trust, under a range of hypothetical redemption scenarios and after giving effect to sponsor equity, underwriter compensation and IPO expenses.” To promote comparability, this commenter also suggested that “the hypothetical redemption scenarios include a maximum of 100% of the public shares (regardless of any provisions of the SPAC’s constituent documents that might theoretically limit redemptions) less any shares subject to a binding commitment to not be redeemed.”

Another commenter, who expressed the general view that “proposed Items 1602(a)(4) and 1602(c) of Regulation S-K should not be adopted,” said that “it is unclear whether a maximum redemption threshold for purposes of proposed Item 1602(a)(4) should require or call for anything other than the redemption of 100% of the SPAC’s public shares.”²³¹ This commenter also said that “a maximum redemption scenario for a SPAC would vary across different de-SPAC transactions” because of the various ways the redemption level is impacted, including by the SPACs’ governing documents, listing requirements, and negotiated conditions in the de-SPAC transaction.²³² The commenter observed that “some de-SPAC transactions are structured such that certain funding mechanisms, such as backstop, forward purchase or PIPE arrangements, apply only in the event of certain redemption thresholds, further complicating the ability to make the assumptions required by proposed Item 1602(a)(4).”²³³ As a result, this commenter asserted that “any purported maximum redemption scenario disclosed at the time of IPO cannot be based on reasonable assumptions given

²³⁰ Letter from Vinson & Elkins.

²³¹ Letter from White & Case.

²³² *Id.*

²³³ *Id.*

the inherent lack of specifics available at the time of the IPO for a prospective de-SPAC transaction.”²³⁴

The same commenter said that “a SPAC may actually become subject to a maximum redemption scenario that is lower than the quartile intervals required to be presented by proposed Item 1602(a)(4).”²³⁵ One commenter recommended the Commission require dilution disclosure at a 90% redemption level, stating it “could be particularly useful to investors if recent redemption activity is indicative of future activity.”²³⁶

Commenters raised concerns that dilution disclosure would be characterized by uncertainty, be based on hypothetical assumptions, or depend on unknown variables.²³⁷ One commenter said that the proposed disclosure under Item 1602(a)(4) and (c) would require “dilution disclosure informed by purely hypothetical assumptions” and that “lengthy and detailed caveats regarding the assumptions would be needed.”²³⁸ As a result of these concerns, the commenter concluded that “proposed Items 1602(a)(4) and 1602(c) of Regulation S–K would only confuse and mislead investors.”²³⁹ Other commenters noted that dilution disclosure at the IPO stage would depend on unknown variables,²⁴⁰ which one of these commenters said will mean the disclosure is not meaningful.²⁴¹ One of these commenters suggested that “tabular disclosure and sensitivity analyses in SPAC IPO registration statements should be limited to the

sources of dilution in existence or contracted at the time of the IPO.”²⁴²

Several commenters expressed concerns that the proposed dilution disclosure would not provide meaningful information to investors.²⁴³ One of these commenters said that “proposed Items 1602(c) and 1604(c) are ambiguous as to what is required to be considered as dilution and how that dilution is to be measured and presented.”²⁴⁴ This commenter said they do not believe current Item 506 disclosures are useful to investors and do not believe investors will find the similar disclosures proposed to be required by Items 1602(a)(4) and (c) and 1604(c) to be any more useful. One commenter said, “the proposed additional dilution disclosure to be included in an IPO prospectus (proposed Item 1602) would just capture in one place information already being disclosed with perhaps some new caveats about potential for dilutive financings and accordingly not result in a better informed investor.”²⁴⁵

The Commission proposed that the calculation of pro forma net tangible book value be done consistent with the methodologies and assumptions used in the disclosure provided pursuant to Item 506 of Regulation S–K. One commenter said that “[Item 506] presentation is not meaningful to investors and in some instances the presentation may actually show that there is a decrease in net tangible book value from the offering after giving effect to the redeemable shares.”²⁴⁶

Another commenter said that, without an identified de-SPAC target or structured de-SPAC transaction, the limited information at the time of the SPAC IPO used to calculate the proposed Item 1602(a)(4) disclosures would produce “an absurd result.”²⁴⁷ The commenter expressed the view that the disclosure provided based on this limited information would not be useful because “all of a SPAC’s shares sold to public investors in the SPAC’s IPO (the public shares) are required to be classified as temporary equity upon the completion of the IPO,” which would mean that “the calculation of pro forma net tangible book value per share in accordance with U.S. GAAP [Generally Accepted Accounting Principles]

inevitably produces a deficit and remains the same constant figure across any assumed redemption thresholds.”²⁴⁸

Another commenter said that “proposed Item 1602(a)(4) would require disclosure of the estimated remaining pro forma net tangible book value per share at specified redemption levels consistent with the methodologies in Item 506 of Regulation S–K” but noted that “Item 506 does not provide a definition for net tangible book value,” and, as a result, the commenter has “observed diversity in such calculations.”²⁴⁹ The commenter recommended “that the Commission include a definition of net tangible book value in the final rule to enhance the usefulness and comparability of the dilution disclosures for investors in SPAC transactions and other registered securities offerings as applicable.”²⁵⁰

One commenter recommended that the Commission give “illustrative examples and calculations” of the dilution disclosure to ensure “robust, transparent, and consistent dilution disclosures.”²⁵¹ Another commenter said they “agree with the proposal to add sensitivity tables to show the dilution across a range of redemption scenarios and would suggest the SEC provide a format to standardize that disclosure.”²⁵² One commenter recommended that “sensitivity analyses should only be required for sources of dilution, such as warrants, where the dilutive impact varies based on changing equity values or other variables.”²⁵³

In response to a request for comment asking whether we should require disclosure of net cash per share (in addition to, or in lieu of the proposed dilution disclosures),²⁵⁴ several commenters recommended we require net cash per share disclosure.²⁵⁵ One commenter said that, in lieu of the proposed dilution disclosure, “SPACs should present the per share amount of

²³⁴ *Id.*

²³⁵ Letter from White & Case.

²³⁶ Letter from CII, citing Joanna Makris, *SPAC Market Review 2022* as “finding February 2022 redemption rate of 89%” available at <https://www.boardroomalpha.com/spac-market-review-march-2022/>.

²³⁷ Letters from Freshfields, Vinson & Elkins, White & Case.

²³⁸ Letter from White & Case.

²³⁹ Letter from White & Case.

²⁴⁰ Letters from Freshfields, Vinson & Elkins (stating that the specifics of the transaction that are unknown include: “will there be a PIPE financing, at what per share valuation, will the PIPE issuance include warrants, will there be convertible equity or debt issued, what will transaction expenses be, are there convertible or derivative securities of the target that will be assumed,” and “Most importantly, the value of the target company is not known at the time of the IPO.”).

²⁴¹ Letter from Freshfields (stating that they did not think the dilution table on the cover of the SPAC’s IPO prospectus “will be meaningful because the SPAC does not yet know the amount of equity to be issued in a PIPE (if any) or to the target company’s stockholders (if any) or the extent to which the SPAC sponsor’s promote will be renegotiated in connection with the actual de-SPAC transaction.”).

²⁴² Letter from Vinson & Elkins.

²⁴³ Letters from ABA, Ropes & Gray (“information called for by the proposed rules would not provide investors or analysts with meaningful information in valuing SPAC shares at the time of a SPAC IPO.”), Vinson & Elkins, White & Case.

²⁴⁴ Letter from ABA.

²⁴⁵ Letter from Loeb & Loeb.

²⁴⁶ Letter from Vinson & Elkins.

²⁴⁷ Letter from White & Case.

²⁴⁸ *Id.*

²⁴⁹ Letter from Ernst & Young LLP (June 13, 2023) (“Ernst & Young”).

²⁵⁰ *Id.*

²⁵¹ Letter from PwC.

²⁵² Letter from Bullet Point Network.

²⁵³ Letter from Vinson & Elkins.

²⁵⁴ See Proposing Release, *supra* note 7, at 29470 (request for comment number 20) (“Should we require other information either in addition to, or in lieu of, the proposed dilution disclosure, such as disclosure of the cumulative amount of dilution that non-redeeming shareholders may experience or the amount of net cash underlying each share at the time of a de-SPAC transaction? If so, should we require that this disclosure be presented in a tabular format?”).

²⁵⁵ Letters from CII; Michael Klausner, Michael Ohlrogge, and Harald Halbhauer; NASAA; Vinson & Elkins.

cash (or securities) in trust, under a range of hypothetical redemption scenarios and after giving effect to sponsor equity, underwriter compensation and IPO expenses.”²⁵⁶ Another commenter said that “the actual net cash per share for non-redeeming shareholders under different redemption scenarios should be displayed in an easily understandable, tabular format.”²⁵⁷

A different commenter said they “support clear disclosure of net cash per share after taking into account all sources of dilution and dissipation of cash, under various redemption scenarios.”²⁵⁸ This commenter said that reductions in net cash may be attributable to a variety of sources, including: (a) sponsor compensation and investment terms, (b) share redemption, (c) exercise of warrants, fractional warrants and convertible securities, (d) PIPE financing, and (e) underwriting fees.²⁵⁹ The commenter also said that “[g]iven the complexity and contingencies involved in the de-SPAC process, investors . . . need clear information about potential consequences to inform their understanding of the true cost of the business combination.”²⁶⁰

One group of commenters said that “the final rules for SPAC mergers should require SPACs to prominently disclose the amount of net cash underlying each share at the time of a de-SPAC transaction,” including on the cover page of the registration statement.²⁶¹ These commenters also said, with respect to the proposed Item 1604(c) requirement to describe “each material potential source of future dilution” for non-redeeming SPAC shareholders, that the dilution concept included in the provision reflects a concept of dilution that is focused on “ownership dilution,” not the kind of dilution (and dissipation of cash) that reduces the net cash underlying a SPAC share.²⁶² These commenters concluded

that, as proposed, none of the disclosures in Item 1604(c) of Regulation S–K would inform investors about the net cash underlying a SPAC share. These commenters also provided a formula for the calculation of net cash per share: (a) total cash (consisting of the sum of cash from SPAC public shareholders plus cash from PIPEs or forward purchase agreements minus cash expenses minus the value of warrants minus the value of other equity derivatives), divided by (b) total shares (consisting of public shares plus founder shares plus PIPE or forward purchase agreement shares plus other shares plus shares issuable under rights).²⁶³ Another commenter supported using this calculation of net cash per share after taking into account all sources of dilution and dissipated cash under 25%, 50%, 75%, 90%, and 100% redemption scenarios.²⁶⁴

One commenter said they “read proposed Item 1604(c)(1) as requiring a determination of the enterprise valuation that will result in a stockholder’s ‘interest per share’ (calculated by reference to a pro forma closing date balance sheet. . .). . . being at least equal to the \$10 price per share paid in the IPO.”²⁶⁵ The commenter said “this is the equivalent of requiring a traditional IPO to include in its Item 506 dilution section alternative price ranges, the midpoint of which would not result in dilution to IPO investors,” which the commenter said “we can

SSRN Elsevier database) (*see supra* note 156). For treatment of warrants in connection with this net cash per share formula, *see id.* at 27 (“All warrants should be valued using standard accounting methodologies as of the day before the merger’s announcement, and their aggregate value should be subtracted from total cash. This is consistent with most SPACs’ accounting treatment of warrants as a liability. To ensure comparability across different SPACs, however, we propose subtracting the value of the warrants even when they are structured to avoid liability treatment under GAAP.” (Footnotes omitted)); *id.* at 27, n.32 (“Alternatively, SPACs could be required to disclose the value of warrants at the time their proxy statement is filed. This would reflect the market’s valuation of the warrants’ dilution.”); *but see* Klausner, Ohlrogge & Ruan, *supra* note 18 at 233, n.11 (2022) (“The concept of net cash per share is central to our analysis. We define that term to be cash in the SPAC minus underwriting fees and other fees incurred in connection with a SPAC’s merger minus the value of warrants as of the day before the announcement of the merger, divided by shares issued in the SPAC’s IPO plus shares issued to shares issued to PIPE investors. We follow the SEC’s treatment of warrants as liabilities. *If we treat warrants as equity of the same value in the denominator of net cash per share, the results would not be significantly different.* For the few SPACs that have convertible debt, we treat the conversion feature as a warrant.” (Emphasis added)).

²⁶³ *Id.*

²⁶⁴ Letter from CIL.

²⁶⁵ Letter from Loeb & Loeb.

safely assume would be materially different from the proposed cover page range due to the significant disconnect between market prices and net book value per share.”²⁶⁶ The commenter said “if misunderstood by the reader, this proposed disclosure also has the dangerous potential to lead a SPAC shareholder to view the disclosure as a guarantee that the stock will not trade down in the aftermarket.”²⁶⁷

One commenter on the proposal said that “[f]or de-SPAC transactions, the most meaningful information would be the expected value per share, using the agreed equity value of the target company plus net cash proceeds from the de-SPAC transaction under a range of hypothetical redemption scenarios.”²⁶⁸ The commenter said, “Given that SPAC warrants are almost uniformly out of the money at the agreed per share equity value used in the de-SPAC transaction (typically the \$10 IPO per unit price), conveying the potential dilutive effect of the warrants can be handled in many different ways.” The commenter suggested disclosing “the percentage ownership of the surviving company at various hypothetical share increments above \$10 per share, utilizing the treasury share method.”²⁶⁹

One commenter recommended that the Commission should consider requiring that intermediaries provide information about “the sponsor, actual and potential conflicts of interest, [and] how much a non-redeeming SPAC investor’s interest will be diluted” in a separate “Key Risks and Conflicts form” that is detached from the prospectus, so that the disclosure receives more investor attention and focus.²⁷⁰

One commenter said that disclosures about “any lock-up periods or earnout provisions for sponsors or underwriters

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Letter from Vinson & Elkins.

²⁶⁹ Letter from Vinson & Elkins. Regarding the treasury stock method for warrants, *see, e.g.*, Donald E. Kieso, Jerry J. Weygandt & Terry D. Warfield, *Intermediate Accounting, Volume 2*, 17 (2019) (“The treasury stock method applies to written call options and equivalents and assumes that: 1. the options and warrants or equivalents are exercised at the beginning of the year (or on the date of issue if it is later), and 2. the proceeds are used to purchase common shares for the treasury at the average market price during the year. If the exercise price is lower than the average market price, then the proceeds from exercise are not sufficient to buy back all the shares. This would result in more shares being issued than purchased and will therefore be dilutive. The excess number of the shares (incremental number) to be issued over the number of shares that would be purchased is added to the weighted average number of shares outstanding in calculating [per share ratios]. Note that no adjustment is made to the numerator.”).

²⁷⁰ Letter from CFA Institute.

²⁵⁶ Letters from Vinson & Elkins.

²⁵⁷ Letter from NASAA.

²⁵⁸ Letter from CIL.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Letter from Michael Klausner, Michael Ohlrogge, and Harald Halhuber (providing that net cash per share should include: “each material source of future dilution and dissipation of cash that non-redeeming shareholders may experience by electing not to tender their shares in connection with the de-SPAC transactions and quantify its impact on the net cash underlying a share”).

²⁶² Letter from Michael Klausner, Michael Ohlrogge, and Harald Halhuber, *citing* Klausner, Ohlrogge & Halhuber, *Net Cash Per Share: The Key to Disclosing SPAC Dilution* (NYU Law and Economics Research Paper No. 22–14, Mar. 28, 2022, last revised Sept. 17, 2022), available at <https://ssrn.com/abstract=4047180> (retrieved from

would be of significant interest to investors and should be required if part of the SPAC offering.”²⁷¹

3. Final Rules

i. Overview of Final Rules and Changes From Proposal

After considering the comments received, regarding dilution disclosure in SPAC registered offerings (such as SPAC IPOs) other than de-SPAC transactions, we are adopting Item 1602(a)(3) and (4), (b)(6), and (c) as proposed, except for certain modifications we discuss below. Regarding de-SPAC transactions, we are also adopting Item 1604(a)(3), (b)(4), (5), and (6), and (c) as proposed, except for certain modifications we discuss below. Each of these provisions is discussed in detail below.

a. Overview of Final Item 1602 Dilution Disclosure (IPOs and Non-De-SPAC Transaction Registered Offerings) and Changes From Proposal

1. Item 1602(a)

Final Item 1602(a)(3) requires, on the outside front cover page of the prospectus in plain English, a statement of the amount of the compensation received or to be received by the SPAC sponsor, its affiliates, and promoters, the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates, and promoters and the price paid or to be paid for such securities, and whether this compensation and securities issuance may result in a material dilution of the purchasers’ equity interests. Final Item 1602(a)(3) also requires the provision of a cross-reference, highlighted by prominent type or in another manner, to the locations of related disclosures in the prospectus. Final Item 1602(a)(3) is

different from the proposal only with respect to changes made regarding SPAC sponsors and securities issuances discussed above in section II.B.

Final Item 1602(a)(4) requires, with respect to SPAC IPOs, on the outside front cover page of the prospectus in plain English, disclosure in the tabular format specified at quartile intervals based on percentages of the maximum redemption threshold: the offering price; as of the most recent balance sheet date filed, the net tangible book value per share, as adjusted, as if the offering and assumed redemption levels have occurred and to give effect to material probable or consummated transactions (other than the completion of a de-SPAC transaction); and the difference between the offering price and such net tangible book value per share, as adjusted.

Final Table 1 to Paragraph (a)(4) provides:

REMAINING PRO FORMA NET TANGIBLE BOOK VALUE PER SHARE

Offering price of __	25% of maximum redemption	50% of maximum redemption	75% of maximum redemption	Maximum redemption

Final Instruction 1 to Item 1602(a)(4) provides, if the offering includes an over-allotment option, separate rows in the tabular disclosure must be included showing the information required by paragraph (a)(4) with and without the exercise of the over-allotment option.

Final Item 1602(a)(4) includes several changes compared to the proposal. First, we have clarified in the final rule how to calculate the required dilution information. In response to the proposal, some commenters generally sought clarification, such as illustrative examples, calculations, or definitions, in connection with the dilution calculation.²⁷² We believe the changes in the final rules will be simpler for registrants to follow and comply with because they provide clear steps regarding how the dilution disclosure should be determined. In addition, we have deleted proposed references to calculating dilution “consistent with the methodologies and assumptions used in the disclosure provided pursuant to § 229.506 (Item 506 of Regulation S–K).” These references to Item 506 are not necessary given the changes made to clarify how to calculate the required dilution information. This change also ensures that redeemable common stock

is not treated as temporary equity for purposes of the calculation in a way that could undermine the meaningfulness of the dilution disclosure as we discuss in more detail below in response to comments. Relatedly, we are revising Item 6 of Form S–1 to state that the registrant must “Provide the information required by Item 506 of Regulation S–K (§ 229.506 of this chapter), unless the registrant is a special purpose acquisition company (as defined in Item 1601 of Regulation S–K),” because the requirements of Item 1602(a)(4) are intended to supplant the requirements of Item 506 for SPACs.

In addition, we have deleted proposed references in Item 1602(a)(4) to “estimated remaining pro forma net tangible book value per share” as the name for the dilution measurement and instead refer to “net tangible book value per share, as adjusted.” We were concerned that references to “estimated remaining pro forma net tangible book value per share” could be ambiguous and that registrants could misinterpret the term to require estimation of what the net tangible assets of a combined company might be in any ultimate de-SPAC transaction. The deletion of this term and its replacement with the new

term helps clarify that registrants should not include any estimates of the assets of any ultimate target company in this calculation.

In addition, in final Item 1602(a)(4), we have replaced the proposed phrase “at quartile intervals up to the maximum redemption threshold” with “at quartile intervals based on percentages of the maximum redemption threshold.” We believe registrants could mistakenly interpret the proposed terms to require quartile intervals based on the total number of shares issued in the offering for the three redemption levels in the table other than the maximum redemption level. We believe this change will eliminate that potential for misinterpretation.

2. Item 1602(b)

Final Item 1602(b)(6) requires the prospectus summary to include in plain English in a tabular format, the nature and amount of the compensation received or to be received by the SPAC sponsor, its affiliates, and promoters, the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates, and promoters and the price paid or to be paid for such

²⁷¹ Letter from NASAA.

²⁷² See letters from PwC, Ernst & Young, *supra* notes 249 and 251.

securities, and, outside of the table, the extent to which this compensation and securities issuance may result in a material dilution of the purchasers' equity interests. Final Item 1602(b)(6) is different from the proposal only with respect to changes made regarding SPAC sponsors and securities issuances discussed above in section II.B.

3. Item 1602(c)

Final Item 1602(c) requires disclosure in a tabular format for the same quartile intervals as in Item 1602(a)(4): the offering price; net tangible book value per share, as adjusted, determined in the same manner as in Item 1602(a)(4); and the difference between the offering price and such net tangible book value per share, as adjusted. Final Item 1602(c) also requires that the tabular disclosure must show: the nature and amounts of each source of dilution used to determine net tangible book value per share, as adjusted; and the number of shares used to determine net tangible book value per share, as adjusted; and any adjustments to the number of shares used to determine the per share component of net tangible book value per share, as adjusted. Final Item 1602(c) also requires a description of each material potential source of future dilution following the registered offering by the special purpose acquisition company, including sources not included in the table with respect to the determination of net tangible book value per share, as adjusted. Final Item 1602(c) also requires a description of the model, methods, assumptions, estimates, and parameters necessary to understand the tabular disclosure.

Final Item 1602(c) contains several changes from the proposal. We have clarified in the final rule that Item 1602(c) dilution should be calculated in the same way as in Item 1602(a)(4) and have deleted references in proposed Item 1602(c) to Item 506 of Regulation S-K, consistent with changes discussed above made to final Item 1602(a)(4) in this respect. In addition, we have clarified that the table in Item 1602(c) should show the nature and amounts of each source of dilution and the number of shares used in the calculation in order to eliminate any ambiguity and the potential that registrants could misinterpret the item to mean that the table merely needs to show the final dilution information and not the line items that went into its calculation.

With respect to the proposed requirement to describe material potential sources of future dilution, the final rules specify that the description should be located outside the table. The final rules also state that the description

of each material potential source of future dilution outside of the table should include "sources not included in the table with respect to the determination of net tangible book value per share, as adjusted." We are making this change to clarify that the disclosure outside of the table is not to be merely duplicative of the sources of dilution used for the calculation of the measure of dilution within the table. Without these changes, the item could have been misinterpreted by registrants to require only disclosure of the same sources of dilution used in the tabular calculation of dilution, only in a non-tabular format. Depending on a SPAC's specific facts and circumstances, the non-tabular disclosure of "each material potential source of future dilution" under Item 1602(c) may need to discuss a broader set of items than "material probable or consummated transactions" that are included for purposes of calculating the tabular dilution measure.²⁷³

We have also clarified that underlying factors such as assumptions that are necessary to understand the table must be described in order to eliminate any ambiguity under the proposal that no such information is required beyond the numbers in the dilution table. This clarification also makes final Item 1602(c) consistent with final Item 1604(c), which contained a proposed provision to this effect (that we are adopting as discussed in detail below).

b. Overview of Final Item 1604 Dilution Disclosure (De-SPAC Transactions) and Changes From Proposal

1. Item 1604(a)

Final Item 1604(a)(3) requires, on the outside front cover page of the prospectus in plain English, a statement of the amount of the compensation received or to be received by the SPAC sponsor, its affiliates, and promoters in connection with the de-SPAC transaction or any related financing transaction; the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates, and promoters and the price paid or to be paid for such securities in connection with the de-SPAC transaction or any related financing transaction; and whether this compensation and securities issuance may result in a material dilution of the equity interests of non-redeeming shareholders who hold the securities until the consummation of the de-SPAC transaction. Final Item 1604(a)(3) also

²⁷³ Depending on the facts and circumstances, both qualitative and quantitative information may be required in the disclosures made outside of the table.

requires the provision of a cross-reference, highlighted by prominent type or in another manner, to the locations of related disclosures in the prospectus. Final Item 1604(a)(3) is different from the proposal only with respect to changes made regarding SPAC sponsors and securities issuances discussed above in section II.B.

2. Item 1604(b)

Final Item 1604(b)(4) requires that the prospectus summary must include in plain English, in a tabular format, the terms and amount of the compensation received or to be received by the SPAC sponsor, its affiliates, and promoters in connection with the de-SPAC transaction or any related financing transaction, the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates, and promoters and the price paid or to be paid for such securities in connection with the de-SPAC transaction or any related financing transaction; and, outside of the table, the extent to which that compensation and securities issuance has resulted or may result in a material dilution of the equity interests of non-redeeming shareholders of the special purpose acquisition company.

In final Item 1604(b)(4), we revised to clarify that certain disclosure should appear outside of the table (rather than within it). It also makes the item consistent with Item 1602(b)(6) in requiring disclosure of the extent of the material dilution not merely whether or not there is such material dilution. Also, in the final rule, we have replaced the term "unaffiliated security holders" with "non-redeeming shareholders" to ensure consistency of usage throughout Item 1604. In addition, this change eliminates any ambiguity that might have caused some registrants to believe they need to subtract affiliated shares from the denominator of the net tangible book value per share calculation, which the proposal did not intend. We also made changes to final Item 1604(b)(4) as compared to the proposal with respect to SPAC sponsors, promoters, and securities issuances discussed above in section II.B.

Final Item 1604(b)(5) requires the prospectus summary to include a brief description in plain English of the material terms of any material financing transactions that have occurred or will occur in connection with the consummation of the de-SPAC transaction, the anticipated use of proceeds from these financing transactions and the dilutive impact, if any, of these financing transactions on non-redeeming shareholders. The sole change from the proposal is that, in final

Item 1604(b)(5), we have revised the term “unaffiliated security holders” to “non-redeeming shareholders” for the same reasons as discussed above regarding Item 1604(b)(4).²⁷⁴

Final Item 1604(b)(6) requires the prospectus summary to include a brief description in plain English of the rights of security holders to redeem the outstanding securities of the special purpose acquisition company and the potential dilutive impact of redemptions on non-redeeming shareholders. We made one change to final Item 1604(b)(6) compared to the proposal to clarify the disclosure required. Final 1604(b)(6) contains the phrase “potential dilutive impact of redemptions on non-redeeming shareholders” instead of the proposed phrase “impact of redemptions on the value of the securities owned by non-redeeming shareholders.” We believe this clarification will eliminate ambiguity and the potential that registrants could misinterpret the item to require undertaking valuations under different scenarios of the securities owned by non-redeeming shareholders.

3. Item 1604(c)

We received comments that indicated that we should provide a definition of net tangible book value or provide examples to enhance the comparability of the disclosures.²⁷⁵ In consideration of these comments, we have revised Item 1604(c) to more clearly set forth the dilution disclosures and calculations it requires and to align this dilution calculation with the dilution calculation under Item 1602(a)(4) and (c), although, as we discuss herein, there are technical differences between the adjustments under Item 1602(a)(4) and (c) versus adjustments under Item 1604(c).

Final Item 1604(c) requires disclosure in a tabular format that includes intervals representing selected potential redemption levels that may occur across a reasonably likely range of outcomes of the offering price disclosed pursuant to Item 1602(a)(4) in the initial registered offering by the SPAC; as of the most recent balance sheet date filed, the net tangible book value per share, as adjusted, as if the selected redemption levels have occurred and to give effect to, while excluding the de-SPAC transaction itself, material probable or consummated transactions, and other material effects on the SPAC’s net tangible book value per share from the

de-SPAC transaction; and the difference between such offering price and such net tangible book value per share, as adjusted. Final Item 1604(c) also requires that the tabular disclosure must show: the nature and amounts of each source of dilution used to determine net tangible book value per share, as adjusted; the number of shares used to determine net tangible book value per share, as adjusted; and any adjustments to the number of shares used to determine the per share component of net tangible book value per share, as adjusted.

Final Item 1604(c) also requires, outside of the table, a description of each material potential source of future dilution that non-redeeming shareholders may experience by electing not to tender their shares in connection with the de-SPAC transaction, including sources not included in the table with respect to the determination of net tangible book value per share, as adjusted.²⁷⁶ Final Rule 1604(c)(1) requires, with respect to each redemption level, a statement of the company valuation at or above which the potential dilution results in the amount of the non-redeeming shareholders’ interest per share being at least the IPO price per share of common stock. Final Item 1604(c)(2) requires the provision of a description of the model, methods, assumptions, estimates, and parameters necessary to understand the tabular disclosure.

Final Item 1604(c) introductory text and (c)(1) and (2) contain certain changes from the proposal. We believe the changes in the final rules will be simpler for registrants to follow and comply with because they provide clear steps regarding how the dilution disclosure should be determined. In addition, in clarifying how to calculate the required dilution, final Item 1604(c) also ensures that redeemable common stock is not treated as temporary equity for purpose of the calculation in a way that could undermine the meaningfulness of the dilution disclosure. As part of these clarifications, we have deleted the proposed provision in Item 1604(c)(1) that would have required “sensitivity analysis disclosure in tabular format that expresses the amount of potential dilution under a range of reasonably likely redemption levels.” We were concerned the meaning of that proposed provision could be unclear to

registrants, particularly its references to “sensitivity analysis.” We believe there was potential for some registrants to interpret the proposed provision merely to mean a range of redemption levels must be analyzed, while other registrants could interpret the provision to mean that a range of redemption levels must be analyzed and also that a sensitivity analysis must be conducted that reflects a range of assumptions for the range of redemption levels.

We also have deleted the following language of proposed Item 1604(c)(1): “At each redemption level in the sensitivity analysis, quantify the dilutive impact on non-redeeming shareholders of each source of dilution, such as the amount of compensation paid or to be paid to the SPAC sponsor, the terms of outstanding warrants and convertible securities, and underwriting and other fees.” We were concerned that the references in that proposed provision to certain sources of potential dilution could confuse registrants about how to calculate dilution and could produce inconsistent interpretations across different registrants.

Final Item 1604(c) accomplishes the same goal as these deleted provisions in proposed Item 1604(c)(1) by requiring disclosure “in a tabular format that includes intervals representing selected potential redemption levels that may occur across a reasonably likely range of outcomes.” We believe the final rule will make it clear that the item does not prescribe the redemption levels for which dilution information must be provided (in contrast to Item 1602(a)(4) and (c)).

Under Item 1604(c), registrants should not select redemption levels that are not possible. For example, registrants should not select levels that, combined with any other funding (such as PIPEs) in connection with the de-SPAC transaction, would result in the SPAC having cash that is lower than any minimum cash condition in the agreements related to the de-SPAC transaction. Registrants are not required to select exactly four levels for Item 1604(c) (which they are required to do in Item 1602(a)(4) and (c)) but should ensure the redemption levels reasonably inform investors of a range of potential outcomes.²⁷⁷

²⁷⁷ While there may be exceptions depending on specific facts and circumstances, the presentation of fewer than four levels of redemption is unlikely to constitute a sufficient range of outcomes to inform investors. As discussed above, there is no requirement in Item 1604(c) to select four redemption levels as there is in Item 1602(a)(4) and (c), but registrants who seek to provide less than four redemption levels pursuant to Item 1604(c) should ensure such presentation is appropriate and tailored to the unique circumstances of the relevant

²⁷⁴ In addition, in final Item 1603(b)(5) we added the word “material” before the words “financing transactions” for consistency with final Item 1604(a)(2).

²⁷⁵ See letters from PwC, Ernst & Young, *supra* notes 249 and 251.

²⁷⁶ In final Item 1604(c) we moved the phrase “that non-redeeming shareholders may experience by electing not to tender their shares in connection with the de-SPAC transaction” from the end of the relevant sentence to instead follow the words “future dilution” for clarity.

Furthermore, we have clarified that the table in final Item 1604(c) should show the nature and amounts of each source of dilution and the number of shares used in the calculation in order to eliminate any ambiguity and the potential that registrants could misinterpret the item to mean that the table needs to show only the final dilution information and not the line items that went into its calculation.

In addition, with respect to the proposed requirement to describe material potential sources of future dilution, the final rule specifies that the description should be located outside of the table. The final rule also states that each material potential source of future dilution outside of the table should include “sources not included in the table with respect to the determination of net tangible book value per share, as adjusted.” We are making this change to clarify that the disclosure outside of the table is not merely duplicative of the sources of dilution used for the calculation of the measure of dilution within the table. Without these changes, the item could have been misinterpreted by registrants to require disclosure of the same sources of dilution used in the tabular calculation of dilution, only in a non-tabular format. Depending on a SPAC’s specific facts and circumstances, the non-tabular disclosure of “each material potential source of future dilution” under Item 1604(c) may need to discuss a broader set of items than “material probable or consummated transactions” that are included for purposes of calculating the tabular dilution measure.

Finally, to reflect the deletion discussed above of the proposed provision in Item 1604(c)(1) regarding “sensitivity analysis,” we have inserted in final Item 1604(c)(2) the words “necessary to understand the tabular disclosure” instead of the proposed words “necessary to understand the sensitivity analysis disclosure.”

ii. Value of SPAC Dilution Information to Investors as a General Matter and Under the Final Rules

In adopting the final rules, we agree with the commenters that expressed the view that the dilution disclosures will provide helpful information to investors. There are a number of potential sources of dilution in common SPAC structures, including: (a) shareholder redemptions, (b) SPAC sponsor compensation, (c) underwriting fees, (d) warrants, (e) convertible securities, and (f) PIPE financings. The

enhanced dilution disclosure required by the final rules will enable investors in a SPAC IPO and subsequent purchasers of SPAC shares to better understand the potential impact upon them of the various dilutive events that may occur over the lifespan of the SPAC.²⁷⁸

Dilution disclosure in Commission filings has evolved over time.²⁷⁹ Today, Commission dilution disclosure requirements remain important, including with respect to SPACs. The Commission disagrees with the views expressed by some commenters that dilution disclosure would not be meaningful for investors’ investment decision-making or for valuation purposes at the IPO stage or de-SPAC transaction stage.²⁸⁰ Investors may use dilution information differently depending on the type of registrant, such as whether the issuer is an operating company or a shell company, such as a SPAC. For example, with an operating company some “value investors” may compare the offering price to net tangible book value.²⁸¹ For a SPAC, however, this specific

comparison may be less meaningful than with an operating company because SPACs typically have limited assets at the time of the IPO and the offering price is typically fixed at \$10 per share. In addition, with an operating company, some “value investors” may compare the debt of the issuer to the net tangible book value. For a SPAC, however, this specific comparison may be less meaningful than with an operating company, because SPACs typically have limited debt at the time of the IPO and have limited assets. Furthermore, with an operating company, some investors may seek to determine a value for the issuer taking into account return on net tangible assets or by using a value calculated by multiplying a market average price-to-net-tangible-book-value-per-share ratio times the issuer’s net tangible book value per share. For a SPAC, however, these specific methods may be less meaningful than with an operating company because of the limited assets of the SPAC and limited, if any, net income at the time of the IPO.

Dilution disclosure is important to SPAC investors for two reasons at both the IPO and de-SPAC transaction stages: (1) it provides investors a way of understanding the impact of the disparity in price paid by insiders and the price paid by investors for shares, and (2) it enables investor comparisons to other SPACs. Additionally, at the de-SPAC transaction stage, dilution disclosure is important to SPAC investors for a third reason: it helps investors evaluate the economics of the de-SPAC transaction, which can inform their investing and voting decisions. We discuss these three reasons in more detail as follows.

First, the difference in per share net tangible book value, as adjusted, as compared to the \$10 offering price, demonstrates to investors how the typically lower-priced SPAC sponsor promote stake affects these investors’ claims on the tangible assets of the company. Similarly, at the de-SPAC transaction stage, when certain other transactions may become probable, the net tangible book value per share, as adjusted, will convey to investors a better understanding of the dilution that these other transactions may produce. Relatedly, net tangible book value per share, as adjusted, provides information to investors on dilution (in the sense of diminution in percentage ownership) resulting from the SPAC sponsor promote, because an increase in common shares in the denominator reduces net tangible book value per share, as adjusted.

²⁷⁸ In this regard, we note that the initial purchasers in SPAC IPOs often resell or redeem their shares prior to the completion of the de-SPAC transaction. See, e.g., Benjamin Mullin & Amrith Ramkumar, *BuzzFeed Suffers Wave of SPAC Investor Withdrawals Before Going Public*, Wall St. J., Dec. 2, 2021. See also Klausner, Ohlrogge & Ruan, *supra* note 18.

²⁷⁹ See *Guides for Preparation and Filing of Registration Statements*, Release No. 33–4666 (Feb. 7, 1964) [29 FR 2490, 2492 (Feb. 15, 1964)]; *Guides for the Preparation and Filing of Registration Statements*, Release No. 33–4936 (Dec. 9, 1968) [33 FR 18617, 18619 (Dec. 17, 1968)]; *Contents of Prospectuses and to Guides for Preparation and Filing of Registration Statements*, Release No. 33–5278 (Aug. 8, 1972) [37 FR 15985, 15986 (Aug. 9, 1972)]; *Proposed Revision of Regulation S-K and Guides for the Preparation and Filing of Registration Statements and Reports*, Release No. 33–6276 (Dec. 23, 1980) [46 FR 78, 82–83 (Jan. 2, 1981)]; *Adoption of an Integrated Disclosure System*, Release No. 33–6383 (Mar. 19, 1982) [47 FR 11380, 11390 (Mar. 16, 1982)].

²⁸⁰ Letters from ABA, Ropes & Gray, Vinson & Elkins, White & Case. See *supra* notes 243 and 244 and accompanying text.

²⁸¹ See, e.g., Klausner, Ohlrogge & Halbhauer, *supra* note 156 at 19 (2022) (“Disclosure of net cash per share at the time of a SPAC’s merger is necessary to allow shareholders to make an informed decision as to whether to redeem their shares (for roughly \$10 per share) or to invest in a proposed merger. . . . One would expect the amount of net cash invested in a target to be closely related to the value of post-merger shares that SPAC shareholders receive in exchange. Our research bears this relationship out empirically, showing that the lower the net cash per share that a SPAC delivers, the lower the post-merger share price will be.” (Footnotes omitted)). As discussed below in the section “Net Cash Per Share Disclosure Recommendations,” we agree with comments that suggested net cash per share information is important to investors, but we believe the net tangible book value per share calculation, which we discuss in more detail below, would substantially convey such information.

Second, investors may focus on the relative dilution in a particular SPAC offering as compared to other SPAC offerings. For example, some types of investors may be more focused on finding SPACs with the highest net tangible book values per share compared to the \$10 offering price and less focused on other qualitative factors about the SPAC.

Third, as discussed above, SPAC shares can be redeemed at an agreed upon price. Some commentators have emphasized that it is important for investors to have information at the de-SPAC transaction stage that enables investors to value these shares on a basis other than the stated agreement price.²⁸² The dilution information will help investors to evaluate the economics of the business combination transaction, assisting their investment and voting decision-making. Investors' redemption decisions are also likely informed by the market price of the SPAC shares, just as owners of stock options base their exercise decisions, in part, on the value of the underlying stock.

While dilution information is important to SPAC investors for the reasons discussed above, we acknowledge that SPAC investors may use dilution information differently than investors in an operating company. For example, with an operating company some "value investors" may compare the offering price to net tangible book value.²⁸³ For a SPAC, however, this specific comparison may be less meaningful than with an operating company because SPACs typically have limited assets at the time of the IPO and the offering price is typically fixed at \$10 per share. In

addition, with an operating company, some "value investors" may compare the debt of the issuer to the net tangible book value.²⁸⁴ For a SPAC, however, this specific comparison may be less meaningful than with an operating company, because SPACs typically have limited debt at the time of the IPO and have limited assets. Furthermore, with an operating company, some investors may seek to determine a value for the issuer that takes into account return on net tangible assets²⁸⁵ or by using a value calculated by multiplying a market average price-to-net-tangible-book-value-per-share ratio times the issuer's net tangible book value per share. For a SPAC, however, these specific methods may be less meaningful than with an operating company because of the limited assets of the SPAC and limited, if any, net income at the time of the IPO.²⁸⁶

We disagree with comments that suggested market practice of disclosing dilution information obviates the need for the proposed rules regarding dilution.²⁸⁷ The final rules will help standardize dilution disclosures across registrants and provide a minimum transparent floor for disclosure, even if market practices change. To the extent potential future registrants may otherwise have provided these disclosures based on market convention or other reasons, such registrants are not likely to incur additional costs in preparing this disclosure.

Some commenters suggested current dilution disclosure under Item 506

produces—and the proposed dilution disclosure would produce—results that are flawed or are calculated using varying methods by registrants.²⁸⁸ We acknowledge the concerns expressed by these commenters that using a method of calculating Item 506's measure of net tangible book value that substantively excludes the redeemable common stock classified as temporary equity may result in dilution disclosure that is less meaningful to an investor. For example, in a SPAC IPO, this calculation could produce negative net tangible book value per share despite the proceeds raised in the offering.

iii. Discussion and Examples Regarding the Calculation of Net Tangible Book Value Per Share, As Adjusted, in SPAC IPOs (Item 1602(a)(4) and (c)) and in De-SPAC Transactions (Item 1604(c))

a. Dilution Disclosure Under Items 1602(a)(4) and (c) and 1604(c) Generally

After considering the comments, we have made changes (as described above) in the final rules to clarify the calculation of net tangible book value per share, as adjusted, as the measure of dilution in Items 1602(a)(4) and (c) and 1604(c). Without these revisions, there would be a risk that some disclosure, even under the new rules, could present results that are not meaningful to investors, such as negative net tangible book value per share in some transactions. In addition, we believe the changes in the final rules will be simpler for registrants to follow and comply with because they provide clear steps regarding how to determine dilution.

b. SPAC IPO Dilution Disclosure: Comparison of Item 1602(a)(4) and (c)

Final Item 1602(a)(4) and (c) are similar in that they require the disclosure of net tangible book value per share, as adjusted, shown in a tabular format. These items, however, have four key differences. First, Item 1602(a)(4) tabular disclosure must be provided on the prospectus cover, while Item 1602(c) disclosure must be provided in the prospectus body. Second, unlike Item 1602(c), registrants providing the Item 1602(a)(4) tabular disclosure do not need to show individual line-items for each source of dilution used to determine net tangible book value per share, as adjusted, in the table; for Item 1602(a)(4), they may simply show net tangible book value per share, as adjusted, in the table for the required quartiles. Third, Item 1602(c) also

²⁸² See, e.g., Klausner, Ohlrogge & Halbhuber, *supra* note 156 at 19 (2022) ("Disclosure of net cash per share at the time of a SPAC's merger is necessary to allow shareholders to make an informed decision as to whether to redeem their shares (for roughly \$10 per share) or to invest in a proposed merger. . . . One would expect the amount of net cash invested in a target to be closely related to the value of post-merger shares that SPAC shareholders receive in exchange. Our research bears this relationship out empirically, showing that the lower the net cash per share that a SPAC delivers, the lower the post-merger share price will be." (Footnotes omitted)). As discussed below in the section "Net Cash Per Share Disclosure Recommendations," we agree with comments that suggested net cash per share information is important to investors, but we believe the net tangible book value per share calculation, which we discuss in more detail below, would substantially convey such information.

²⁸³ See, e.g., Richard Phalon, *Forbes Greatest Investment Stories 3* (2004) ("In his last years, Ben Graham," the co-author with David Dodd of *Security Analysis* (1934), "distilled six decades of experience into ten criteria that would help the intelligent investor pick value stocks . . . The Ten: . . . [4.] A stock price down to two-thirds of tangible book value per share.").

²⁸⁴ See, e.g., *ibid.* ("Ben Graham distilled six decades of experience into ten criteria . . . [6.] Total debt less than tangible book value.").

²⁸⁵ See, e.g., Todd A. Finkle, Warren Buffett, *Investor and Entrepreneur*, (2023) ("To assess a company's potential as an investment vehicle," the investors discussed in the book "are looking for a set of specific ratios that indicate potential for yielding high returns . . . Most of [these investors'] investments are in companies that earn 'more than 20 percent' of what [one of the investors] calls the 'net tangible equity capital or net tangible assets' required to run their businesses . . . The formula for returns on a company's net tangible assets is as follows: Return on Net Tangible Assets = Net Income/Net Tangible Assets.").

²⁸⁶ See, e.g., Mario Massari, Gianfranco Gianfrate & Laura Zanetti, *The Valuation of Financial Companies: Tools and Techniques*, Section 5.3.1 Market Multiples 126–127 (2014), David Frykman, Jakob Tolleryd, *The Financial Times Guide to Corporate Valuation* 58–59 (2012) (book-value based multiples work "best with a company with a lot of tangible assets like factories, hardware commodities, mines, etc. and that derives its revenue and cash flow from those assets. Examples of such companies today are banks, real estate and investment companies. . . . When calculating the P/BV ratio for a company in distress, usually intangible assets are removed from the book value since they most probably have no resale value. That ratio is sometimes referred to as price/tangible book value . . .").

²⁸⁷ Letter from Loeb & Loeb. See *supra* note 245 and accompanying text.

²⁸⁸ Letters from Ernst & Young, Vinson & Elkins, White & Case. See *supra* notes 246, 247, 248, 249, and 250 and accompanying text.

contains the following requirement that Item 1602(a)(4) does not contain—to describe, outside of the table, each material potential source of future dilution following the registered offering by the special purpose acquisition company, including sources not included in the table with respect to the determination of net tangible book value per share, as adjusted. Fourth, unlike Item 1602(a)(4), Item 1602(c) requires the provision of a description of the model, methods, assumptions, estimates, and parameters necessary to understand the tabular disclosure.

With respect to the requirement in final Item 1602(c) to describe each material potential source of future dilution (including those not shown in the table), these material potential sources of future dilution under final Item 1602(c) are to be disclosed outside of the table. These sources may not be the same as transactions that must be shown in the dilution table required by Item 1602(c). This non-tabular disclosure of “each material potential source of future dilution” in Item 1602(c) potentially may need to discuss a broader set of items than “material probable or consummated transactions,” although this would depend on a SPAC’s specific facts and circumstances.

c. De-SPAC Dilution Disclosure Under Item 1604(c), Including Examples of Adjustments

Dilution disclosure is also required in final Item 1604(c) in connection with de-SPAC transactions. An objective of the dilution disclosure required by Item 1604(c) is to depict the amount of net assets that the SPAC will contribute to the post-combination entity, as also noted by some commenters.²⁸⁹ In order to accomplish this objective of depicting the amount of net assets that the SPAC will contribute to the post-combination entity, final Item 1604(c) requires three adjustments of the SPAC’s net tangible book value per share as of the most recent balance sheet filed. The first adjustment is for the redemption of the SPAC’s shares. This adjustment is important because both the amount of net tangible assets in the numerator (for example, cash or securities held through the trust account) and the number of shares in the denominator will vary,

depending on the redemption level. The second adjustment is to give effect to material probable or consummated transactions other than consummation of the de-SPAC transaction itself. This adjustment is also important because these transactions may affect the amount of net tangible assets in the numerator and the number of shares in the denominator. Examples of transactions that could be material probable or consummated transactions include funding backstops, forward purchases, or PIPE financings. We generally expect the term “probable or consummated transactions” to be applied in the net tangible book value per share, as adjusted, calculation, similar to its application in 17 CFR 210.11–01 through 210.11–03 (“Article 11” of Regulation S–X),²⁹⁰ which requires pro forma financial information that incorporates the effects of “probable or consummated transactions.”²⁹¹ The third adjustment is for inclusion of other material effects of the de-SPAC transaction on the SPAC’s net tangible book value per share but not the de-SPAC transaction itself. A consummation of the de-SPAC transaction could have material effects on the amount of net tangible book value that the SPAC contributes to the post-combination entity that do not stem from the types of transactions identified in the second adjustment discussed above. Two examples of such other effects would be the issuance of shares contingent on consummation of the de-SPAC transaction as compensation to a SPAC sponsor and the expected incurrence of transaction expenses to consummate the de-SPAC transaction.

Further, to ensure “net tangible book value per share, as adjusted” depicts the amount of net assets that the SPAC will contribute to the post-combination entity, calculation of the measure excludes the effect of the consummation of the de-SPAC transaction itself. Thus, target company assets should not be included in net tangible book value per

share, as adjusted and, in de-SPAC transactions where the consideration paid for the target company is securities of the SPAC, the SPAC should not include those securities paid as consideration in the denominator of the net tangible book value per share, as adjusted, calculation.²⁹²

iv. Discussion of Comments

a. Warrants

We are not adopting one commenter’s recommendation that dilution from warrants should be conveyed using the treasury share method.²⁹³ A treasury share method approach would involve calculating the difference between the strike price of a warrant and the trading price of the shares of the post-de-SPAC transaction combined company.²⁹⁴ At the time of the dilution disclosure, those trading prices are not known. The commenter suggested using “various hypothetical share increments above \$10 per share,” which is the typical SPAC IPO offering price.²⁹⁵ We do not believe that conveying the dilutive effect of warrants using that approach would be appropriate in connection with the dilution disclosure requirements we are adopting, because the hypothetical prices used in the calculation may not be realistic. Further, we believe there is sufficient disclosure about the terms of the warrants²⁹⁶ that would enable an investor to conduct such analysis on the strike price of a warrant using assumptions of trading prices of shares.

The same commenter recommended that “sensitivity analyses should only be required for sources of dilution, such as warrants, where the dilutive impact varies based on changing equity values or other variables.”²⁹⁷ As discussed above, final Item 1604(c) does not include the proposed provisions related

²⁹² See *accord* Klausner, Ohlrogge & Halbhuber, *supra* note 156 at 21, n.10 (“A post-merger calculation, which we explain below is an incorrect way to measure dilution, would include all shares outstanding of the combined post-merger company, including shares issued to shareholders of the target.”). In addition, inclusion of these shares in the denominator is inconsistent with the numerator calculation as it excludes the de-SPAC transaction itself. Also, as a result of our approach of excluding target company assets, we have not adopted a commenter suggestion that would have included the value of the target company. See letter from Vinson & Elkins, *supra* note 268 and accompanying text (expressing the view that the most meaningful information would be a per share value of the target company plus net cash).

²⁹³ Letter from Vinson & Elkins. See *supra* note 269 and accompanying text.

²⁹⁴ See Kieso, Weygandt & Warfield (discussing the treasury stock method), *supra* note 269.

²⁹⁵ *Id.*

²⁹⁶ See, e.g., final Item 1604(c), Item 1602(b)(3), Item 1603(a)(6), and Item 1604(b)(5) and (c).

²⁹⁷ Letter from Vinson & Elkins.

²⁹⁰ While we expect “probable or consummated transactions” to generally be applied similarly between the net tangible book value per share, as adjusted, calculation and Article 11 of Regulation S–X, we observe that the contexts of each disclosure are different and do not foreclose the possibility that different treatments of a transaction may arise depending on the particular circumstances.

²⁹¹ See, e.g., 17 CFR 210.11–01(a)(8) (“Consummation of other transactions has occurred or is probable for which disclosure of pro forma financial information would be material to investors.”) Notwithstanding this similarity with Article 11 of Regulation S–X, a company should not title or describe “net tangible book value per share, as adjusted” as a “pro forma” measure, which could mislead investors since target company assets are not included in the calculation.

²⁸⁹ See *accord* Klausner, Ohlrogge & Halbhuber, *supra* note 156 at 21, n.10 (“A post-merger calculation, which we explain below is an incorrect way to measure dilution, would include all shares outstanding of the combined post-merger company, including shares issued to shareholders of the target.”). In addition, inclusion of these shares in the denominator is inconsistent with the numerator calculation as it excludes the de-SPAC transaction itself.

to sensitivity analysis that concerned the commenter. For Item 1602(a)(4) and (c) and 1604(c), with respect to classification of warrants on an unadjusted basis, as either a liability or equity, registrants should follow applicable GAAP.²⁹⁸ This classification may affect the calculation of net tangible book value per share, as adjusted, because a liability-classified warrant would increase liabilities thereby reducing net tangible book value, while an equity-classified warrant would not do so, unless the effect of its exercise is included in the calculation. Whether to adjust net tangible book value per share to give effect to the exercise of a warrant is a judgment based on facts and circumstances, including whether the effect of the exercise would be consistent with the objective of the disclosure—to depict the amount of net assets the SPAC will contribute to the post-combination entity. When the exercise of the warrant is not contingent on the consummation of the de-SPAC transaction, then adjustment that includes the effect of the warrant's exercise in net tangible book value per share, as adjusted, generally would not be appropriate because those warrants will remain outstanding after the de-SPAC transaction.

As discussed above, the non-tabular disclosure of “each material potential source of future dilution” under Item 1604(c) potentially may need to discuss a broader set of items than “material probable or consummated transactions,” although this would depend on a SPAC's specific facts and circumstances. Thus, whether or not a registrant has made an adjustment for warrants in net tangible book value per share, as adjusted, the registrant may need to describe how the warrants are a material potential source of future dilution.

b. Redemptions

We are not adopting a commenter's suggestion to include a redemption scenario that would reflect “100% of the public shares (regardless of any provisions in the SPAC's governing documents that might theoretically limit redemptions).”²⁹⁹ While we acknowledge that the suggested approach would permit an identical comparison across SPACs at the 100% redemption level, as the commenter noted, we believe that suggested approach would be less meaningful to

investors than the maximum redemption level approach we are adopting in the final rules, because that suggested approach would not take into account the governing documents and so would present a scenario that may not in fact occur in practice. We agree that comparability is an important goal as there may be certain investors who focus on the relative dilution in a particular SPAC offering as compared to other SPAC offerings. However, that comparability across SPACs should be balanced with the need to disclose information tailored to the registrant. The requirement in Item 1602(a)(4) and (c) of the final rules to provide a maximum redemption level (instead of redemption based on 100% of securities sold) and other redemption levels as a percentage of this maximum will provide more issuer-specific information than absolute 25%, 50%, 75%, and 100% levels.³⁰⁰ While the rules we are adopting will not necessarily provide comparability at identical percentages across SPACs, we believe investors nevertheless may make valuable comparisons across SPACs when looking at the dilution information supplied at each of the prescribed intervals in the rule.³⁰¹

The same commenter expressed the view that current dilution disclosure under Item 506 of Regulation S-K is unhelpful for IPO-stage investors, as the output is driven by the maximum redemption scenario which can differ based on (i) different provisions of the SPAC's constituent documents and (ii) the interpretation of those constituent documents.³⁰² We believe the dilution information requirements related to IPOs in Item 1602 that we are adopting

³⁰⁰ Item 1604(c) allows more discretion over issuer-specific dilution information by requiring a range of reasonably likely redemption levels rather than the fixed percentages established by the table in Item 1602(a)(4).

³⁰¹ If the offering sizes across the SPACs being compared are similar and the restrictions on maximum redemptions in the governing documents of the SPACs being compared are similar, the percentages presented in the table may be close to identical across the relevant set of SPACs examined. Also, where the size of the offering is large and the restriction on redemption is small by comparison, the various 25, 50, and 75 percentages of maximum redemption may closely approximate 25, 50, and 75 absolute percentages of securities sold in the offering. For example, if the offering raises \$1 billion and the redemption restriction is \$5 million, then the maximum redemption level would be 99.5% (\$995 million divided by \$1 billion) and 75% of the maximum redemption level would be 74.625% (.75 times .995). See also Table 1 (Number of SPAC IPOs in the U.S. Securities Market from 2012–2023) in section I (providing data, including total capital raised per year and the number of offerings per year, from which an average offering size per year may be calculated).

³⁰² Letter from Vinson & Elkins. See *supra* note 230 and accompanying text.

will provide more helpful information to investors than current market practice under Item 506 with respect to SPACs, where, in the experience of the Commission staff, some registrants have focused solely on a maximum redemption scenario. Item 1602 as adopted will provide a greater range of redemption scenario dilution information to investors. Further, the Commission does not believe that different interpretations of a SPAC's governing documents will make a SPAC unable to provide the required dilution information at the maximum redemption level for two reasons. First, a SPAC will know how to interpret its own governance documents. In addition, in the experience of the Commission staff, many SPACs use similar, well-established governing document provisions that set their maximum redemption level at a level to avoid the SPAC being an issuer of penny stock.³⁰³ We do not anticipate these standardized provisions will involve difficult interpretive issues.

One commenter said that “a SPAC may actually become subject to a maximum redemption scenario that is lower than the quartile intervals required to be presented by proposed Item 1602(a)(4).”³⁰⁴ As discussed above in the description of the dilution rules we proposed, the redemption levels required by Item 1602(a)(4) are “25% of maximum redemption,” “50% of maximum redemption,” and “75% of maximum redemption” and thus are relative to the maximum redemption level and are not an absolute percentage. To clarify for investors the percentage used, registrants may add information to the table headers. For example, where the maximum redemption is 97.5%, a registrant could add “25% of Maximum Redemption (24.375%).” For greater clarity, in final Item 1602(a)(4), we have replaced the proposed terms “at quartile intervals up to the maximum redemption threshold” with the terms “at quartile intervals based on percentages of the maximum redemption threshold,” because we believe registrants could mistakenly interpret the proposed terms to require quartile intervals based on the total number of shares issued in the offering for the three redemption levels in the table other than the maximum redemption level.

One commenter recommended the Commission require dilution disclosure

³⁰³ See Rule 419 (Offerings by blank check companies); Rule 3a51-1 (definition of “penny stock”).

³⁰⁴ Letter from White & Case.

²⁹⁸ See Financial Accounting Standards Board Accounting Standards Codification 815-40 and International Financial Reporting Standard IAS 32, *Financial Instruments: Presentation*.

²⁹⁹ Letter from Vinson & Elkins. See *supra* note 230 and accompanying text.

at a 90% redemption level.³⁰⁵ We do not believe it is necessary to make such changes to the final rules. We believe the four redemption thresholds proposed will give investors a reasonable picture of the potential range of dilution outcomes pursuant to Item 1602(a)(4) and (c). For Item 1604(c) in connection with de-SPAC transactions, we believe providing a prescriptive level of 90% would be inconsistent with the requirement to provide SPAC-specific reasonably likely redemption levels.

c. Assumptions

Commenters raised concerns that dilution disclosure would be characterized by uncertainty, be based on hypothetical assumptions, or depend on unknown variables.³⁰⁶ As discussed above, we have made changes to final Items 1602(a)(4) and (c) and 1604(c) to clarify how registrants should calculate dilution. Where registrants are making adjustments consistent with “net tangible book value per share, as adjusted” or are making assumptions in connection with other dilution disclosures required under the final rules, we believe registrants should be able to provide the required dilution information based on reasonable assumptions. We do not believe that dilution disclosure would mislead investors, as suggested by one commenter, or that such assumptions would need to be presented with lengthy and detailed caveats.³⁰⁷ On the contrary, we believe investors will understand that assumptions being made in connection with required dilution disclosure do not mean the dilution has occurred or is certain to occur. The final rules require a description of the assumptions necessary to understand the tabular disclosure,³⁰⁸ and, in providing that disclosure, registrants may highlight that these are assumptions in order to make that point clearer for investors. While we do not believe that the assumptions necessarily need lengthy and detailed caveats,³⁰⁹ if there are facts and circumstances in which a registrant believes a lengthy or detailed discussion is needed, we believe that would be

appropriate to allow investors to understand the accompanying tabular disclosure.

d. Net Cash Per Share Disclosure

We are not adding an explicit net cash per share disclosure requirement as several commenters recommended that we require.³¹⁰ One group of commenters said net cash per share disclosure should be provided on the cover page of the registration statement.³¹¹ These commenters expressed the view that the dilution concept included in the proposal reflects a concept of dilution that is focused on “ownership dilution,” not the kind of dilution (and dissipation of cash) that reduces the net cash underlying a SPAC share.³¹²

We do not agree with that group of commenters that the proposal was limited to dilution focused solely on reduction in the percentage ownership of a shareholder out of total shares deemed to be issued and outstanding. We agree this form of dilution described by commenters is an element of the denominator in the net tangible book value per share, as adjusted, calculation, but the numerator of the net tangible book value per share, as adjusted, calculation will capture and convey other information—such as existing cash (prior to the relevant transaction, e.g., IPO or de-SPAC transaction), cash raised in securities issuances, and cash paid out to holders of redeemable securities—of the same type that these commenters focus on in recommending disclosure of net cash per share.³¹³

³¹⁰ Letters from CII; Michael Klausner, Michael Ohlrogge, and Harald Halbhüser; NASAA; Vinson & Elkins. See *supra* notes 254 through 264 and accompanying text.

³¹¹ Letter from Michael Klausner, Michael Ohlrogge, and Harald Halbhüser. See *supra* note 261 and accompanying text.

³¹² Letter from Michael Klausner, Michael Ohlrogge, and Harald Halbhüser. See *supra* note 262 and accompanying text. These commenters also provided a formula for the calculation of net cash per share: (a) Total cash (consisting of the sum of cash from SPAC public shareholders plus cash from PIPEs or forward purchase agreements minus cash expenses minus the value of warrants minus the value of other equity derivatives), divided by (b) Total shares (consisting of public shares plus founder shares plus PIPE or forward purchase agreement shares plus other shares plus shares issuable under rights). See *id.*

³¹³ When calculating return on net tangible book value per share, some investors may exclude non-operating assets, such as cash among others, in order limit the measure to those returns on net tangible book value per share that are sustainable. See, e.g., Gary R. Trugman, Understanding Business Valuation (2018) (recommending an analyst calculating return on net tangible assets “remove any items on the balance sheet that may be attributable to non-operating assets or liabilities.”). However, for the avoidance of doubt on the part of registrants, this is not appropriate for a registrant with respect to the calculation on net tangible book value per share, as adjusted, in connection with

Because we believe substantially all the information that would be conveyed to an investor by a net cash per share measure will be conveyed by the required “net tangible book value per share, as adjusted,” we are not adding an explicit net cash per share disclosure requirement.³¹⁴ But shareholders who seek to calculate “net cash per share” at different levels of redemption should have the information to perform this calculation based on the disclosure provided in connection with net tangible book value per share, as adjusted.

e. Cover Page

Regarding comments that recommended that de-SPAC transaction dilution information be presented on the prospectus cover page,³¹⁵ the Commission believes it is sufficient to require the tabular disclosure in the prospectus body in Item 1604(c).³¹⁶ At the de-SPAC stage, there will be more registrant-specific information included in the dilution disclosure, as the registrant will have more information about potential causes of dilution (such as expected redemption levels and financings that will accompany the de-SPAC transaction). Due to this, these disclosures may not be as easily presentable in a straightforward way on the cover page. Item 1604(a)(3), however, will require the registrant to state on the prospectus cover page whether SPAC sponsor compensation and ownership may result in a material dilution of the equity interests of non-redeeming shareholders who hold the securities until the consummation of the

dilution disclosure, which should include non-operating tangible assets such as cash among others.

³¹⁴ The calculations of net tangible book value per share, as adjusted, in final Item 1602(a)(4) and (c) and 1604(c), take into account similar elements as the cash component of net cash per share, such as the inclusion of cash held by the SPAC and securities purchased by the SPAC, as well as the removal of expenses and warrant liabilities. Net cash per share has aspects that make it less useful for investors than net tangible book value per share, as adjusted. First, with respect to the net cash per share calculation, “net cash” in the numerator is reduced by the value of the equity-classified awards, which would be inconsistent with GAAP. We do not believe this is appropriate and have not taken this approach with respect to net tangible book value per share, as adjusted (as discussed above). Second, the net cash per share calculation includes all shares issuable by rights, regardless of any conditions on such issuance, whereas net tangible book value per share, as adjusted, would only make an adjustment to include such shares where a criterion for making an adjustment is met (as discussed above).

³¹⁵ Letter from Michael Klausner, Michael Ohlrogge, and Harald Halbhüser.

³¹⁶ As discussed above, in combined proxy statements and registration statements in connection with de-SPAC transactions, the cover page of the prospectus may be further back in the document.

³⁰⁵ Letter from CII. See *supra* note 236 and accompanying text.

³⁰⁶ Letters from Freshfields, Vinson & Elkins, White & Case. See *supra* notes 237, 238, and 240 and accompanying text.

³⁰⁷ Letter from White & Case. See *supra* note 238 and accompanying text.

³⁰⁸ See final Items 1602(c) and 1604(c)(2).

³⁰⁹ In this respect, as noted above, we disagree with the comment that “lengthy and detailed caveats” would be “need[ed].” See letter from White & Case, *supra* note 238 and accompanying text.

de-SPAC transaction and to provide a cross-reference highlighted by prominent type to the location of related disclosures in the prospectus.

f. Interest Per Share Disclosure

We disagree in part with the commenter who suggested that the final sentence of proposed Item 1604(c)(1) required a determination of the enterprise valuation that will result in a shareholder's "interest per share" calculated by reference to a pro forma closing date balance sheet being at least equal to the \$10 price per share paid in the IPO.³¹⁷ The use of the term "valuation" in Item 1604(c)(1) would not require, as suggested by the commenter, an "enterprise valuation" (which typically values the sum of the equity and debt of a company minus cash).³¹⁸ We agree, however, with the general point suggested by the commenter that a registrant's preparation of Item 1604(c)(1) disclosure could be assisted by reference to, among other potential sources, a pro forma balance sheet. But we believe this would be the case only where such pro forma balance sheet contains the number of total shares (calculated consistent with Item 1604(c)), because the amount of shares is a critical component of the calculation required to provide disclosure under this item. The pro forma balance sheet may not be capable of serving as the sole source of this information, because it may show total shares only for certain redemption levels, such as zero redemptions and maximum redemptions; hence, it may not provide the total share number "with respect to each redemption level" as required by Item 1604(c)(1).

To further clarify, we provide the following basic example of disclosure under Item 1604(c)(1). A hypothetical SPAC issued shares in an IPO at \$10 per share. After giving effect to the IPO, the issued and outstanding shares of the SPAC are 20,000,000, for a total market capitalization of \$200,000,000. In connection with the de-SPAC transaction, the SPAC issues 65,000,000 shares to the target company's

shareholders and issues 15,000,000 shares in a private placement for a total of 100,000,000 outstanding shares. Two (out of several) redemption levels the SPAC has chosen to use for the disclosure required by Item 1604(c) are zero redemptions and 5,000,000 shares redeemed (5% of the total shares). Where redemptions are zero, for purposes of Item 1604(c)(1), the SPAC would have 100,000,000 total shares after giving effect to the de-SPAC transaction and related financing. Where redemptions are zero, the company valuation at or above which the non-redeeming shareholders' interest per share would be at least the IPO price per share (\$10 in this example) would be calculated as: \$10 (per share IPO price) times 100,000,000 shares, or \$1,000,000,000. Where 5,000,000 shares are redeemed (5% of the total shares), the SPAC would have 95,000,000 total shares after giving effect to the de-SPAC transaction and related financing. At this redemption level, the company valuation at or above which the non-redeeming shareholders' interest per share would be at least the IPO price per share (\$10 in this example) would be calculated as: \$10 (per share IPO price) times 95,000,000 shares, or \$950,000,000. For the remaining redemption levels, the registrant would provide the required disclosure in a similar manner.

With respect to the commenter's concern that some investors may misunderstand disclosure under the item and view it as a guarantee that the stock will not trade down in the aftermarket,³¹⁹ we do not believe investors are likely to misunderstand disclosure under Item 1604(c)(1) in that manner. As discussed above, we believe it will be clear to investors that the various valuation figures provided at each of the redemption levels are not guarantees about movements in or levels of future market trading prices of the post-de-SPAC transaction combined company. In addition, to the extent a registrant has a concern about investor confusion regarding the disclosure required under Item 1604(c)(1), such a registrant could provide additional disclosure discussing this issue, such as, for example, explicitly stating that the required disclosure is not a guarantee that the trading price of the combined company will not be below the IPO price nor is the disclosure a guarantee the company valuation will attain one of the stated levels of valuation.

Another commenter recommended that the Commission consider requiring

that intermediaries provide information about "the sponsor, actual and potential conflicts of interest, [and] how much a non-redeeming SPAC investor's interest will be diluted" in a separate "Key Risks and Conflicts form" that is detached from the prospectus, so that the disclosure receives more investor attention and focus.³²⁰ We believe that the disclosure we are requiring in this release will receive an appropriate level of investor attention and focus and that no further amendments are needed in this regard.

g. Lock-Up and Earnout Provisions

One commenter said that "any lock-up periods or earnout provisions for sponsors or underwriters would be of significant interest to investors and should be required if part of the SPAC offering."³²¹ We are not making any changes in response to this comment because the final rules already will require such disclosure. Where there are earnout provisions for SPAC sponsors, the registrant would need to disclose these pursuant to Items 1602 and 1604 regarding compensation of SPAC sponsors and ownership of SPAC securities by SPAC sponsors. Also, where there are lock-ups for SPAC sponsors, the registrant would need to disclose these pursuant to Item 1603(a)(9) regarding the material terms of any agreement, arrangement, or understanding regarding restrictions on whether and when the SPAC sponsor and its affiliates may sell securities of the SPAC. In connection with underwriters, plan of distribution information is required by Forms S-1 and F-1.³²²

E. Prospectus Cover Page and Prospectus Summary Disclosure

1. Proposed Rules

i. Proposed Prospectus Cover Page Disclosure

For registered offerings (including IPOs) by SPACs other than de-SPAC transactions, the Commission proposed Item 1602(a) to require information on the prospectus outside front cover page in plain English about, among other things: (1) the time frame for the SPAC to consummate a de-SPAC transaction, (2) redemptions, (3) SPAC sponsor compensation, (4) dilution (including simplified tabular disclosure), and (5) conflicts of interest.

³²⁰ Letter from CFA Institute.

³²¹ Letter from NASAA.

³²² See Item 8 of Form S-1 (incorporating 17 CFR 229.508 (Item 508 of Regulation S-K) (Plan of Distribution)) and Item 4 of Form F-1 (requiring the furnishing of information pursuant to Part 1, Item 9.B (Plan of Distribution) of Form 20-F).

³¹⁷ Letter from Loeb & Loeb, *supra* notes 265, 266, and 267 and accompanying text. See also proposed Item 1604(c)(1) ("For each redemption level in the sensitivity analysis, state the company valuation at or above which the potential dilution results in the amount of the non-redeeming shareholders' interest per share being at least the initial public offering price per share of common stock.").

³¹⁸ See, e.g., Jeffrey C. Hooke, *Security Analysis on Wall Street: A Comprehensive Guide to Today's Valuation Methods* 234 (1998) (showing key valuation data of publicly traded stocks using enterprise value defined as (1) market value of equity, plus (2) outstanding debt, minus (3) cash on hand).

³¹⁹ Letter from Loeb & Loeb. See *supra* note 267 and accompanying text.

For de-SPAC transactions, the Commission proposed Item 1604(a) to require that SPACs include information on the prospectus outside front cover page in plain English about, among other things: (1) the fairness of the de-SPAC transaction, (2) material financing transactions, (3) SPAC sponsor compensation and dilution, and (4) conflicts of interest.

ii. Proposed Prospectus Summary Disclosure

For registered offerings (including IPOs) by SPACs other than de-SPAC transactions, the Commission proposed Item 1602(b) to require in the prospectus summary a brief description in plain English about, among other things: (1) how the SPAC will identify and evaluate potential business combination candidates and whether it will solicit shareholder approval for the de-SPAC transaction, (2) the material terms of the trust or escrow account and the amount or percentage of the gross offering proceeds that the special purpose acquisition company will place in the trust or escrow account, (3) the material terms of the securities being offered, including redemption rights, and whether the securities are the same class as those held by the SPAC sponsor and its affiliates, (4) the period of time in which the SPAC intends to consummate a de-SPAC transaction, (5) any plans to seek additional financings and how the terms of additional financings may impact unaffiliated security holders, (6) in a tabular format, compensation of the SPAC sponsor, its affiliates, and promoters, and the extent to which this compensation may result in a material dilution of the purchasers' equity interests, and (7) any material actual or potential conflicts of interest between the SPAC sponsor or its affiliates or promoters and purchasers in the offering, including those that may arise in determining whether to pursue a de-SPAC transaction.

For de-SPAC transactions, the Commission proposed Item 1604(b) to require in the prospectus summary a brief description in plain English about, among other things: (1) the background and material terms of the de-SPAC transaction, (2) whether the SPAC reasonably believes that the de-SPAC transaction is fair or unfair to unaffiliated security holders, the bases for such belief, and whether the SPAC or the SPAC sponsor has received any report, opinion, or appraisal from an outside party concerning the fairness of the de-SPAC transaction, (3) any material actual or potential conflicts of interest between the SPAC sponsor or its affiliates or promoters and

unaffiliated security holders in connection with the de-SPAC transaction, (4) in a tabular format, the terms and amount of the compensation received or to be received by the SPAC sponsor and its affiliates in connection with the de-SPAC transaction or any related financing transaction, and whether that compensation has resulted or may result in a material dilution of the equity interests of unaffiliated security holders of the special purpose acquisition company, (5) the material terms of any financing transactions that have occurred or will occur in connection with the consummation of the de-SPAC transaction, the anticipated use of proceeds from these financing transactions and the dilutive impact, if any, of these financing transactions on unaffiliated security holders, and (6) the rights of security holders to redeem the outstanding securities of the SPAC and the potential impact of redemptions on the value of the securities owned by non-redeeming shareholders.

2. Comments

Several commenters generally supported the proposed prospectus cover page and prospectus summary disclosure requirements.³²³ One of these commenters expressed the view that these requirements would assist shareholders in understanding: (a) the compensation structures for SPAC sponsors, (b) conflicts in the relationship between SPAC sponsor, underwriter, and shareholder, (c) potential sources of dilution, and (d) whether or not any fairness opinions were obtained from third parties in connection with the de-SPAC transaction.³²⁴ The commenter suggested this understanding would better equip investors to evaluate the wisdom of placing their money at risk in a SPAC, would closely align the information provided in SPAC IPOs with the information provided to investors in traditional IPOs, and would help to narrow the information asymmetries in the SPAC IPO model.

Several commenters suggested the proposed prospectus cover page requirements would produce cover page disclosure that will be dense and longer than one page.³²⁵

³²³ Letters from ABA (expressing support for proposed Items 1602 and 1604 but also expressing concern regarding the length and density of prospectus cover page and determining fairness in de-SPAC transactions), Better Markets, CFA Institute.

³²⁴ Letter from Better Markets.

³²⁵ See, e.g., letters from ABA, Loeb & Loeb, Ropes & Gray, Vinson & Elkins. See also 17 CFR 229.501 ("Item 501" of Regulation S-K) (one-page limit for prospectus cover page).

One commenter said "requiring disclosure to be included at least three times in the document (e.g., on the cover page, in the summary, and in the body of the document where the same information often appears multiple times) seems excessive and potentially distracting to investors."³²⁶ This commenter also expressed the view that the Commission should not require disclosure of "any plans to seek additional financing and how such additional financing might impact shareholders" in IPO registration statements.³²⁷ The commenter said that, at the time of the IPO, this disclosure would be "purely hypothetical," and would lead to "boilerplate" disclosures that would "distract" investors from other more useful and material information.³²⁸ The commenter, however, said that, "if the SPAC already has commitments for additional financing at the time of the IPO (e.g., a forward purchase agreement or a backstop commitment), the material terms of such financings and potential impact on shareholders or on the de-SPAC transaction should be disclosed."³²⁹

3. Final Rules

After considering the comments received, we are adopting Items 1602(a) and (b) and 1604(a) and (b) as proposed with certain modifications discussed below.³³⁰

We agree with the commenter who expressed the view that investors will benefit from these provisions, including by better understanding factors including compensation, conflicts of interest, and dilution.³³¹ Under the final rules, the key disclosures concerning SPAC offerings and de-SPAC transactions will be highlighted on the cover page and in the prospectus summary in an easily readable and understandable form. The disclosure under these items also will enable investors to better parse complex aspects of SPAC transactions. As a result, we believe investors will be

³²⁶ Letter from Vinson & Elkins.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ In certain rules, a cover page requirement may be similar to but not identical with a prospectus summary requirement. We note that the cover page disclosure for Item 1602(a)(3) (exclusive of securities issuance disclosure) is not required to contain the same level of detail as required in the tabular disclosure in the prospectus summary under Item 1603(b)(6), which should contain line items for each compensation item. Disclosure under Item 1603(a)(6) should provide a similar level of detail as under Item 1602(b)(6), except in non-tabular format.

³³¹ Letter from Better Markets. See *supra* note 324 and accompanying text.

better able to identify and assess important aspects of the transactions that may affect their investment and voting decisions. Although in current market practice, many SPACs already disclose similar information on prospectus cover pages,³³² the final rules we are adopting will standardize this information across all registration statements filed by SPACs for IPOs and for de-SPAC transactions. In addition, investors may benefit from comparing this information not only across other SPAC transactions but by comparing it to investments contemplated in securities of non-SPACs where those registrants provide similar disclosure under current market practice.

Several commenters suggested the proposed prospectus cover page requirements would produce cover page disclosure that will be dense and longer than one page.³³³ While we recognize that the new cover page requirements will increase the amount of information included on the prospectus outside front cover page, we believe these requirements will be a limited incremental increase compared to current prospectus outside front cover page disclosure and we do not believe that this incremental increase will undermine the overall clarity of the cover page disclosure. Also, we continue to believe outside front cover page prominence of the required information serves the key purpose of alerting investors to the importance of the information. We believe registrants will be able to fit the required dilution information in tabular form on the outside front cover page just as they currently fit required information on the securities offering price, underwriting fees, and net proceeds in tabular form on the outside front cover page. Based on Commission staff's experience with current outside front cover page disclosure and staff's consideration of how outside front cover page disclosure will appear under the final rules, we believe there will be space to add this additional table and other new disclosure required by the final rules without making the outside front cover page cramped or difficult to read. We also do not believe these requirements will compel registrants to abandon non-required elements that often appear on the outside front cover page such as

company artwork and logos, use of large fonts for service provider names, and aesthetic use of empty space.

One commenter on the proposal said requiring cover page, prospectus summary, and body of the document disclosures seems excessive and potentially distracting to investors.³³⁴ We disagree and believe the enhanced disclosures in each of the three locations will serve a valuable purpose for investors.³³⁵ The cover page provides the first alerts to investors about information that is important for their investment and voting decisions. In the prospectus summary, we believe the additional disclosures will reduce information processing costs, including for less financially sophisticated investors or investors with limited time to analyze the prospectus, by providing information in plain English about important SPAC features in a concise format. Finally, the prospectus body contains the detailed information needed for more comprehensive investor understanding.

One commenter expressed the view that prospectus summary disclosure related to additional financings (other than committed financings) at the IPO stage would be hypothetical and boilerplate and would distract investors from more useful information.³³⁶ We agree that, if financing agreements have been entered into, then they must be disclosed. To this end, Item 1602(b)(5) requires disclosure of these agreements and how their terms may impact unaffiliated security holders. However, under final Item 1602(b)(5), as proposed, even if no such agreements have been entered at the time that Item 1602(b)(5) is applicable, registrants are required to generally describe any plans to seek additional financings and how the terms of additional financings may affect unaffiliated security holders even if the actual, specific terms of any financing agreements (should they ultimately be entered) may not be known.³³⁷ The disclosure of these plans

will alert investors to the potential aspects of the overall de-SPAC transaction structure, including those that impact future dilution, which will help investors make informed investment and voting decisions. As with dilution disclosure in SPAC IPOs that we discuss in section II.D.3 above (where commenters raised similar concerns), even where a registrant has not committed to a transaction or will not have consummated a transaction, registrants should be able to use reasonable assumptions about potential financing needs to provide the required disclosure. We disagree with the view that this prospectus summary information would be a distraction to investors from other important information. On the contrary, as we discuss generally above, we believe the prospectus summary disclosure regarding additional financing plans will highlight key issues for investors and the summary format will help them process the information, particularly when comparing potential investments in different SPACs. We do not believe investors will misconstrue this information to mean the additional financing is certain to occur. Registrants may highlight this lack of certainty in their disclosure if they have concerns their investors will misconstrue the information.³³⁸ We do not expect the additional financing prospectus summary disclosures will be boilerplate, as the additional financing disclosure will need to be tailored to the plans of the SPAC.

In final Item 1602(a)(5), we replaced the proposed term "SPAC sponsor or its affiliates or promoters and purchasers in the offering" with the term "SPAC sponsor, its affiliates, or promoters; and purchasers in the offering." We made the same changes to final Item 1602(b)(7).³³⁹ Both the changes to Item 1602(a)(5) and (b)(7) were made to clarify that the interests of each of the listed persons should be assessed

additional financings" will reflect the level of development of such plans. A registrant is only required to disclose plans that are known to the registrant to be "plans to seek additional financings."

³³⁸ In connection with similar issues in the context of Item 1602(c) disclosure of "each material potential source of future dilution," we discuss above in section II.D.3.iii that registrants may warn investors that the disclosure about such potential sources should not be misconstrued as indications certain events are certain to occur in the future.

³³⁹ In addition, in final Items 1602(b)(7) and 1604(a)(4) and (b)(3) we moved "material" after "actual or potential" for consistency throughout new subpart 1600.

³³² Item 501(b) of Regulation S-K sets forth disclosure requirements for the outside front cover page of prospectuses, such as the name of the registrant, title and amount of securities being offered, and the offering price of the securities.

³³³ See, e.g., letters from ABA, Loeb & Loeb, Ropes & Gray, Vinson & Elkins. See also Item 501 of Regulation S-K (one-page limit for prospectus cover page).

³³⁴ Letter from Vinson & Elkins. See *supra* note 326 and accompanying text.

³³⁵ Staff experience in reviewing current SPAC filings is that some SPACs repeat disclosure numerous times in current registration statements even where not required by current rules; we infer from this market practice that some issuers may believe such repetition is helpful to investors in understanding important facts that may not be well understood through an isolated reference. The final rules we are adopting are not inconsistent with that current market practice.

³³⁶ Letter from Vinson & Elkins. See *supra* notes 328 and 329 and accompanying text.

³³⁷ Final Item 1602(b) provides that the disclosure required thereunder in the prospectus summary must be in the form of a "brief description." We expect that the level of detail of the disclosure under final Item 1602(b)(5) of "[a]ny plans to seek

against the interests of “purchasers in the offering.”³⁴⁰

In final Item 1604(a)(1) and (b)(2), we made revisions to reflect changes we are making to Items 1606 and 1607 that are discussed in section II.G.³⁴¹

In final Item 1604(a)(4), following the phrase “State whether, in connection with the de-SPAC transaction, there may be any actual or potential material conflict of interest,” we added the phrase “including any material conflict of interest that may arise in determining whether to proceed with a de-SPAC transaction and any material conflict of interest arising from the manner in which the special purpose acquisition company compensates a SPAC sponsor, officers, and directors or the manner in which a SPAC sponsor compensates its officers and directors.” This change makes Item 1604(a)(4) required cover page disclosure congruent with Item 1603(b) (non-cover page) disclosure. In de-SPAC transactions, the cover page disclosure under Item 1604(a)(4) should provide a cross reference to, among other things, the description of these actual or potential material conflicts of interest under Item 1603(b).

We also made a number of other changes to the final rules related to prospectus cover page and prospectus summary disclosure that are discussed above in other sections of this release.³⁴²

F. De-SPAC Transactions: Background, Reasons, Terms, and Effects

1. Proposed Item 1605

The Commission proposed Item 1605 of Regulation S–K to require disclosure of the background, material terms, and effects of the de-SPAC transaction, including:

- A summary of the background of the de-SPAC transaction, including, but not limited to, a description of any contacts, negotiations, or transactions

³⁴⁰ In addition, in final Item 1602(b)(5) we replaced the proposed term “impact” with the term “affect” for clarity.

³⁴¹ See final Item 1604(a)(1) and (b)(2).

³⁴² See (a) section II.B (Sponsors) discussion of final Items 1602(a)(3) and (b)(6) and 1604(a)(3) and (b)(4) and (5); (b) section II.C (Conflicts of Interest) discussion of final Items 1602(a)(5), 1604(a)(4) and (b)(3), and 1602(b)(7); and (c) section II.D (Dilution) discussion of final Items 1602(a)(4) and 1604(b)(4) and (5). In addition to the changes to final Item 1604(b)(3) discussed in other sections of this release, we have moved the language “in connection with the de-SPAC transaction” from the end of the item to the beginning of the item and made punctuation and paragraph numbering changes to clarify the comparison of interests must be between each of “the SPAC sponsor, SPAC officers, SPAC directors, SPAC affiliates or promoters, target company officers, or target company directors” and “unaffiliated security holders of the SPAC.”

that have occurred concerning the de-SPAC transaction;

- A brief description of any related financing transaction, including any payments from the SPAC sponsor to investors in connection with the financing transaction;
- The reasons for engaging in the particular de-SPAC transaction and for the structure and timing of the de-SPAC transaction and any related financing transaction;
- An explanation of any material differences in the rights of security holders of the post-business combination company as a result of the de-SPAC transaction;
- Disclosure regarding the accounting treatment and the Federal income tax consequences of the de-SPAC transaction, if material;
- Any material interests in the de-SPAC transaction or any related financing transaction held by the SPAC sponsor and the special purpose acquisition company’s officers and directors, including fiduciary or contractual obligations to other entities as well as any interest in, or affiliation with, the target company; and
- A statement whether or not security holders are entitled to any redemption or appraisal rights, a summary of such redemption or appraisal rights, and, if there are no redemption or appraisal rights available for security holders who object to the de-SPAC transaction, a brief outline of any other rights that may be available to security holders.

2. Comments: Item 1605

One commenter stated that proposed Item 1605 would provide useful information to investors.³⁴³ Some commenters, however, opposed proposed Item 1605, stating it would be duplicative of existing disclosure requirements.³⁴⁴ One of these commenters said that, in lieu of adopting Item 1605, they “recommend a more uniform methodology to address conflicts of interest arising from business combinations in general by revising Items 1004(a)(2) and 1013(b) of Regulation M–A and Item 403 of Regulation S–K to incorporate the provisions of proposed Item 1605 taking into consideration that many issues addressed in proposed Item 1605 may arise and be applicable to business

³⁴³ Letter from Committee on Capital Markets Regulation.

³⁴⁴ Letters from ABA (“To eliminate duplication, we recommend against adoption of Item 1605”), Vinson & Elkins (“The SEC should not adopt a new disclosure requirement with respect to material interests in a prospective de-SPAC transaction or any related financing transaction held by the sponsor and the SPAC’s officers and directors, as proposed”).

combinations that are not effected by a SPAC or a blind pool.”³⁴⁵

One commenter recommended that we revise proposed Item 1605(b)(2), with respect to descriptions of related financings.³⁴⁶ The commenter said, “PIPE investors often buy into SPAC deals on discounted terms compared to the terms offered to public shareholders in a SPAC.” The commenter said “the discount that PIPE investors receive is in the form of additional derivative securities, guarantees, or other complex financial arrangements and it is difficult for public investors to know the effective price per share at which PIPE investors are buying.”³⁴⁷ The commenter recommended that we revise proposed Item 1605(b)(2) to state: “A brief description of related financing transactions, including the effective price per share at which investors are buying, after accounting for the value of any securities or guarantees they receive from the SPAC, SPAC sponsor or affiliate of either in connection with the financing transaction.”³⁴⁸

3. Final Item 1605

After considering the comments received, we are adopting Item 1605 as proposed, with several modifications discussed below.

By providing a specialized disclosure rule tailored to de-SPAC transactions, the Item 1605 disclosure requirements will provide investors with information necessary to evaluate the reasons for a de-SPAC transaction and for choosing a particular structure and financing for the transaction. These requirements will also help promote consistent disclosure, allowing for greater comparability of these disclosures across de-SPAC transactions.

Given the unique qualities of de-SPAC transactions, we believe registrants will benefit from the centralization of the SPAC-related requirements in the Item 1600 series of Regulation S–K. If there are facts and circumstances that may result in required disclosure under a current rule being the same as under any of the rules we are adopting, registrants are not

³⁴⁵ Letter from ABA (specifically suggesting “revising Items 1004(a)(2) and 1013(b) of Regulation M–A and Item 403 of Regulation S–K to incorporate the provisions of proposed Item 1605 taking into consideration that many issues addressed in proposed Item 1605 may arise and be applicable to business combinations that are not effected by a SPAC or a blind pool”).

³⁴⁶ Letter from Michael Klausner and Michael Ohlrogge.

³⁴⁷ *Id.* (“For instance, if a PIPE investor buys a share for \$10, but also receives a free warrant worth \$1.50, then the PIPE investor is in effect paying \$8.50 for the share.”).

³⁴⁸ *Id.*

required to repeat disclosures, except where the applicable rule may so require (such as by calling for the disclosure in a specific location such as the prospectus cover page or prospectus summary). We are not adopting the recommendation that we adopt a more uniform methodology to address conflicts of interest arising from business combinations in general,³⁴⁹ because it is beyond the scope of our proposals concerning conflicts of interest and Item 1605, both of which are focused on SPACs.

We are not revising Item 1605(b)(2) to provide more specificity on the types of securities or guarantees received from the SPAC, as suggested by one commenter. We are adopting Item 1605(b)(2) as proposed to require the disclosure of material terms of the de-SPAC transaction, including a brief description of any related financing transaction, including any payments from the SPAC sponsor to investors in connection with the financing transaction. In most, if not all, cases, Item 1605(b)(2) will require the registrant to disclose the price paid by PIPE investors and other benefits such as derivative securities that are acquired by PIPE purchasers (in addition to SPAC shares), because these are likely to be material terms. One commenter recommended we require “A brief description of related financing transactions, including the effective price per share at which investors are buying, after accounting for the value of any securities or guarantees they receive from the SPAC, SPAC sponsor or affiliate of either in connection with the financing transaction.”³⁵⁰ We are not revising the item to adopt this recommendation because we believe it would be difficult for registrants to calculate accurately or would result in inconsistent methodologies among registrants, or both, with respect to how registrants would convert various features, rights, or contractual provisions attendant to related financing transactions into amounts used to adjust actual transaction values to achieve the suggested effective price; we believe the resulting disclosure characterized by these issues could mislead investors or undermine the ability of investors to make comparisons across SPACs or both.

We have made a number of modifications in final Item 1605 as compared to the proposal. First, in Item

1605(a), we have replaced the term “Furnish” with the term “Provide” in the sentence “Furnish a summary of the background of the de-SPAC transaction” to make it clear that we intend this disclosure to be filed. This change will also make Item 1605(a) consistent with the other items in Item 1605 in this respect.

Second, in Item 1605(b)(5) and (6), we have deleted the phrase “, if material” to align the phrasing with the existing disclosure requirements in Item 4 of Form S-4³⁵¹ as it was our intent to capture the same information at the same threshold and we did not intend for the phrasing to imply that the accounting treatment or Federal income tax consequences may not be material disclosure in a business combination transaction.³⁵²

Third, as discussed above in section II.C of this release regarding conflicts of interest, we are revising Item 1605(d) to address interests of target company officers and directors. Thus, in final Item 1605(d), we have added the phrase “; or held by the target company’s officers or directors that consist of any interest in, or affiliation with, the SPAC sponsor or the special purpose acquisition company.”

Fourth, in final Item 1605(d), we have revised the phrase “held by the SPAC sponsor and the special purpose acquisition company’s officers and directors” by replacing the term “and” with “or” in each instance, because the requirements of Item 1605(d) should apply disjunctively where any of the named persons has a material interest in the de-SPAC transaction or any related financing (and not be limited to only those situations where every named person has such an interest).

Fifth, we revised Item 1605(b)(3), (4), and (6) to clarify that these requirements will require disclosure with respect to the SPAC, target company, and/or security holders of the SPAC or target company. These changes eliminate potential ambiguity that could have caused registrants to inappropriately interpret the items as not including disclosure with respect to those persons in connection with de-SPAC transactions. Accordingly, as adopted:

- final Item 1605(b)(3) requires: “A reasonably detailed discussion of the reasons of the SPAC and the target company for engaging in the de-SPAC transaction and reasons of the SPAC for

the structure and timing of the de-SPAC transaction and any related financing transaction;”

- final Item 1605(b)(4) requires: “An explanation of any material differences in the rights of SPAC and target company security holders as compared with security holders of the combined company as a result of the de-SPAC transaction;” and

- final Item 1605(b)(6) requires: “The Federal income tax consequences of the de-SPAC transaction to the SPAC, the target company, and their respective security holders.”

G. Board Determination About the De-SPAC Transaction; Reports, Opinions, Appraisals, and Negotiations

1. Proposed Item 1606(a)

The Commission proposed Item 1606(a) to address concerns regarding potential conflicts of interest and misaligned incentives in connection with the SPAC’s decision to proceed with a particular de-SPAC transaction and to assist investors in assessing the fairness of a particular de-SPAC transaction to unaffiliated investors. Specifically, the Commission proposed Item 1606(a) to require a statement from a SPAC as to whether it reasonably believes that the de-SPAC transaction and any related financing transactions are fair or unfair to the SPAC’s unaffiliated security holders, as well as disclosures regarding whether any director voted against or abstained from voting on, approval of the de-SPAC transaction or any related financing transaction.

2. Comments: Item 1606(a)

Commenters expressed differing views on proposed Item 1606(a). Some commenters supported the proposed requirement.³⁵³

Other commenters opposed proposed Item 1606(a).³⁵⁴ Some of these commenters expressed the view that modeling rules applicable to de-SPAC transactions after the going private rules is inappropriate because the underlying

³⁵³ Letters from Better Markets; Marcie Frost, Chief Executive Officer, California Public Employees’ Retirement System (June 9, 2022) (“CalPERS”); Committee on Capital Markets Regulation; Consumer Federation; Professor Holger Spamann (June 12, 2022) (“Holger Spamann”); NASAA; Public Citizen.

³⁵⁴ Letters from ABA; Andrew Tuch, Professor of Law, Washington University in St. Louis (June 13, 2022) (“Andrew Tuch”); Cato Institute; CFA Institute; Davis Polk & Wardwell LLP (June 13, 2022) (“Davis Polk”); Freshfields; Goodwin; Alfredo Ortiz, President & CEO, Job Creators Network (June 13, 2022) (“Job Creators Network”); Jonathan Kornblatt; Kirkland & Ellis; Loeb & Loeb; NYC Bar; Paul Swegle; Ropes & Gray; Skadden Arps Slate Meagher & Flom LLP (June 13, 2022) (“Skadden”); White & Case.

³⁴⁹ Letter from ABA. See *supra* note 345 and accompanying text.

³⁵⁰ Letter from Michael Klausner and Michael Ohlrogge. See *supra* notes 347 and 348 and accompanying text.

³⁵¹ See disclosure requirements in (a)(5) and (a)(6) under Item 4 of Form S-4.

³⁵² In addition, in final Item 1605(b)(4) we deleted the phrase “after the completion of the de-SPAC transaction” for clarity and to avoid redundancy with the immediately preceding words “as a result of the de-SPAC transaction.”

affiliate relationships present in a going private transaction are not present in a de-SPAC transaction.³⁵⁵ Some commenters observed that a fairness determination is not required or provided in an IPO and thus should not be required in a de-SPAC transaction.³⁵⁶

One commenter said proposed Items 1606 and 1607 would represent a “dramatic shift to de-SPAC transactions processes and disclosures,” because, in part, SPAC boards have not historically made a recommendation to shareholders regarding whether or not to redeem shares at the time of the business combination and fairness opinions obtained in connection with de-SPAC transactions are typically limited to whether the transaction is fair to the SPAC, not whether the transaction is fair to any particular class of shareholders.³⁵⁷ This commenter observed, “By opining on whether the de-SPAC transaction and related financings are fair to unaffiliated stockholders, as opposed to the SPAC itself, the SPAC board and any fairness opinion provider would essentially be making a recommendation regarding whether or not to redeem shares.”³⁵⁸

Several commenters expressed the view that requiring disclosure of a fairness determination would result in increased liability and litigation risk in de-SPAC transactions³⁵⁹ and in fewer de-SPAC transactions.³⁶⁰ A few commenters indicated that financial advisors may refuse to provide fairness opinions due to concerns about the potential liability related to delivery of a fairness opinion, in which case the SPAC board of directors would decide not to proceed with an otherwise favorable de-SPAC transaction due to the board’s concerns about its own liability.³⁶¹

Other commenters expressed the view that proposed Items 1606 and 1607 would effectively require de-SPAC transactions to be “substantively fair,” which, in the view of these commenters, would exceed the Commission’s authority.³⁶² One of these commenters expressed that imposing a substantive

obligation on the SPAC board of directors to undertake an analysis of the fairness of the de-SPAC transaction is an issue that is the exclusive province of State law.³⁶³

One commenter stated that, while the disclosure in proposed Item 1606(a) would be new, “in light of the fiduciary duties applicable to SPACs and their directors and officers,” the disclosure in proposed Item 1606(a) and (b) “would likely be redundant with the standard disclosure of the SPAC board’s reasons for approval of the de-SPAC transaction.”³⁶⁴

Several commenters expressed concern that the proposed fairness determination disclosure requirement would likely or effectively require a SPAC to obtain a fairness opinion from a financial advisor³⁶⁵ and raised concern about the cost of obtaining a fairness opinion.³⁶⁶ One of those commenters also expressed concern that the perceived requirement, under proposed Items 1606(a) and 1607, to obtain a fairness opinion could increase the need to include projections in the de-SPAC transaction disclosure documents in support of a SPAC sponsor’s fairness determination.³⁶⁷

Another commenter indicated that proposed Item 1606 (and Item 1607) would be burdensome and, to address that burden, suggested that proposed Item 1606 should not apply to de-SPAC transactions generally but only to those de-SPAC transactions that raise risks of “severe conflicts of interest.”³⁶⁸

Some commenters also said they prefer that any fairness determination be made as to the de-SPAC transaction as a whole (instead of the de-SPAC transaction and any related financing transaction separately)³⁶⁹ and with respect to all of a SPAC’s shareholders (instead of to its unaffiliated shareholders).³⁷⁰ One of those

commenters also suggested that a fairness determination should not include related financings because financial advisors providing a fairness opinion do not traditionally include such financing within the scope of the opinion.³⁷¹

3. Final Item 1606(a)

We continue to believe that SPACs and the hybrid nature of de-SPAC transactions present potential conflicts of interest and misaligned incentives that are not present in other types of business combination transactions. As a result, we believe that it is appropriate for shareholders to have more complete information regarding the SPAC’s decision to proceed with a particular de-SPAC transaction. Many commenters that supported proposed Item 1606(a) expressed similar views.³⁷² At the same time, we acknowledge that many commenters raised significant concerns with the proposed disclosure requirement.³⁷³ Some commenters expressed concerns that the proposed rule could be interpreted to require a fairness opinion,³⁷⁴ even if not explicitly required, and concerns about the cost to obtain such an opinion.³⁷⁵ Some commenters also expressed concerns about imposing requirements in connection with the de-SPAC transaction process of going public that do not exist in the traditional IPO process, such as requiring a fairness determination.³⁷⁶ Regarding these concerns, while we acknowledge that disclosures regarding the board’s determination to proceed with a particular transaction are more typically associated with merger transactions, as discussed above, the de-SPAC transaction is a hybrid capital raising transaction that marks the introduction of the target company to the U.S. public

³⁷¹ Letter from Davis Polk.

³⁷² Letters from Better Markets, CalPERS, Committee on Capital Markets Regulation, Consumer Federation, Holger Spamann, NASAA, Public Citizen. *See supra* note 353 and accompanying text.

³⁷³ Letters from ABA, Andrew Touch, Cato Institute, CFA Institute, Davis Polk, Freshfields, Goodwin, Job Creators Network, Jonathan Kornblatt, Kirkland & Ellis, Loeb & Loeb, NYC Bar, Paul Swegle, Ropes & Gray, Skadden, White & Case. *See supra* note 354 and accompanying text.

³⁷⁴ Letters from ABA, Andrew Touch, Cato Institute, Davis Polk, Freshfields, Job Creators Network, Jonathan Kornblatt, Paul Swegle. *See supra* note 365 and accompanying text.

³⁷⁵ Letters from ABA, Cato Institute, Davis Polk, Freshfields, Goodwin, Jonathan Kornblatt, Paul Swegle, Ropes & Gray, Skadden. *See supra* note 366 and accompanying text.

³⁷⁶ Letters from ABA, Andrew Touch, Cato Institute, CFA Institute, Davis Polk, Freshfields, Kirkland & Ellis, Loeb & Loeb, NYC Bar, Ropes & Gray, Skadden, White & Case. *See supra* notes 355 and 356 and accompanying text.

³⁶³ Letter from NYC Bar.

³⁶⁴ Letter from Vinson & Elkins.

³⁶⁵ Letters from ABA, Andrew Tuch, Cato Institute, Davis Polk, Freshfields, Job Creators Network, Jonathan Kornblatt, Paul Swegle.

³⁶⁶ Letters from ABA, Cato Institute, Davis Polk, Freshfields, Goodwin, Jonathan Kornblatt, Paul Swegle, Ropes & Gray, Skadden.

³⁶⁷ Letter from Cato Institute (indicating that disclosure of projections would raise potential liability for SPACs as a result of the amendments to the PSLRA safe harbor).

³⁶⁸ Letter from Andrew Tuch (“In short, the Proposed Rules would subject de-SPACs to more onerous regulation than either going-private transactions subject to Rule 13e-3 [17 CFR 270.13e-3] or traditional IPOs. A way to address this is to apply Items 1606 and 1607 more selectively, to those de-SPACs raising heightened risks of self-dealing by SPAC fiduciaries, or perhaps not to apply these particular provisions at all.”).

³⁶⁹ Letters from ABA, Davis Polk, Freshfields, Goodwin, Ropes & Gray, Skadden, White & Case.

³⁷⁰ Letters from ABA, Goodwin.

³⁵⁵ Letters from Andrew Tuch, Freshfields, Kirkland & Ellis, Loeb & Loeb, Skadden.

³⁵⁶ Letters from ABA, Cato Institute, CFA Institute, Davis Polk, Freshfields, Kirkland & Ellis, NYC Bar, Ropes & Gray, Skadden, White & Case.

³⁵⁷ Letter from Ropes & Gray.

³⁵⁸ *Id.*

³⁵⁹ Letters from Cato Institute, CFA Institute, Freshfields, Goodwin, Jonathan Kornblatt, White & Case.

³⁶⁰ Letters from Davis Polk, Goodwin, Job Creators Network, Jonathan Kornblatt, Skadden, White & Case.

³⁶¹ Letters from ABA, Goodwin.

³⁶² Letters from ABA, Goodwin, NYC Bar, White & Case.

securities markets (similar to an IPO), and such introduction is done by way of a business combination or similar transaction. As a result, while we believe that the similarity to an IPO is a reason that the de-SPAC transaction regulatory framework generally should be similar to the IPO regulatory framework, the business combination element of de-SPAC transactions makes certain differences in the final rules that apply to de-SPAC transactions appropriate.

In response to commenters' concerns, we are revising Item 1606(a) to focus on situations in which a determination as to the advisability of the de-SPAC transaction is required by the law of the jurisdiction in which the SPAC is organized.³⁷⁷ Doing so will make clear that Item 1606(a) does not require the de-SPAC transaction to be substantively fair or the SPAC to make a fairness determination when it is not otherwise required to do so under applicable State or foreign corporate law.³⁷⁸

Instead, under final Item 1606(a), if the law of the jurisdiction of the SPAC's organization requires the SPAC's board of directors (or similar governing body)³⁷⁹ to determine whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its shareholders, or otherwise make any comparable determination, the SPAC will be required to disclose that determination. Under Delaware General Corporation Law, a board of directors of a corporation that seeks to enter a merger or consolidation is required to adopt a resolution approving the transaction agreement and declaring its advisability.³⁸⁰ In the experience of the Commission staff, many SPACs governed by Delaware law provide a statement in registration statements or proxy statements filed for de-SPAC transactions that the transaction agreement the board approved is advisable and in the best interests of

shareholders. Comparable requirements may apply to registrants organized under the laws of other jurisdictions. The final rule would codify existing disclosure practices in this regard and serve to standardize the disclosure across a variety of State or foreign law requirements.

We believe that the approach taken in final Item 1606(a) represents an appropriate balance between our goal of providing more transparency around the SPAC's decision to proceed with a particular de-SPAC transaction and the concerns raised by commenters that the proposed rule would create a new substantive corporate law requirement³⁸¹ as well as other concerns raised by commenters, including increased liability and risks of litigation and decreased de-SPAC transactions.³⁸² The new disclosure requirement will help achieve the same goal sought by the proposed fairness determination requirement—enhancing SPAC security holders' ability to assess the SPAC's decision to proceed with a particular de-SPAC transaction—without imposing new procedural obligations regarding how such a decision is made. While the final rule will not require a SPAC to make a determination regarding the fairness or suitability of the de-SPAC transaction, if such a determination is required by applicable corporate law, we believe investors should be informed of that fact and receive appropriate disclosure (as described below) regarding the considerations that went into such a determination.³⁸³ The fact that many registrants already provide such disclosure supports our view that the factual disclosures required by the final rule should not impose undue costs or create excessive exposure to new liability or litigation risk.

In addition, these changes from the proposal should avoid any misimpression that Item 1606(a) creates

a requirement, implicit or explicit, or expectation that a fairness opinion must be obtained to comply with its requirements. We are mindful of commenters' concerns about increased liability and litigation risk associated with such opinions.³⁸⁴ We are also mindful of comments indicating that financial advisors may refuse to provide fairness opinions due to concerns about the potential liability related to delivery of a fairness opinion and that a SPAC's board of directors may decide not to proceed with an otherwise favorable de-SPAC transaction because it cannot obtain a fairness opinion.³⁸⁵ Cognizant of these concerns, we reiterate that nothing in the final rule requires a SPAC to obtain a fairness opinion in connection with a de-SPAC transaction.

The changes to Items 1606(a) and (b) and 1607³⁸⁶ should also address one commenter's concern that the new requirements would represent "a dramatic shift to de-SPAC transactions processes and disclosures" by requiring more limited disclosure aligned with requirements already applicable to a SPAC by the law of its jurisdiction of incorporation.³⁸⁷

We agree with commenters who stated that any rule addressing the board's decision to proceed with a de-SPAC transaction should focus on all of a SPAC's security holders rather than only its unaffiliated security holders.³⁸⁸ In response to these comments, we have revised the final rule to reference security holders of the SPAC generally, in contrast to the proposed rule, which addressed only unaffiliated security holders.

The changes to Item 1606(a) address one commenter's concern that the perceived requirement to obtain a fairness opinion could increase the need to include projections in the de-SPAC transaction disclosure documents in support of such fairness determination.³⁸⁹

Finally, in response to commenters' recommendations that proposed Item 1606(a) be required with respect to the de-SPAC transaction and related financing as a whole,³⁹⁰ we are revising

³⁷⁷ See generally Section 251(b) of the Delaware General Corporation Law ("The board of directors . . . shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability.").

³⁷⁸ This revision also addresses the comments questioning the Commission's authority to require a fairness determination and the comment expressing the view that imposing an obligation on a board to undertake an analysis of the fairness of the de-SPAC transaction is an issue that is the exclusive province of State law. See *supra* notes 362 and 363, respectively, and accompanying text.

³⁷⁹ This provision allows for the possibility that a SPAC's governing body may be other than a "board of directors," whether as a result of a SPAC being organized as an entity other than a corporation or being a corporation organized in a jurisdiction where the governing body is different than a "board of directors."

³⁸⁰ See *supra* note 377 and accompanying text.

³⁸¹ The approach taken in final Item 1606(a) also addresses a related commenter's concern that disclosure arising from a fairness determination would be redundant in light of the fiduciary duties applicable to SPACs and their officers and directors. See letter from Vinson & Elkins. See also *supra* note 364 and accompanying text.

³⁸² Letters from Cato Institute, CFA Institute, Davis Polk, Freshfields, Goodwin, Job Creators Network, Jonathan Kornblatt, Skadden, White & Case. See *supra* notes 359 and 360 and accompanying text.

³⁸³ Because final Item 1606(a) will require disclosure when a determination is required to be made under the law of the SPAC's jurisdiction of organization, rather than imposing a separate fairness determination that would be more burdensome, we do not believe there is a need to limit Item 1606(a) to instances of "severe conflicts of interest," as one commenter suggested. See letter from Andrew Tuch. See also *supra* note 368 and accompanying text.

³⁸⁴ Letters from Cato Institute, CFA Institute, Freshfields, Goodwin, Jonathan Kornblatt, White & Case. See *supra* note 359 and accompanying text.

³⁸⁵ Letters from ABA, Goodwin. See *supra* note 361 and accompanying text.

³⁸⁶ See *infra* section II.G.10–12.

³⁸⁷ Letter from Ropes & Gray. See *supra* notes 357 and 358 and accompanying text.

³⁸⁸ Letter from ABA, Goodwin. See *supra* note 370 and accompanying text.

³⁸⁹ Letter from Cato Institute. See *supra* note 367 and accompanying text.

³⁹⁰ Letters from ABA, Davis Polk, Freshfields, Goodwin, Ropes & Gray, Skadden, White & Case. See *supra* notes 369–371 and accompanying text.

Item 1606(a) to remove any reference to related financing. While the proposed rule was intended to result in the disclosure of a fairness determination with respect to a de-SPAC transaction as a whole, we were persuaded by commenters' concerns that including "any related financing" in the rule could have signaled a separate determination should be made with respect to the related financing.³⁹¹ We continue to believe that related financing is usually fundamental to the success of the de-SPAC transaction but have adopted a final rule that simplifies the disclosure about the determinations made by a SPAC's board of directors (or similar governing body) with respect to the de-SPAC transaction. On the other hand, given the continued importance to a SPAC's shareholders of the related financing, we are moving the reference to related financing to final Item 1606(b), which requires discussions of the factors considered by the SPAC board of directors (or similar governing body) in making the determination disclosed in response to Item 1606(a). This change is discussed further below.

4. Proposed Item 1606(b)

The Commission proposed Item 1606(b) to supplement the fairness determination disclosure required by proposed Item 1606(a). Specifically, proposed Item 1606(b) would require a SPAC to discuss the material factors upon which the reasonable belief regarding the fairness of a de-SPAC transaction and any related financing transaction is based and, to the extent practicable, the weight assigned to each factor.

5. Comments: Item 1606(b)

Commenters expressed differing views on proposed Item 1606(b). Some commenters supported the proposed requirement generally³⁹² and some commenters specifically indicated the requirement would allow investors to conduct a better evaluation of the merits of a de-SPAC transaction and incentivize sponsors to avoid transactions that could potentially be viewed as unfair.³⁹³

Other commenters stated that the inclusion of a mandatory list of factors to be addressed in disclosure under proposed Item 1606(b) may force the SPAC to disclose information not actually considered by the SPAC in making its fairness determination.³⁹⁴

Some commenters also stated that the mandatory list of factors in proposed Item 1606(b) is at odds with the Commission's history of implementing a principles-based disclosure regime and does not account for the fact that the factors relevant to making a fairness determination will vary from company to company and that different fairness assessors may also have different views on which factors are appropriate for the same company.³⁹⁵ These commenters proposed that the Commission modify proposed Item 1606(b) to provide that the factors should be discussed to the extent they were considered.³⁹⁶ One commenter said that it is "not within the Commission's authority to require SPAC boards of directors to conform their deliberative processes to the Commission's rules and that Item 1606(b) impermissibly encroaches upon the discretion of a board to evaluate whatever information it deems appropriate in deciding to proceed with a transaction."³⁹⁷

Some commenters stated that the factors the proposal required to be discussed should not be assigned weight because it would not be practical or workable to do so, such weighting could result in investors placing too much or not enough emphasis on the factors described by the SPAC, and various members of the SPAC board will likely assign differing weights to differing factors.³⁹⁸ Another commenter stated that a weighting of factors would require a high degree of professional subjectivity, which may expose boards and financial institutions to liability which would ultimately discourage them from pursuing de-SPAC transactions.³⁹⁹

6. Final Item 1606(b)

We are adopting Item 1606(b) as proposed, with certain modifications discussed below. We continue to believe that disclosure of the factors considered by a SPAC's board of directors (or similar governing body) in making the decision to proceed with a de-SPAC transaction, to the extent they were considered, would provide shareholders with important information to allow those shareholders to make informed voting or investment decisions.

While several commenters supported proposed Item 1606(b),⁴⁰⁰ as discussed

above, some commenters expressed the view that only factors actually considered should be required to be discussed.⁴⁰¹ This was the intent of the language in the proposed rule requiring a discussion of "factors upon which the belief stated in paragraph (a) . . . is based." In light of the comments received, however, to clarify our intent in the final rule, we have added the terms "To the extent considered" to qualify the factors and the analysis of those factors required to be discussed. This change will avoid any potential for ambiguity or misinterpretation that the rule requires a discussion of factors not considered or a more extensive analysis of any factor considered than would otherwise have taken place in the absence of the final rule.⁴⁰² As a result, final Item 1606(b) requires a discussion of a non-exclusive list of factors the board of directors (or similar governing body) considered in making any determination disclosed in response to Item 1606(a) to the extent such factors were considered. These factors would include, but not be limited to, the valuation of the target company, financial projections relied upon by the board of directors (or similar governing body), the terms of financing materially related to the de-SPAC transaction, any report, opinion, or appraisal referred to in Item 1607(a), and the dilution described in Item 1604(c). We believe these factors are generally matters that a board of directors (or similar governing body) is likely to consider in determining whether a transaction is advisable and in the best interests of the SPAC and its security holders (or in making a comparable determination). At the same time, by revising the disclosure requirement to make clear that the listed factors must be disclosed *to the extent considered*, the final rule reflects our understanding that the fiduciary duties and discussions of boards of directors (or similar governing bodies) are not uniform across companies or jurisdictions. Moreover, this change makes clear that final Item 1606(b) does not require boards of directors (or similar governing bodies) to specifically consider the listed factors or, if considering them, dictate how thoroughly to consider them, when determining whether a transaction is advisable and in the best interests of the

Public Citizen. See *supra* note 393 and accompanying text.

⁴⁰¹ Letters from ABA, Goodwin, White & Case. See *supra* notes 394–396 and accompanying text.

⁴⁰² This revision also addresses the comments questioning the Commission's authority to mandate the factors that a SPAC must discuss under Item 1606(b). See *supra* notes 362, 363, and 397 and accompanying text.

³⁹¹ *Id.*

³⁹² Letters from Better Markets, CalPERS, Holger Spamann.

³⁹³ Letters from Committee on Capital Markets Regulation, Consumer Federation.

³⁹⁴ Letters from ABA, Goodwin, White & Case.

³⁹⁵ Letters from ABA, Goodwin.

³⁹⁶ *Id.*

³⁹⁷ Letter from White & Case.

³⁹⁸ Letters from ABA, Goodwin, Ropes & Gray.

³⁹⁹ Letter from Skadden.

⁴⁰⁰ Letters from Better Markets, CalPERS, Committee on Capital Markets Regulation, Consumer Federation, Holger Spamann, NASAA,

SPAC and its security holders (or in making a comparable determination).

Some commenters expressed concern with the practicability of assigning weight to factors, the possibility that shareholders would emphasize those weights too much or too little,⁴⁰³ and that a weighting of factors, which may require a high degree of professional subjectivity, may expose boards and financial institutions to liability which would ultimately discourage them from pursuing de-SPAC transactions.⁴⁰⁴ Although proposed Item 1606(b) was never intended to force disclosure of the weight of each factor where the SPAC board did not, or could not, conduct such a weighting (proposed Item 1606(b) required a discussion of such weighting only “to the extent practicable”), we nevertheless recognize commenters’ concerns and the possibility that the proposed item requirement could be misunderstood. Based on commenters’ suggestions, we have removed references to the weighting of factors from final Item 1606(b) to eliminate such potential misinterpretation and in recognition of the potential practical challenges to assigning a weight to various factors or discussing such weighting.

To reduce potential redundancy in the disclosure requirement, we have also removed the terms “in reasonable detail” from the first sentence of Item 1606(b). Any disclosure responsive to Item 1606(b) is already required to be complete, and the deleted terms are not necessary to confirm that such a principle applies here.

Further, as discussed above, we are revising Item 1606(b) to include any financing materially related to the de-SPAC transaction in the non-exclusive list of factors to be discussed because PIPE offerings and other financings are a common feature of a de-SPAC transaction and, in some instances, the success of the de-SPAC transaction and of the post-de-SPAC company is dependent on the existence of related financing. Given the importance of such financing, we have revised final Item 1606(b) to include financing materially related to the de-SPAC transaction in the non-exclusive list of factors that a board of directors (or similar governing body) would be required to discuss, to the extent the board of directors (or similar governing body) considered such financing. By moving the reference to related financing from Item 1606(a) to Item 1606(b), we are also eliminating

any potential confusion that the board of directors (or similar governing body) would need to make a separate Item 1606(a) determination for financing materially related to the de-SPAC transaction.

7. Proposed Item 1606(c) Through (e)

The Commission proposed Item 1606(c) through (e) to provide additional information about the de-SPAC transaction and any related financing transaction, including whether a majority of unaffiliated security holders is required to approve the transaction(s), the involvement of any unaffiliated representative acting on behalf of unaffiliated security holders, and whether the transaction(s) were approved by a majority of directors of the SPAC who are not employees of the SPAC.

8. Comments: Item 1606(c) Through (e)

Commenters expressed differing views on proposed Item 1606(c) through (e). Some commenters supported the proposed requirements.⁴⁰⁵

With respect to proposed Item 1606(c), one commenter indicated that disclosure about whether the de-SPAC or related financing transaction was structured to require approval of at least a majority of unaffiliated security holders would be redundant due to the requirement of Item 21 of Schedule 14A to disclose similar information.⁴⁰⁶

With respect to proposed Item 1606(d), a few commenters expressed the view that retention of a representative to act solely on behalf of unaffiliated security holders in the negotiation of the de-SPAC transaction is rare and that, as a result, such a requirement will not result in meaningful additional disclosure.⁴⁰⁷ One of the commenters also indicated that the disclosure requirement would not result in a change in the use of unaffiliated representatives.⁴⁰⁸

One commenter supported the proposed requirement to disclose whether any non-executive director voted against, or abstained from voting on, the approval of the de-SPAC transaction⁴⁰⁹ and said it is consistent with current market practice.⁴¹⁰ Another commenter stated that a

requirement to identify any director that voted against or abstained from voting on the approval of the de-SPAC transaction would “prejudice[] companies against de-SPAC transactions” and could inhibit board discussions.⁴¹¹ This commenter said that this proposed requirement would make it more difficult and less likely that individual directors would oppose a transaction if they know that their objection will be made public.⁴¹² This commenter also recommended that the proposed rule be more precise about its applicability being only to directors of the SPAC.⁴¹³

9. Final Item 1606(c) Through (e)

We continue to believe that the new disclosures under Item 1606(c) through (e) will provide investors with important information and a better understanding of the process by which a SPAC determined to proceed with a particular de-SPAC transaction. We are adopting Item 1606(c), (d), and (e) as proposed, with some modifications and minor technical changes discussed below. In the final rules, we moved the requirement to identify any director who voted against, or abstained from voting on, approval of the de-SPAC transaction from proposed Item 1606(a) to final Item 1606(e), because, as Item 1606(e) is generally related to issues involving approval of the de-SPAC transaction by the board of directors (or similar governing body), we considered this a more appropriate place for this requirement.

We disagree with the assertion made by a commenter that the disclosure required under proposed Item 1606(c) would be redundant given the existing requirement in Item 21 of Schedule 14A, which requires disclosure of the vote required for approval (among other things) of the matter by shareholders.⁴¹⁴ Schedule 14A does not expressly differentiate among affiliated and unaffiliated security holders as with Item 1606(c). Also, a Schedule 14A may not be filed in connection with some de-SPAC transactions. Thus, we believe the information provided to investors under Item 1606(c) is not redundant and will benefit investors by improving their understanding of the SPAC’s governance procedures followed in connection with approving the de-SPAC transaction. We expect this improved understanding will enhance investor voting, redemption, and other

⁴⁰³ Letters from ABA, Goodwin, Ropes & Gray. See *supra* note 398 and accompanying text.

⁴⁰⁴ Letter from Skadden. See *supra* note 399 and accompanying text.

⁴⁰⁵ Letters from Better Markets, CalPERS, Committee on Capital Markets Regulation, Consumer Federation, Holger Spamann, NASAA, Public Citizen.

⁴⁰⁶ Letter from Vinson & Elkins.

⁴⁰⁷ Letters from Freshfields, Vinson & Elkins.

⁴⁰⁸ Letter from Freshfields.

⁴⁰⁹ We have moved this requirement from proposed Item 1606(a) to final Item 1606(e). Thus, we are including comments relating to that portion of proposed Item 1606(a) in this section.

⁴¹⁰ Letter from Davis Polk.

⁴¹¹ Letter from Freshfields.

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ Letter from Vinson & Elkins. See *supra* note 406 and accompanying text.

investment decisions. We have revised Item 1606(c) to clarify that the shareholder approval relates to shareholders of the SPAC.

A few commenters said the use of unaffiliated representatives in negotiations is rare.⁴¹⁵ One of those commenters also said the disclosure requirement in proposed Item 1606(d) would not lead to a change in market practices.⁴¹⁶ We note that the proposed rule was not intended and the final rule is not intended to change market practices relating to the retention of any such unaffiliated representative. As is the case with final Item 1606(c) and (e), final Item 1606(d) is a disclosure requirement intended to provide investors with important information and a better understanding of the process by which a SPAC determined to proceed with a particular de-SPAC transaction and does not require SPACs to change their processes in connection with de-SPAC transaction approval.

One commenter said directors will be more reluctant to vote against a de-SPAC transaction if they know that their objection will be made public.⁴¹⁷ We decline to revise Item 1606(e) in response to the commenter's concern. Directors are generally subject to fiduciary duties imposed by State or foreign law. We expect that directors will generally seek to make voting decisions consistent with their duties to security holders or the company irrespective of whether that decision is publicly disclosed.

We have also made conforming changes to Item 1606(c) through (e) to be consistent with final Item 1606(a), as discussed above.

10. Proposed Item 1607

The Commission proposed Item 1607(a) to require disclosure about whether or not the SPAC or SPAC sponsor received any report, opinion, or appraisal from an outside party relating to the consideration or the fairness of the consideration to be offered to security holders or the fairness of the de-SPAC transaction or any related financing transaction to the SPAC, SPAC sponsor or unaffiliated security holders.

The Commission proposed Item 1607(b) to require disclosure of certain information about any such report, opinion, or appraisal from an outside party as well as any negotiation or report by an unaffiliated representative,

including the identity of the outside party or unaffiliated representative, the qualifications of the outside party or unaffiliated representative, any material relationship between the outside party, its affiliates, or unaffiliated representative and the SPAC, SPAC sponsor, or their respective affiliates, whether the SPAC or SPAC sponsor determined the amount of consideration to be paid or the valuation of the target company, or whether the outside party recommended the amount of consideration to be paid or the valuation of the target company. Proposed Item 1607(b) would also require a summary of the negotiation, report, opinion, or appraisal, including a description of the procedures followed, the findings and recommendations, the bases for and methods used to arrive at such findings and recommendations, any instructions received from the SPAC or SPAC sponsor, and any limitation imposed by the SPAC or SPAC sponsor on the scope of the investigation.

The Commission proposed Item 1607(c) to require all such reports, opinions or appraisals to be filed as exhibits to the Form S-4, Form F-4, and Schedule TO for the de-SPAC transaction or included in the Schedule 14A or 14C for the transaction.

11. Comments: Item 1607

We received differing views from commenters. Some commenters generally supported proposed Item 1607.⁴¹⁸ Other commenters generally opposed, or expressed concerns regarding specific aspects of, proposed Item 1607.⁴¹⁹ We discuss these specific concerns in more detail below.

As discussed above in the comments on proposed Item 1606, several commenters stated that proposed Items 1606 and 1607 exceed the Commission's authority because they effectively require de-SPAC transactions to be "substantively fair."⁴²⁰

Some of these commenters suggested that the filing of board materials required under Item 1607(c) is inappropriate because it will

"inevitably" result in a reduction of information presented to, and considered by, a SPAC's board of directors, which may affect the board's ability to fulfill its fiduciary duties.⁴²¹ Given that board materials are typically not prepared with a view that they will be included in public filings and subject to liability, these commenters also expressed the view that filing such materials may expose their preparers to liability under the Securities Act and the Exchange Act and that the proposed requirement would be "impractical and unworkable" because the preparers are not trained to prepare any such materials to withstand scrutiny under the Federal securities laws.⁴²² Also, the commenters indicated that some preparers will not consent to the use of their materials in a public filing.⁴²³ Finally, these commenters stated that some information included in such reports may be immaterial, speculative, or ultimately determined to be unreliable.⁴²⁴

One commenter indicated that the requirement in proposed Item 1607(c) to file as an exhibit (or include) any such report, opinion, or appraisal related to the fairness determination in addition to the requirement in proposed Item 1607(b) to disclose a summary of the report, opinion, or appraisal could limit any incremental benefit an investor would receive from the filing of such reports, opinions, or appraisals.⁴²⁵ Another commenter stated that proposed Item 1607 should not apply to de-SPAC transactions generally but only to those de-SPAC transactions that raise risks of "severe conflicts of interest."⁴²⁶ Yet another commenter suggested that the Commission consider whether the incremental cost and liabilities related to filing the reports would have the unintended consequence of discouraging SPACs from obtaining the reports because SPACs would not be required to obtain the reports as a basis for their fairness determination under proposed Item 1606(a).⁴²⁷ One commenter also proposed that we more narrowly tailor Item 1607(b)(6) to de-SPAC transactions and modify Item 4(b) of Forms S-4 and F-4 to direct filers to comply with the requirements of Item 1607(b)(6), rather than 17 CFR 229.1015(b) ("Item 1015(b)" of

⁴¹⁵ Letters from Freshfields, Vinson & Elkins. See *supra* notes 407 and 408 and accompanying text.

⁴¹⁶ Letter from Vinson & Elkins. See *supra* note 408 and accompanying text.

⁴¹⁷ Letter from Freshfields. See *supra* notes 411 and 412 and accompanying text.

⁴¹⁸ Letters from Committee on Capital Markets Regulation; Consumer Federation; ICGN; Michael Dambra, Ph.D., CPA, University at Buffalo, SUNY, Omri Even-Tov, Ph.D., University of California, Berkeley, Kimberlyn George, University of California, Berkeley (June 3, 2022) ("Michael Dambra, Omri Even-Tov, and Kimberlyn George").

⁴¹⁹ Letters from ABA ("with respect to proposed Item 1607, we believe it is unnecessary and unrealistic to require the filing of board books and other written materials presented to the board in connection with the reports, opinions or appraisals, as in the case with going-private transactions"), Andrew Tuch, Ernst & Young, Goodwin, Ropes & Gray, Vinson & Elkins.

⁴²⁰ Letters from ABA, Goodwin, NYC Bar, White & Case. See *supra* note 362 and accompanying text.

⁴²¹ Letters from ABA, Goodwin.

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ Letter from Ernst & Young.

⁴²⁶ Letter from Andrew Tuch.

⁴²⁷ Letter from Ernst & Young.

Regulation M–A), for de-SPAC transactions.⁴²⁸

12. Final Item 1607

We are adopting Item 1607(a) as proposed with the modifications discussed below. Final Item 1607(a) only requires the disclosure specified in Item 1607(b) *if* the SPAC or SPAC sponsor received any report, opinion (other than an opinion of counsel), or appraisal from an outside party or unaffiliated representative materially relating to a determination disclosed in response to Item 1606(a), the approval of the de-SPAC transaction, the consideration or the fairness of the consideration to be offered to security holders of the target company in the de-SPAC transaction, or the fairness of the de-SPAC transaction to the SPAC, its security holders, or SPAC sponsor. Thus, if such a report, opinion, or appraisal from an outside party or unaffiliated representative was not received, then no disclosure will be required under Item 1607.

The final rule includes some clarifying revisions to Item 1607(a). We added a reference to an “unaffiliated representative” to avoid any confusion arising out of references to an “unaffiliated representative” in Item 1607(b) without a corresponding reference in Item 1607(a). We also added the parenthetical terms “other than an opinion of counsel” to clarify that an opinion of counsel is outside of the rule’s scope. In addition, we included a reference to the target company in final Item 1607(a)(3) to specify which security holders are being offered the consideration. Finally, we reversed the order of “SPAC sponsor” and “security holders” in final Item 1607(a)(4) to avoid the implication that the rule also applies to security holders of SPAC sponsor.

To address commenters’ concerns regarding the possible disclosure of immaterial, speculative, or unreliable materials,⁴²⁹ we are revising Item 1607(a) to limit the scope of the final rule to only reports, opinions, or appraisals that are materially related to any Item 1606(a) determination of the board of directors (or similar governing body) or the other matters listed in final Item 1607(a)(2) through (4). As they already do now in other filings relating to de-SPAC transactions, SPACs may continue to add any supplemental, explanatory discussion so that investors can properly understand the context and purpose of the disclosed reports,

opinions, or appraisals and assess these reports, opinions, or appraisals appropriately.

In addition, by revising Item 1606 to remove the requirement to disclose a fairness determination in the context of a de-SPAC transaction and making corresponding revisions to Item 1607, the final rule should address commenters’ concerns that proposed Item 1607 would exceed the Commission’s authority.⁴³⁰

We believe adopting final Item 1607 is more consistent with the remaining rules applicable to SPACs and de-SPAC transactions than the alternative suggested by a commenter to instead update similar existing requirements in Form S–4 and F–4.⁴³¹ Item 1607(a) is limited to a specific set of events and determinations, unlike Item 4(b) in Form S–4 and F–4, which more generally refer to reports, opinions, or appraisals materially relating to the subject transaction. Also, under the alternative suggested by the commenter, the Item 1607(b) disclosure would not be required to the extent a de-SPAC transaction is not registered on Form S–4 or F–4.⁴³² Finally, we believe registrants will benefit from the centralization of the SPAC-related requirements in the Item 1600 series of Regulation S–K, which are primarily applied to de-SPAC transactions through new general instructions in the relevant forms and schedules,⁴³³ rather than through revisions to specific item requirements within each relevant form or schedule as suggested.

Several commenters expressed concern that compliance with Item 1607(c) will result in a reduction of information presented to the SPAC’s board of directors, which could negatively affect the ability of those directors to fulfill their fiduciary duties.⁴³⁴ Another commenter suggested that the incremental cost and liability of filing such materials would discourage a SPAC from obtaining those materials.⁴³⁵ While we recognize these

concerns and acknowledge that the final rule could impact the information provided to the SPAC’s board of directors,⁴³⁶ we believe there remain significant incentives (e.g., conducting due diligence on the target company or receiving an independent evaluation of the proposed de-SPAC transaction) for boards to seek and use this information as part of their decision-making process so we do not find this a persuasive reason to withhold such disclosure from investors. Directors are generally subject to fiduciary duties imposed by State or foreign law. We expect directors to seek to fulfill those duties by continuing to inform themselves of the potential merits of a de-SPAC transaction with the assistance of outside parties despite the potential public nature, added cost, or risk of liability associated with the filing of any report, opinion, or appraisal.

Furthermore, we believe that it would be impractical to require disclosure under Item 1607 only in instances of “severe conflicts of interest” as one commenter suggested⁴³⁷ because quantifying or classifying the extent of a conflict of interest is difficult given the wide variety of facts and circumstances in each de-SPAC transaction.

We are adopting Item 1607(b) and (c) as proposed, with two technical modifications. We revised Item 1607(b)(5) to specify that the related disclosure is only required for reports, opinions, or appraisals related to the fairness of the consideration to be offered to security holders of the target company in the de-SPAC transaction. We also revised Item 1607(c) to specify that the reports, opinions, or appraisals required to be filed are those referred to in Items 1607(a) and (b).

We disagree with the comments that the filing of reports, opinions, or appraisals pursuant to Item 1607(c) would have limited incremental benefit to investors.⁴³⁸ Although the summary required by Item 1607(b)(6) provides investors with useful information regarding the preparation and findings or recommendations of the report, opinion, or appraisal, we believe that it is important for investors to be able to review the actual report, opinion, or appraisal being summarized and, in many cases, being relied upon by the board when considering the transaction.

We also disagree with the comments that the filing of reports, opinions, or

⁴²⁸ Letters from ABA, Goodwin, NYC Bar, White & Case. *See supra* note 420 and accompanying text.

⁴³¹ Letter from Vinson & Elkins. *See supra* note 428 and accompanying text.

⁴³² Item 14(b)(6) of Schedule 14A directs filers to comply with Item 1015(b) of 17 CFR 229.1000 through 229.1016 (“Regulation M–A”) in the same manner as Form S–4 and F–4. *But see* the potential registration requirements for de-SPAC transactions, in the absence of an exemption, as a result of the adoption of Rule 145a.

⁴³³ *See* General Instruction L.1 to Form S–4; General Instruction VIII to Form S–1; General Instruction I.1 to Form F–4; General Instruction VII to Form F–1; General Instruction K to Schedule TO.

⁴³⁴ Letters from ABA, Goodwin. *See supra* note 421 and accompanying text.

⁴³⁵ Letter from Ernst & Young. *See supra* note 427 and accompanying text.

⁴³⁶ *See* discussion of Item 1607, *infra* section VIII.B.1.iii.f.

⁴³⁷ Letter from Andrew Tuch. *See supra* note 426 and accompanying text.

⁴³⁸ Letter from Ernst & Young. *See supra* note 425 and the accompanying text.

⁴²⁹ Letter from Vinson & Elkins.

⁴²⁸ Letters from ABA, Goodwin. *See supra* note 424 and accompanying text.

appraisals pursuant to Item 1607(c) would present their preparers with an “impractical and unworkable” task or that the preparers would not consent to the public use of such materials.⁴³⁹ While the requirements of Item 1607(c) may affect how preparers price their services as well as the types of information included in their reports and opinions, such materials have historically and routinely been included with filings relating to transactions other than de-SPAC transactions,⁴⁴⁰ and in those cases, registrants and preparers have been able to navigate the preparation, filing, and evaluation of such materials. We are not aware of any reason (and commenters have not provided any specific reason) why materials used in de-SPAC transactions would be any different.

We are also amending Item 601 of Regulation S-K, Schedule 14A, and Schedule TO to implement the final Item 1607(c) exhibit filing requirement. For Forms S-1, S-4, F-1, and F-4, which refer to the exhibit requirements in Item 601 of Regulation S-K, the Item 1607(c) exhibit filing requirement will be incorporated through new 17 CFR 229.601(b)(98) (Item 601(b)(98) of Regulation S-K). Schedule 14A and Schedule TO will incorporate the Item 1607(c) exhibit filing requirement through new Item 25(b) of Schedule 14A and new Item 12(b) of Schedule TO, respectively. Because Item 1 of Schedule 14C generally requires compliance with the relevant items of Schedule 14A, the Item 1607(c) exhibit filing requirement will be incorporated into Schedule 14C through new Item 25(b) of Schedule 14A.

H. Tender Offer Filing Obligations

1. Proposed Item 1608

The Commission proposed Item 1608 to codify a staff position that a Schedule TO filed in connection with a de-SPAC transaction should contain substantially the same information about a target private operating company that is required under the proxy rules and that a SPAC must comply with the procedural requirements of the tender

offer rules when conducting the transaction for which the Schedule TO is filed, such as a redemption of the SPAC securities. Redemption rights offered by a SPAC to its security holders in connection with the de-SPAC transaction or an extension of the timeframe to complete a de-SPAC transaction generally have indicia of being a tender offer, but the Commission staff has not objected if a SPAC does not comply with the tender offer rules when the SPAC files a Schedule 14A or 14C in connection with a de-SPAC transaction or an extension and complies with Regulation 14A or 14C, because the Federal proxy rules would generally mandate substantially similar disclosures and applicable procedural protections as required by the tender offer rules.⁴⁴¹ Proposed Item 1608 would not affect the staff position for those SPACs that file Schedule 14A or 14C for their de-SPAC transactions or extensions. SPACs that do not file a Schedule 14A or 14C (such as FPIs) in connection with the de-SPAC transaction (or an extension of time to complete a de-SPAC transaction),⁴⁴² however, would be subject to the requirements of proposed Item 1608.⁴⁴³

2. Comments: Item 1608

A few commenters generally supported the proposed rule but suggested certain changes.⁴⁴⁴

One of these commenters recommended the Commission codify and clarify that a SPAC filing a Schedule 14A or 14C in connection with a de-SPAC transaction (or seeking an extension of time to complete a de-

SPAC transaction) would neither need to file a Schedule TO nor comply with the tender offer rules.⁴⁴⁵ While expressing support for proposed Item 1608, the same commenter stated that a SPAC stockholder's ability to redeem its shares at its option does not result in the existence of a tender offer.⁴⁴⁶ The same commenter stated that SPACs that are FPIs and that elect to report generally on domestic forms and whose de-SPAC transaction disclosure document is nearly “identical” to a proxy or information statement filed by a domestic filer pursuant to Regulation 14A or 14C should not have to file a Schedule TO.⁴⁴⁷ Finally, the commenter stated that such a SPAC's investors are confused when presented with a proxy statement and a tender offer document that proceed as parallel but different processes while not having any added protection.⁴⁴⁸

Another commenter suggested that proposed Item 1608 is too broad because it would apply to tender offers conducted by SPACs but not related to a de-SPAC transaction.⁴⁴⁹ The same commenter stated that the adoption of proposed Securities Act Rule 145a would effectively require the use of Form S-4 or F-4 for all de-SPAC transactions, thus rendering Item 1608 unnecessary.⁴⁵⁰

3. Final Item 1608

After considering the comments, we are adopting Item 1608 as proposed.

We decline to revise the final item to clarify that a SPAC filing a Schedule 14A or 14C in connection with a de-SPAC transaction (or seeking an extension of time to complete a de-SPAC transaction) would neither need to file a Schedule TO nor comply with the tender offer rules, as recommended by a commenter.⁴⁵¹ We do not believe the codification of the commenter's view is necessary because Item 1608, as adopted, is a more precise way to address an exception to the standard de-SPAC transaction structures that have been used historically. We also note that Item 1608 applies only if a SPAC files a Schedule TO for the redemption of securities offered to security holders (e.g., in connection with a de-SPAC transaction or an extension of the timeframe to complete a de-SPAC transaction). We have revised General Instruction K to Schedule TO to

⁴⁴¹ See *supra* note 23.

⁴⁴² “Foreign private issuer” is defined in Securities Act Rule 405 and 17 CFR 240.3b-4(c). The term “foreign private issuer” means any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter: (1) More than 50% of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) Any of the following: (i) The majority of the executive officers or directors are United States citizens or residents; (ii) More than 50% of the assets of the issuer are located in the United States; or (iii) The business of the issuer is administered principally in the United States.

⁴⁴³ The staff has historically expressed the view that the same information about the target company that would be required in a Schedule 14A should be included in such a Schedule TO, in view of the requirements of Item 11 of Schedule TO and 17 CFR 229.1011(c) (“Item 1011(c)” of Regulation M-A) and the importance of this information in making a redemption decision. Item 11 of Schedule TO states “Furnish the information required by Item 1011(a) and (c) of Regulation M-A.” Item 1011(c) of Regulation M-A states “Furnish such additional material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.”

⁴⁴⁴ Letters from ABA, Vinson & Elkins.

⁴⁴⁵ Letter from ABA.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ Letter from Vinson & Elkins.

⁴⁵⁰ *Id.*

⁴⁵¹ Letter from ABA. See *supra* note 445 and accompanying text.

⁴³⁹ Letters from ABA, Goodwin. See *supra* notes 422 and 423 and accompanying text.

⁴⁴⁰ For example, in a going-private transaction subject to Rule 13e-3, any report, opinion (other than an opinion of counsel) or appraisal from an outside party that is materially related to the transaction is required to be filed as an exhibit to the Schedule 13E-3. See Item 16 of Schedule 13E-3 and 17 CFR 229.1016(c) (Item 1016(c) of Regulation M-A). Additionally, in other public company mergers and business combinations, Item 21(c) of Forms S-4 and F-4 requires that any report, opinion or appraisal materially relating to the subject transaction and referred to in the prospectus be furnished as an exhibit to such form.

separately address the requirements for a filing that relates to a redemption of securities offered to security holders other than in connection with a de-SPAC transaction (*e.g.*, the redemption of securities in connection with an extension of the timeframe to complete a de-SPAC transaction).

With respect to the comment that the redemption of a SPAC's shares at the option of a stockholder is not a tender offer,⁴⁵² as noted above, the Commission has expressed the view that SPAC redemptions conducted pursuant to a SPAC's organizational documents generally have indicia of being a tender offer. However, as discussed above, the Commission staff has not objected if a SPAC does not comply with the tender offer rules when the SPAC files a Schedule 14A or 14C in connection with a de-SPAC transaction or an extension and complies with Regulation 14A or 14C. Item 1608 does not affect this staff position for those SPACs that file a Schedule 14A or 14C for their de-SPAC transactions or extensions.

Regarding the comment that FPIs whose de-SPAC transaction disclosure document is "identical" to a proxy or information statement filed by a domestic filer pursuant to Regulation 14A or 14C should not have to file a Schedule TO,⁴⁵³ we note that an FPI is not required to comply with Regulations 14A or 14C and, thus, any filing the FPI considers to be a proxy or information statement would not be subject to compliance with those regulations and would not be subject to the liability provisions associated with filings required to comply with those regulations (although the filing would be subject to the liability provisions associated with the specific filing made).

Finally, with respect to the same commenter's statement that investors in a SPAC that is an FPI and which delivers both a disclosure document similar to a proxy statement and a tender offer document will be confused without any additional protection,⁴⁵⁴ we believe the SPAC should be able to provide enough clarity and investor support regarding the purposes of each such document to surmount these concerns.

We also received a suggestion to expressly state that Item 1608 is applicable only to tender offers conducted by SPACs related to a de-

SPAC transaction.⁴⁵⁵ We decline to revise Item 1608 as suggested because Item 1608 is intended to apply to Schedule TO filings by SPACs for any redemption of securities offered to security holders, which would include the redemption of securities offered in connection with an extension of the timeframe to complete a de-SPAC transaction.⁴⁵⁶

In response to a commenter's view that the adoption of proposed Rule 145a may result in the requirement to use Form S-4 or F-4 for all de-SPAC transactions, thus rendering Item 1608 unnecessary,⁴⁵⁷ we note that there are certain situations today,⁴⁵⁸ and there could be situations under future SPAC structures, in which Item 1608 would still be applicable and provide security holders with important disclosure to use in making their investment decision.

I. Structured Data Requirement

1. Proposed Item 1610

The Commission proposed Item 1610 to require SPACs to tag all information disclosed pursuant to subpart 1600 of Regulation S-K in Inline XBRL in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual.

2. Comments

A number of commenters supported proposed Item 1610.⁴⁵⁹ One of those commenters said that tagging the quantitative and narrative disclosures would provide investors with searchable formats to access the information they would like to review, including potential conflicts of interests and potential risks.⁴⁶⁰ Another commenter said the provision of structured data will make subpart 1600 of Regulation S-K information more easily accessible for purposes of

aggregation, comparison, filtering, and other analysis.⁴⁶¹

Some commenters addressed whether the Commission should provide exemptions or different requirements for FPIs, SRCs, or emerging growth companies ("EGCs").⁴⁶² One commenter said there was not a compelling reason to provide for such exemptions or different requirements.⁴⁶³ Another commenter said that "[u]ltimately requirements should be the same" across issuers "to ensure the availability of a complete dataset for investors," but that "the Commission may wish to offer a phase-in period for smaller companies and [foreign private issuers] that have more limited resources."⁴⁶⁴

One commenter indicated they believe there is no need for structured data tagging for SPAC IPOs because SPAC IPOs are considerably simpler and easier to understand for investors than traditional IPOs and the redemption rights make an investment in a SPAC IPO considerably less risky.⁴⁶⁵ Another commenter recommended that the Commission evaluate responses from the issuer community regarding the costs of tagging this information.⁴⁶⁶

One commenter said the Commission should provide detailed technical guidance prior to the rule implementation, taking account of all possible use cases for reporting, and an EDGAR Beta testing environment with voluntary early filing allowed 12 to 15 months prior to the first mandatory compliance date.⁴⁶⁷

One commenter suggested the Commission consider use of Legal Entity Identifiers (LEIs) within the registration process and enhanced disclosures of IPOs by SPACs and in de-SPAC transactions.⁴⁶⁸

3. Final Item 1610 and Tagging Compliance Date

After considering the comments received, we are adopting Item 1610 as

⁴⁵⁵ Letter from Vinson & Elkins. *See supra* note 449 and accompanying text.

⁴⁵⁶ If a SPAC files a Schedule TO for any redemption of securities offered to security holders, final Item 1608 requires a Schedule TO to provide the information required by General Instruction L.2. to Form S-4, General Instruction I.2. to Form F-4, and Item 14(f)(2) of Schedule 14A (§ 240.14a-101), as applicable, in addition to the information otherwise required by Schedule TO. If the Schedule TO relates to an extension of the timeframe to complete a de-SPAC transaction and a target company has not been identified by the SPAC, we would not expect this information required by Item 1608 regarding a target private operating company to be known or disclosed.

⁴⁵⁷ *Id.*

⁴⁵⁸ For example, the redemption of securities offered by a foreign private issuer or in connection with an extension of the timeframe to complete a de-SPAC transaction where a Schedule 14A or 14C is not filed.

⁴⁵⁹ Letters from ABA; Crowe LLP (June 13, 2022) ("Crowe"); ICGN; PwC; Campbell Pryde, President and CEO, XBRL US (June 13, 2022) ("XBRL US").

⁴⁶⁰ Letter from ICGN.

⁴⁶¹ Letter from PwC.

⁴⁶² Letters from ICGN, XBRL US. *See* Proposing Release, *supra* note 7, at 29476 (request for comment number 55) (requesting comment on structured data with respect to FPIs, SRCs, and EGCs).

⁴⁶³ Letter from ICGN.

⁴⁶⁴ Letter from XBRL US.

⁴⁶⁵ Letter from Vinson & Elkins.

⁴⁶⁶ Letter from PwC.

⁴⁶⁷ Letter from XBRL US.

⁴⁶⁸ Letter from Stephan Wolf, CEO, Global Legal Entity Identifier Foundation (June 13, 2022) ("Global Legal Entity Identifier Foundation") ("The LEI itself is a 20-digit, alpha-numeric code based on the ISO 17442 standard developed by the International Organization for Standardization (ISO).").

⁴⁵² Letter from ABA. *See supra* note 446 and accompanying text.

⁴⁵³ Letter from ABA. *See supra* note 447 and accompanying text.

⁴⁵⁴ Letter from ABA. *See supra* note 448 and accompanying text.

proposed,⁴⁶⁹ but we are providing a one year phased-in compliance date for the tagging requirements.

We agree with the commenter who said that tagging the quantitative and narrative disclosures would provide investors with searchable formats to access the information they would like to review, including potential conflicts of interests and potential risks.⁴⁷⁰ We also agree with the commenter who said that the provision of structured data will make subpart 1600 of Regulation S-K information more easily accessible for purposes of aggregation, comparison, filtering, and other analysis.⁴⁷¹

We believe that the structured data requirements will enhance the usability of the SPAC disclosures. The requirements we are adopting include detail tagging of the quantitative disclosures and block text tagging of the narrative disclosures required under subpart 1600. These structured data requirements will make SPAC disclosures more readily available and easily accessible to investors and other market participants for aggregation, comparison, filtering, and other analysis.⁴⁷²

One commenter suggested that the Commission may wish to “offer a phase-in period for smaller companies and [foreign private issuers] that have more limited resources.”⁴⁷³ To address these concerns, we have determined to provide a one-year phase in for the tagging requirements. We believe the additional one-year period for tagging compliance will help lessen burdens associated with the tagging requirements under the final rules for all registrants.⁴⁷⁴

⁴⁶⁹ The tagging requirements we are adopting are implemented by inclusion of a cross-reference to Rule 405 of Regulation S-T in Item 1610 of Regulation S-K and by revising 17 CFR 232.405(b) to include the proposed SPAC-related disclosures. We are also adopting amendments that add a corresponding Instruction to Schedule TO.

⁴⁷⁰ Letter from ICGN. *See supra* note 460 and accompanying text.

⁴⁷¹ Letter from PwC. *See supra* note 461 and accompanying text.

⁴⁷² These considerations are generally consistent with objectives of the recently enacted Financial Data Transparency Act of 2022, which directs the establishment by the Commission and other financial regulators of data standards for collections of information. Such data standards must meet specified criteria relating to openness and machine-readability and promote interoperability of financial regulatory data across members of the Financial Stability Oversight Council. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Public Law 117–263, tit. LVIII, 136 Stat. 2395, 3421–39 (2022).

⁴⁷³ Letter from XBRL US. *See supra* note 464 and accompanying text.

⁴⁷⁴ Furthermore, SRCs and FPIs are subject to Inline XBRL requirements for other filings, which minimizes the burden reduction associated with any tagging phase-in for those entities. *See infra* note 477.

We disagree with one commenter’s view that there is no need for structured data tagging for SPAC IPOs because SPAC IPOs are considerably simpler and easier to understand for investors than traditional IPOs and the redemption rights make an investment in a SPAC IPO considerably less risky.⁴⁷⁵ On the contrary, we believe structured data is useful to investors in the SPAC IPO setting (as well as the de-SPAC transaction setting), particularly by enabling comparison and the extraction and analysis of information, as discussed above. In addition, as discussed above, special risks such as conflicts of interest and dilution in SPAC IPOs and de-SPAC transactions may be complex and enhancing investor ability to use, compare, and analyze the data will help investors assess such risks.

We have not received any responses from the issuer community regarding the costs of the data tagging requirements, but we nonetheless do not believe the structured data requirements will unduly add to companies’ burden in preparing their filings based on our extensive experience with existing tagging requirements. We believe such incremental costs are appropriate given the significant benefits to investors, as described above.

As a result of the requirement to tag SPAC IPO disclosures, SPACs will incur tagging compliance costs at an earlier stage of their lifecycle, because SPACs do not have to tag IPO registration statements under current Commission rules.⁴⁷⁶ While the tagging requirements for SPAC disclosures will impose additional compliance costs on registrants, we expect such costs will be modest and largely the final rules will simply shift the timing of such costs because under the current rules such registrants are subject to data tagging requirements in their first post-IPO periodic report on Form 10–Q, 20–F, or 40–F,⁴⁷⁷ as discussed in greater detail in section VIII (Economic Analysis) below.

One commenter recommended that the Commission provide an EDGAR beta-testing environment with voluntary early filing allowed 12 to 15 months prior to the first mandatory compliance date.⁴⁷⁸ In lieu of the suggested beta-testing environment, we have determined to provide a one year

⁴⁷⁵ Letter from Vinson & Elkins. *See supra* note 465 and accompanying text.

⁴⁷⁶ SPACs are currently not obligated to tag any disclosures until they file their first post-IPO periodic report on Form 10–Q, Form 20–F, or Form 40–F. *See* 17 CFR 229.601(b)(101)(i)(A).

⁴⁷⁷ *See* 17 CFR 229.601(b)(101).

⁴⁷⁸ Letter from XBRL US. *See supra* note 467 and accompanying text.

phased-in compliance date for the tagging requirements, as noted above. This approach will provide additional time for registrants to prepare for the new requirements. It will also provide sufficient time for the adoption of a final taxonomy that will take into consideration initial disclosures that will be provided in response to the final rules, which should help lessen the compliance burden for registrants and improve data quality for investors by reducing the need for extensive custom tagging. The commenter also said the Commission should provide detailed technical guidance prior to the rule implementation, “taking account of all possible use cases for reporting” to ensure consistency of reported data.⁴⁷⁹ Consistent with the Commission’s common practice, a draft taxonomy will be made available for public comment, and the Commission will incorporate a final taxonomy into an updated version of the EDGAR system before the tagging requirements take effect.

One commenter suggested the Commission consider use of Legal Entity Identifiers (LEIs) within the registration process and enhanced disclosures of IPOs by SPACs and in de-SPAC transactions.⁴⁸⁰ The Commission is not adopting requirements regarding LEIs in this rulemaking but will take the comment under advisement.⁴⁸¹

III. Disclosures and Liability in De-SPAC Transactions

In light of the reliance on de-SPAC transactions as a vehicle for private operating companies to access the U.S. public securities markets with greater relative frequency than in the past, the Commission proposed a number of new rules and amendments to existing rules to more closely align the treatment of private operating companies entering the public markets through de-SPAC transactions with that of companies conducting traditional IPOs. In connection with these proposals, the Commission expressed the view in the Proposing Release that a private operating company’s method of becoming a public company should not negatively impact investor protection.⁴⁸²

⁴⁷⁹ *Id.*

⁴⁸⁰ Letter from Global Legal Entity Identifier Foundation. *See supra* note 468 and accompanying text.

⁴⁸¹ *See supra* note 472 (regarding the Financial Data Transparency Act of 2022).

⁴⁸² Proposing Release, *supra* note 7, at 29477.

A. Non-Financial Disclosures in De-SPAC Disclosure Documents

1. Proposed Rules

The Commission proposed to require certain non-financial statement disclosures in connection with de-SPAC transactions. The Commission proposed that, if the target company in a de-SPAC transaction is not subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act, disclosure with respect to the target company pursuant to the following items in Regulation S-K would be required in the registration statement or schedule⁴⁸³ filed in connection with the de-SPAC transaction: (1) §§ 229.101 (“Item 101”) (description of business); (2) 229.102 (“Item 102”) (description of property); (3) 229.103 (“Item 103”) (legal proceedings); (4) 229.304 (“Item 304”) (changes in and disagreements with accountants on accounting and financial disclosure); (5) 229.403 (“Item 403”) (security ownership of certain beneficial owners and management, assuming the completion of the de-SPAC transaction and any related financing transaction);⁴⁸⁴ and (6) 229.701 (“Item 701”) (recent sales of unregistered securities).⁴⁸⁵ Where the private operating company is an FPI, the proposed amended registration forms included the option of providing disclosure relating to the private operating company in accordance with Items 3.C, 4, 6.E, 7.A, 8.A.7, and 9.E of Form 20-F, consistent with disclosure provided by FPIs in IPOs.⁴⁸⁶

Also, the Commission proposed amendments to Forms S-1 and F-1 to provide that where these forms are used to register securities in connection with a de-SPAC transaction, these forms must

include the information required in Forms S-4 (in the case of Form S-1) and F-4 (in the case of Form F-1).⁴⁸⁷ Finally, the Commission proposed General Instruction K to Schedule TO and new Item 14(f)(1) to Schedule 14A to incorporate into each of those forms, if the filing relates to a de-SPAC transaction, the disclosure provisions of Items 1603 through 1609 of Regulation S-K, as well as the structured data provision of Item 1610 of Regulation S-K.

2. Comments

Commenters generally supported the Commission’s proposal to align non-financial disclosures for de-SPAC transactions with the requirements in a traditional IPO.⁴⁸⁸ A few commenters suggested the proposed disclosure requirements are consistent with current practice.⁴⁸⁹ These commenters said the proposed disclosure requirements would otherwise be required in a Form 8-K filing following the closing of the de-SPAC transaction.⁴⁹⁰ One commenter said the proposed requirements reflect “current best practice” and would not create a “significant burden” for targets.⁴⁹¹

One commenter said that the proposed requirements, other than Item 701, would require information “already disclosed with respect to target companies.”⁴⁹² In the commenter’s view, the proposed disclosures, including Item 701, “would not provide meaningful information or benefits to investors.”⁴⁹³

Regarding the proposed amendment to Form S-1 to require the information required by Form S-4, one commenter recommended “the final rule include explicit language that such Form S-1 should include all information for the

private operating company that would have been required in a Form S-4.”⁴⁹⁴

3. Final Rules

Except for the modifications we discuss below, we are adopting as proposed: (a) General Instruction L.2 to Form S-4, (b) General Instruction I.2 to Form F-4,⁴⁹⁵ (c) Item 14(f)(2) of Schedule 14A, (d) General Instruction K to Schedule TO, (e) General Instruction VIII to Form S-1, and (f) General Instruction VII to Form F-1.⁴⁹⁶ We believe there will be two main benefits to investors from these requirements. First, the inclusion of these disclosures in a Form S-4 or Form F-4 registration statement will mean that any material misstatements or omissions contained therein would subject the issuers and other parties to liability under sections 11 and 12 of the Securities Act, which would align with the protections afforded to investors under the Securities Act for disclosures provided in a Form S-1 or F-1 for an IPO.

Second, as a result of these new requirements, this information will be available to investors prior to the inception of trading of the post-business combination company’s securities on a national securities exchange, rather than the earliest instance of such requirement being the requirement to set this information out in a Form 8-K due within four business days of the completion of the de-SPAC

⁴⁹⁴ Letter from Grant Thornton LLP (June 13, 2022) (“Grant Thornton”).

⁴⁹⁵ The regulatory text section of the Proposing Release inadvertently omitted Item 304 of Regulation S-K from proposed General Instruction I.2 to Form F-4. We have corrected that oversight in this adopting release. Additionally, the cross-references to the applicable Items from Form 20-F in the case where the target is a foreign private issuer have been corrected from those proposed to align with the requirements applicable to domestic targets, that is Items 4, 6.E, 7.A, 8.A.7, and 16F of Form 20-F. In addition, in Form F-4, we have added the term “applicable” to modify “disclosure requirements” in the following sentence in General Instruction I in order to be consistent with similar language in Form S-4: “To the extent that the applicable disclosure requirements of Subpart 229.1600 are inconsistent with the disclosure requirements of this Form, the requirements of Subpart 229.1600 are controlling.” We made similar changes to add the term “applicable” to Schedule 14A and Schedule TO for the same reason.

⁴⁹⁶ Under the final rules, with respect to the requirements to provide Item 403 of Regulation S-K (security ownership of certain beneficial owners and management) information assuming the completion of the de-SPAC transaction and any related financing transaction, the Item 403 information that must be provided is with respect to certain beneficial owners, directors, named executive officers, and directors and executive officers as a group (*i.e.*, the persons identified in Item 403) of the post-de-SPAC transaction combined company and not for the target company as a separate entity.

⁴⁸³ See (a) proposed Item 14(f)(2) of Schedule 14A; (b) proposed General Instruction L.2. to Form S-4; and (c) proposed General Instruction I.2 to Form F-4. See also proposed Item 1608 of Regulation S-K (incorporating into Schedule TO applicable information required by Item 14(f)(2) of Schedule 14A, General Instruction L.2. to Form S-4, and General Instruction I.2 to Form F-4). Proposed Item 14(f)(2)(vii) of Schedule 14A would have required additional disclosure for any directors appointed without action by the security holders of the SPAC.

⁴⁸⁴ Item 18(a)(5) of Form S-4 currently requires disclosure pursuant to Item 403 regarding the target company and a SPAC’s principal shareholders, through Item 6 of Schedule 14A, in a Form S-4 that includes a proxy seeking shareholder approval of the de-SPAC transaction.

⁴⁸⁵ The proposed changes to Forms S-4 and F-4 regarding disclosure pursuant to Item 701 of Regulation S-K were proposed to be required in Part I (information required in the prospectus) of Form S-4 and Form F-4, whereas in Form S-1, the Item 701 disclosure requirement appears under Part II (information not required in prospectus) of the form.

⁴⁸⁶ Proposed General Instruction L.2 to Form S-4; proposed General Instruction I.2 to Form F-4.

⁴⁸⁷ See proposed General Instruction VIII to Form S-1 (“If the securities to be registered on this Form will be issued in a de-SPAC transaction, attention is directed to the requirements of Form S-4 applicable to de-SPAC transactions, including, but not limited to, General Instruction L.”); proposed General Instruction VII to Form F-1 (“If the securities to be registered on this Form will be issued in a de-SPAC transaction, attention is directed to the requirements of Form F-4 applicable to de-SPAC transactions, including, but not limited to, General Instruction I.”).

⁴⁸⁸ Letters from ABA, CalPERS, Davis Polk, Ernst & Young, ICGN, NASAA, PwC.

⁴⁸⁹ See letters from ABA, PwC.

⁴⁹⁰ Letters from ABA, PwC.

⁴⁹¹ Letter from ABA.

⁴⁹² Letter from Vinson & Elkins. This commenter also said, “We do not believe Item 701 disclosure with respect to the target company, as opposed to the registrant, would be consistent with IPO disclosure or provide meaningful information to investors.”

⁴⁹³ Letter from Vinson & Elkins.

transaction.⁴⁹⁷ As a result, shareholders will be able to consider this information when they make voting, investment, or redemption decisions in connection with a de-SPAC transaction.

One commenter suggested that disclosure under the proposed requirements is already provided with respect to target companies and would not provide meaningful benefits to investors.⁴⁹⁸ We disagree with this view that the requirements would not provide meaningful benefits to investors. Also, we believe compliance with these requirements will be minimally burdensome where disclosure of this information is already market practice and codifying this practice will create a uniform, transparent, minimum floor standard of disclosure across transactions, even if market practice were to change in the future.

In response to the comment recommending that Form S-1 should include explicit language that Form S-1 should include all information for the private operating company that would have been required in a Form S-4,⁴⁹⁹ we have revised General Instruction VIII of Form S-1 to clarify that, if the securities to be registered on Form S-1 will be issued in a de-SPAC transaction, the requirements of Form S-4 apply to Form S-1, including, but not limited to, Item 17 and General Instruction L. Similarly, in the final rules, we have revised General Instruction VII of Form F-1 to clarify that, if the securities to be registered on Form F-1 will be issued in a de-SPAC transaction, the requirements of Form F-4 apply to Form F-1, including, but not limited to, Item 17 and General Instruction I.

With respect to instructions in both General Instruction L.2 to Form S-4 and General Instruction I.2 to Form F-4 that apply with respect to the target company “[i]f the target company is a foreign private issuer,” we made several corrections from the proposal. First, we deleted the requirement to provide target company information pursuant to Item 3.C of Form 20-F (reasons for the offer and use of proceeds), because there is not a similar analog in the list of disclosure items to be provided with respect to the target company when the target company is not an FPI in the same instructions. Second, we deleted the requirement to provide target company

information pursuant to Item 9.E of Form 20-F (dilution) because dilution information will already be required through the application of Item 1604 in the forms in connection with a de-SPAC transaction.⁵⁰⁰ Third, we added a requirement to provide target company information pursuant to Item 16F of Form 20-F (change in registrant’s certifying accountant), because the intent of the proposal was that there should be an analog for FPI target companies to Item 304 of Regulation S-K (changes in and disagreements with accountants on accounting and financial disclosure) in the list of disclosure items to be provided with respect to the target company when the target company is not an FPI in the same instructions and the reference to Item 16F of Form 20-F was inadvertently omitted from the proposal.

In the final rules, we have also revised Item 14(f)(2) of Schedule 14A to remove the additional disclosure required for any directors appointed without action by the security holders of the SPAC to align the disclosure required under Item 14(f)(2) of Schedule 14A with that required under General Instruction L.2 to Form S-4 and General Instruction I.2 to Form F-4.

B. Minimum Dissemination Period

1. Proposed Rules

Historically, in business combination transactions, there has been no requirement under Commission rules to provide security holders with a minimum amount of time to consider proxy statement or other disclosures.⁵⁰¹ In view of the unique circumstances surrounding de-SPAC transactions, the Commission proposed to amend Exchange Act Rule 14a-6 and Rule 14c-2, as well as to add instructions to Forms S-4 (General Instruction L.3) and F-4 (General Instruction I.3), to require that prospectuses and proxy and

information statements filed in connection with de-SPAC transactions be distributed to security holders at least 20 calendar days in advance of a security holder meeting or the earliest date of action by consent, or the maximum period for disseminating such disclosure documents permitted under the applicable laws of the SPAC’s jurisdiction of incorporation or organization if such period is less than 20 calendar days.⁵⁰²

2. Comments

A number of commenters generally supported the proposed minimum dissemination periods for disclosure documents in de-SPAC transactions.⁵⁰³

One commenter on the proposal supported “as much lead time as possible for dissemination” and suggested the Commission “consider whether federal securities laws should override the laws of the jurisdiction of incorporation or organization if such jurisdictions allow less than 20 calendar days advance dissemination for de-SPAC merger/proxy vote documentation where such de-SPAC will be trading on SEC regulated markets.”⁵⁰⁴

Another commenter said that the period of 20 calendar days “is consistent with current market practice

⁵⁰² The 20-calendar day period is the same length of time as the 20-day advance disclosure period in 17 CFR 240.13e-3(f)(1). In adopting a 20-day advance disclosure requirement for dissemination of documents in connection with going private transactions, the Commission stated this requirement was intended to provide reasonable assurance that the information required to be disclosed to security holders would be disseminated sufficiently far in advance of the transactions to permit security holders to make “an unhurried and informed” decision. *Going Private Transactions by Public Companies or Their Affiliates*, Release No. 33-6100 (Aug. 2, 1979) [44 FR 46736 (Aug. 8, 1979)].

⁵⁰³ Letters from ABA, Better Markets (supporting the 20-day dissemination period, stating that “[t]o make meaningful decisions, investors in a SPAC need the information regarding the proposed transaction in a timely manner” and that “[i]n the absence of a federally mandated minimum time period to disseminate information regarding the transaction, the potential for abuse is clear”); CalPERS; CFA Institute (“CFA Institute supports as much lead time as possible for dissemination of disclosure documents regarding the de-SPAC transaction and agrees with the proposed minimum of twenty (20) calendar days in advance merger approval vote”); Davis Polk (“the minimum dissemination period proposed in the amendments to Exchange Act rules 14a-6 and [14c-2] is a welcome modification to improve public confidence by providing a minimum period to review the disclosures provided in connection with a de-SPAC transaction.”); ICGN (“For investors, after a SPAC has searched for a potential business candidate for up to two years, time may be running out. Investors should be able to receive proxy and prospectus statements within a reasonable time frame that provides them with the ability to assess the de-SPAC business transaction and vote accordingly.”); NASAA.

⁵⁰⁴ Letter from CFA Institute.

⁴⁹⁷ We note registrants should already be preparing this information in anticipation of making a Form 8-K filing (or a Form 20-F for an FPI) in connection with a de-SPAC transaction. See *supra* note 489 (letters from ABA, PwC).

⁴⁹⁸ Letter from Vinson & Elkins. See *supra* notes 492 and 493 and accompanying text.

⁴⁹⁹ Letter from Grant Thornton. See *supra* note 494 and accompanying text.

⁵⁰⁰ We made a similar change to Form F-1. We added new Item 9.E.4 to Form F-1 that provides: Where the registrant is a special purpose acquisition company (as defined in Item 1601 of Regulation S-K), in lieu of providing the information required under Item 9.E.1 and Item 9.E.2, provide the disclosure required pursuant to Item 1602(a)(4) and (c) of Regulation S-K in an offering other than a de-SPAC transaction (as defined in Item 1601 of Regulation S-K) and provide the disclosure required under Item 1604(c) of Regulation S-K in connection with a de-SPAC transaction.

⁵⁰¹ In Form S-4 and Form F-4, however, there is a requirement to send a prospectus to security holders a minimum of 20 business days prior to a security holder meeting, or, if no meeting is held, other action, that is applicable when a registrant incorporates by reference information about the registrant or the company being acquired into the form. General Instruction A.2 of Form S-4 and General Instruction A.2 of Form F-4.

for the solicitation period in de-SPAC transactions.”⁵⁰⁵ The commenter said that, if the safe harbor from the Investment Company Act is adopted as proposed, the Commission should “consider an exception to the minimum dissemination period in the event necessary to stay within the safe harbor.”⁵⁰⁶

Another commenter said, “The SEC’s proposed solution does not align with the treatment of IPOs. An IPO prospectus is substantially final at launch of the IPO roadshow; however, since there is no required length for a roadshow, investors in an IPO may only have access to a substantially final version of the prospectus for a few days prior to making their investment decision.”⁵⁰⁷ The commenter said that stockholder meeting notices required to be provided certain numbers of days prior to a stockholder meeting are typically included in proxy statements and stated that, “Under the current framework, the final registration statement or proxy statement in a de-SPAC transaction is available for at least 10 days and a preliminary version is typically publicly available for up to several months longer than in an IPO.” This commenter also stated, “The SEC justifies this differential treatment by citing the complexity of the SPAC structure, the conflicts of interest that are often present in this structure and the effects of dilution on non-redeeming shareholders, but it fails to appreciate that many of these same considerations can be present in IPO transactions and that this proposed rule is decidedly contrary to the SEC’s stated intention of aligning de-SPAC transactions with IPOs.”

Another commenter appeared to suggest that the minimum dissemination period for purposes of proposed General Instruction L.3 to Form S-4 should be the same as the IPO “48 hour” rule of 17 CFR 240.15c2-8 (“Rule 15c2-8”).⁵⁰⁸

3. Final Rules

We are adopting the amendments to Rules 14a-6 and 14c-2 and Forms S-4 (General Instruction L.3) and F-4 (General Instruction I.3) as proposed, except for clarifying changes discussed below. In addition to the need for enhanced disclosure in de-SPAC transactions, we continue to believe that it is important to ensure that SPAC security holders have adequate time to

analyze the information presented in these transactions.

Although the laws of a SPAC’s jurisdiction of incorporation or organization may require the SPAC to send a notice to its security holders at least a specified number of days before the security holder meeting to approve a proposed business combination transaction, the information in such notices is often limited.⁵⁰⁹ These laws do not generally require a minimum period of time for dissemination of other information about the transaction (including any proxy statements or other materials required by the Federal securities laws) to security holders.⁵¹⁰ Exchange listing standards also do not impose such requirements.⁵¹¹ Without a minimum period for dissemination of prospectuses, proxy statements, and other materials before a security holder meeting (or action by consent), SPACs and SPAC sponsors may provide prospectuses or proxy or information statements for a de-SPAC transaction to the SPAC’s security holders within an abbreviated time frame, leaving the security holders with relatively little time to review what are often complex disclosure documents for these transactions.

We recognize that SPACs are often required under their governing instruments and applicable exchange listing rules to complete de-SPAC transactions within a certain time frame. Nevertheless, given the complexity of the structure of SPACs, the conflicts of interest that are often present in this structure and the effects of dilution on non-redeeming shareholders, the 20-calendar day minimum dissemination

periods we are adopting will provide an important investor protection by establishing a minimum time period for security holders to review prospectuses and proxy and information statements in de-SPAC transactions.⁵¹²

In order to account for the prospect that the laws of a SPAC’s jurisdiction of incorporation or organization may have a maximum advance time period provision applicable to the dissemination of materials to security holders, the rules we are adopting include provisions that would require a registrant to satisfy the maximum dissemination period permitted under the applicable law of such jurisdiction when this period is less than 20 calendar days to avoid conflicting with such a requirement. One commenter suggested that the Commission should override the laws of the jurisdiction of incorporation or organization of the SPAC where such jurisdictions provide a maximum period for dissemination of less than 20 days.⁵¹³ We are not adopting such suggestion because we believe the instances where there is a maximum period of less than 20 days will be limited.⁵¹⁴

Another commenter said that the Commission should consider an exception to the minimum dissemination period where necessary to stay within the Investment Company Act safe harbor.⁵¹⁵ As discussed below in section VI, we are not adopting the proposed Investment Company Act safe harbor.

One commenter suggested that the proposed minimum dissemination period is contrary to the Commission’s stated purpose of aligning de-SPAC transactions with IPOs because investors in IPOs typically have only short periods of time to review prospectuses.⁵¹⁶ While we acknowledge that, under the final rules, investors may

⁵⁰⁹ See, e.g., Del. Code Ann. tit. 8, sec. 222; Del. Code Ann. tit. 8, sec. 251(c) (stating, in part, that “[d]ue notice of the time, place and purpose of the meeting shall be given to each holder of stock, whether voting or nonvoting, of the corporation at the stockholder’s address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting [to vote on an agreement of merger or consolidation]”).

⁵¹⁰ See R. Franklin Balotti, Jesse A. Finkelstein, John Mark Zeberkiewicz & Blake Rohrbacher, *Delaware Law of Corporations and Business Organizations*, sec. 9.16 (4th ed. 2022 & Supp. 2022) (“[t]he only statutory requirements for the notice of the meeting are that it state the time, place and purpose of the meeting and that the notice contain a copy of the merger agreement or a summary of the agreement . . . [i]n practice, of course, many such meetings will be governed by the federal proxy rules, which require that a full proxy statement be submitted to the stockholders.”).

⁵¹¹ See, e.g., NYSE Listed Company Manual Section 401.03 which “recommends that a minimum of 30 days be allowed between the record and meeting dates so as to give ample time for the solicitation of proxies” and 402.05 which “recommends the [proxy soliciting] material be provided 30 days prior to the meeting date in order to allow the firms ample time to mail the material to beneficial owners and receive replies from them.”

⁵¹² The requirements to “distribute” the various security holder materials under the minimum dissemination time periods in the rules we are adopting are satisfied when the materials are sent and not when they are received by the security holder. Thus, where the registrant is mailing a full set of hard copy materials to security holders, the requirement would be met when the materials are placed in the mail.

⁵¹³ Letter from CFA Institute. See *supra* note 117 and accompanying text.

⁵¹⁴ A review, in June 2023, by the Commission staff of the corporation laws of each of the 50 U.S. States found there are currently no U.S. States with a maximum period of notice for a stockholder meeting that is less than 20 days. We acknowledge that there remains the possibility a U.S. State could change its law to provide for a maximum period of notice less than 20 days or foreign law could contain such a provision.

⁵¹⁵ Letter from Davis Polk. See *supra* note 506 and accompanying text.

⁵¹⁶ Letter from Vinson & Elkins. See *supra* note 507 and accompanying text.

⁵⁰⁵ Letter from Davis Polk.

⁵⁰⁶ Letter from Davis Polk.

⁵⁰⁷ Letter from Vinson & Elkins.

⁵⁰⁸ Letter from Loeb & Loeb.

have more time to review prospectuses in a de-SPAC transaction than in an IPO, we believe this is appropriate because in the Commission staff's experience, due to the hybrid nature of SPAC transactions, registration statements in de-SPAC transactions in some cases are substantially lengthier than both the earlier IPO registration statement for the specific SPAC (that is involved in the de-SPAC transaction) and registration statements for IPOs of traditional operating companies, as the registration statements contain both IPO-like information about the target company and M&A-like information about the de-SPAC (and other related) transactions. Further, as noted by a different commenter⁵¹⁷ and as observed by Commission staff, current market practice appears to be that many SPACs deliver these disclosures to investors earlier than 20 calendar days prior to the meeting date, meaning the final rules we are adopting should impose minimal burdens in such instances and would provide a uniform and transparent minimum floor standard for the dissemination of such disclosure should market practices change.

One commenter also said that a preliminary version of the final registration statement may be available for months prior to the security holder meeting date related to the de-SPAC transaction.⁵¹⁸ We do not believe this fact provides a basis for not adopting the proposed rules regarding minimum dissemination periods. These preliminary filings may be amended prior to their becoming effective and, in the case of a combined registration and proxy statement that has not yet become effective, this disclosure would not yet have been delivered to security holders.

To the extent one commenter appeared to suggest that the minimum dissemination period should be the same as the IPO "48 hour" rule of Exchange Act Rule 15c2-8,⁵¹⁹ we do not believe a 48-hour period would provide investors sufficient time to review the disclosure, particularly given the complex hybrid nature of de-SPAC transactions. Moreover, providing only 48 hours before the shareholder meeting will not provide enough time for certain shareholders' votes to be considered as a practical matter, given that many shares are held through securities intermediaries such as broker-dealers and such intermediaries often require voting instruction forms to be submitted

to them at least 48 hours prior to the shareholder meeting.⁵²⁰

We are making minor changes in the final rules compared to the proposals for purposes of clarity and to make the registration forms congruent with the amendments to Rules 14a-6 and 14c-2 that we are adopting. The final rules provide that each of Rules 14a-6 and 14c-2 and Forms S-4 and F-4 will contain the language "must be distributed to security holders no later than the lesser of 20 calendar days prior to the date on which the meeting of security holders is to be held or action is to be taken in connection with the de-SPAC transaction." Where the proposed amendments to Forms S-4 and F-4 referred to the "date on which action is to be taken," these revisions eliminate any potential for misinterpretation that the proposed language only referred to action by consent and not at a meeting of security holders. In addition, the terms "to be held" and "to be taken" are intended to clarify these rules since these events are in the future when viewed from the point in time at which the security holder materials are distributed.

C. Private Operating Company as Co-Registrant

1. Proposed Rules

Under section 6(a) of the Securities Act, each "issuer" ⁵²¹ must sign a Securities Act registration statement.⁵²² In the Proposing Release, the Commission stated that a de-SPAC transaction marks the introduction of a private operating company to the U.S. public securities markets, and investors look to the business and prospects of the

⁵²⁰ As discussed in sections III.C and IV.A, the Commission is adopting Rule 145a and amendments to registration statement forms that are related to certain co-registration obligations. As a result, in connection with de-SPAC transactions, Rule 15c2-8 may apply and require the delivery of the preliminary prospectus to any person who is expected to receive a confirmation of sale pursuant to the terms of that rule, because the target company is typically not such a reporting company before the transaction. We will continue to consider the effect of Rule 15c2-8 on de-SPAC transactions. At the present time, however, we are not making any changes to Rule 15c2-8.

⁵²¹ The Securities Act broadly defines the term "issuer" to include every person who issues or proposes to issue any securities. See section 2(a)(4) of the Securities Act [15 U.S.C. 77b].

⁵²² In addition, section 6(a) requires the issuer's principal executive officer or officers, principal financial officer, comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer) to sign a registration statement. When the issuer is a foreign entity, the registration statement must also be signed by the issuer's duly authorized representative in the United States.

private operating company in evaluating an investment in the combined company.⁵²³ The Commission stated that, accordingly, it is the private operating company that, in substance, issues or proposes to issue its securities, as securities of the newly combined public company.⁵²⁴

Given that the target company therefore is, in substance, an "issuer" of securities in a de-SPAC transaction regardless of transaction structure,⁵²⁵ the Commission proposed to amend Instruction 1 to the signatures section of both Form S-4 and Form F-4 to require that, when the SPAC would be the issuer filing the registration statement for a de-SPAC transaction, the term "registrant" would mean not only the SPAC but also the target company.⁵²⁶ The Commission also proposed to amend the general instructions to Forms S-4 and F-4 to provide that, if the securities to be registered on the form will be issued by a SPAC in a de-SPAC transaction, the term "registrant" for purposes of the disclosure requirements of the form means the SPAC.⁵²⁷

2. Comments

A number of commenters generally supported the proposal.⁵²⁸ These commenters indicated that the co-registration proposal would better align liability and disclosure in de-SPAC transactions with IPOs. One stated that "the proposed changes that would treat a target operating company as a co-

⁵²³ Proposing Release, *supra* note 7, at 29479.

⁵²⁴ Proposing Release, *supra* note 7, at 29479.

⁵²⁵ See section 2(a)(4) of the Securities Act.

⁵²⁶ See Proposed Instruction 1 to the Signatures section of Form S-4 and Form F-4. Securities Act registration statement forms use the term "registrant" throughout rather than the term "issuer." See, e.g., Form S-4. A "registrant" is a type of "issuer." Rule 405 defines the term "registrant" as "the issuer of the securities for which the registration statement is filed." For the purposes of this release, we are using the terms "co-registrant" and "co-registration" to describe the situation where the target company must be included as a registrant on a registration statement for a de-SPAC transaction given that the target company is an "issuer" of securities in a de-SPAC transaction regardless of transaction structure. Moreover, the Commission has previously specified who constitutes the "registrant" for purposes of signing a Securities Act registration statement in certain contexts. For example, an instruction in Forms S-4 and F-4 requires two or more existing corporations to be deemed co-registrants when they will be parties to a consolidation and the securities to be offered are those of a corporation not yet in existence at the time of filing. See Instruction 3 to the signature page for Form S-4 and Form F-4.

⁵²⁷ Proposed General Instruction L.1 to Form S-4; proposed General Instruction I.1 to Form F-4.

⁵²⁸ Letters from Andrew Tuch; Americans for Financial Reform Education Fund (June 13, 2022) ("Americans for Financial Reform Education Fund"); Better Markets; CalPERS; CFA Institute; CII; Senator Elizabeth Warren; ICGN; KPMG LLP (June 13, 2022) ("KPMG"); Loeb & Loeb; NASAA; Paul Swegle.

⁵¹⁷ Letter from Davis Polk.

⁵¹⁸ Letter from Vinson & Elkins. See *supra* note 507 and accompanying text.

⁵¹⁹ Letter from Loeb & Loeb. See *supra* note 508 and accompanying text.

registrant at the time a Form S-4 or F-4 is filed would contribute to the Commission achieving its objective to better align de-SPAC transactions with traditional IPOs and afford investors with consistent protections.”⁵²⁹ Another stated that, “By making target companies co-registrants, the Proposed Rules ensure that target operating companies and their directors and officers have strong incentives under section 11 to deter disclosure errors and other misconduct, even in conventionally structured de-SPACs.”⁵³⁰ Yet another stated, “We believe that treating both the SPAC and the target as an issuer under Section 6(a) of the Securities Act would help to align investor protections with those of a traditional IPO.”⁵³¹

Several of these commenters also indicated that the rule proposal would benefit investors by increasing the quality and reliability of the disclosure provided in de-SPAC transaction registration statements. One argued that the disclosures provided in de-SPAC registration statements should be “enhanced” due to the fact that “both parties to the de-SPAC transaction [would be] liable for material misstatements and omissions to investors and shareholders,”⁵³² while another stated “the proposed co-registrant requirements, and attendant liabilities for misstatements or omissions, would ensure that target company directors, boards and managements make accurate representations regarding the status of the pre-merger entity.”⁵³³

Other commenters generally opposed or had concerns regarding the proposal,⁵³⁴ generally characterizing the proposal as “not necessary”⁵³⁵ or “inappropriate.”⁵³⁶ Several commenters stated that the rule proposal would not benefit investors or that the benefit would be uncertain.⁵³⁷ A number of commenters indicated that there are already strong incentives under the existing framework to ensure that disclosures in registration statements for de-SPAC transactions are

accurate and complete, pointing to the existing liability frameworks that they state apply to de-SPAC transactions, such as sections 11 and 17(a) of the Securities Act, sections 10(b) and 14(a) of the Exchange Act, and 17 CFR 240.10b-5 (“Rule 10b-5”), and the Commission’s ability to bring enforcement actions.⁵³⁸ A few of these commenters suggested it is unnecessary to impose additional liability because target company officers and directors, by virtue of their roles in the combined company, will effectively “own” any Exchange Act liabilities related to the disclosure in the de-SPAC transaction registration statement inherited by the combined company.⁵³⁹

Several commenters suggested the co-registrant proposal would create a disparity compared to traditional M&A business combination transactions where a target is not a co-registrant.⁵⁴⁰

⁵³⁸ Letters from ABA (stating that “the Target and its affiliates—while not signatories of the Merger Registration Statement—may nonetheless still be subject to liability for disclosures in the Merger Registration Statement under Rule 10b-5 of the Exchange Act and potential enforcement actions by the Commission under Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and under the proxy rules as participants in the proxy solicitation by the SPAC.”), Davis Polk (“the private operating target company and its affiliates are already subject to enforcement actions by the Commission irrespective of these amendments . . .”), Kirkland & Ellis (noting that “alternative statutory liability schemes cover various aspects of the de-SPAC transaction, including Section 11 where appropriate.”), NYC Bar, Skadden, Vinson & Elkins, Winston & Strawn LLP (June 13, 2022) (“Winston & Strawn”) (“In connection with the stockholder vote to approve the business combination and the repurchase of shares from redeeming SPAC stockholders, a SPAC already has liability under Section 14(a) of the Exchange Act and the antifraud provisions of Rule 10b-5.”).

⁵³⁹ Letters from ABA (noting that under current law “the Target’s directors and officers will ‘own’ the disclosures going forward . . . so there is already a strong incentive for the Target’s directors and officers to ensure the accuracy and completeness of the initial Merger Registration Statement disclosures”), NYC Bar (“it is unnecessary to impose additional liability on the Target’s directors and management in connection with the registration statement because those parties, by virtue of inheriting the disclosures of the registration statement and the ongoing disclosure obligations of the combined public company, will have Exchange Act liability going forward and with respect to historical disclosures as a result of the business combination.”).

⁵⁴⁰ Letters from ABA (“Inasmuch as a De-SPAC Transaction is fundamentally an M&A transaction, and no different than business combinations in other contexts, the Commission has never required targets in other business combinations in these circumstances to be added as co-registrants of a merger registration statement.”), CFA Institute (“As to the need to amend the merger registration statement forms and schedules filed in connection with de-SPAC mergers involving a private operating company target, but not other mergers, creates regulatory uncertainty and confusion.”), Skadden (“Moreover, the proposed co-registrant changes may occasion inconsistent treatment of de-SPAC transactions compared to other business

In contrast, another commenter stated that de-SPAC transactions involve “clearly different facts and circumstances than a non-SPAC merger because the SPAC board is not making a decision about the benefits of changing its operating business model via merger but rather is offering its shareholders the alternative of investing in the surviving company if they prefer that to \$10 in cash.”⁵⁴¹

Other commenters suggested the co-registration proposal is inconsistent with existing definitions of registrant and issuer because, they asserted, the target in a de-SPAC transaction is not issuing or proposing to issue any securities pursuant to the de-SPAC registration statement.⁵⁴²

One commenter opposed the co-registration proposal and expressed the view that: “[i]n most de-SPAC transactions the shares being registered on the SPAC’s registration statement are being issued only to the target’s shareholders and are not being issued or sold by the target company. Adding the target company as a co-registrant means that, in most cases, the target company will have potential Section 11 liability with respect to its own shareholders, but this is not logical or intuitive and is not consistent with the structure of a traditional IPO. In a traditional IPO, a company’s existing shareholders at the time of the IPO do not receive registered shares and would not have potential Section 11 claims against the company due to the disclosures in the IPO registration statement.”⁵⁴³

Another commenter suggested the co-registration proposal is inconsistent with 17 CFR 230.140 (“Rule 140”).⁵⁴⁴ The commenter said the purpose of Rule 140—to “ensure[] that the requisite information about the underlying issuer is adequately disclosed so new investors are fully informed of the attendant risks and returns relating to a potential investment”—is “not a concern in de-SPAC transactions,” because “full Form 10-type information” is already provided under current rules about the

combination transactions that are substantively similar and where the Commission’s concerns about the adequacy of target company disclosure also could exist.”). See also letter from Nicholas Pappas, King & Wood Mallesons (June 13, 2022) (“King & Wood Mallesons”) (“An example of the species of transaction in respect of which the Proposed Rules require qualification is where a seller is proposing to sell a subsidiary/target company. . . . At the time of running the sale process there is generally no intention on the part of the seller to IPO the target company.”).

⁵⁴¹ Letter from Bullet Point Network.

⁵⁴² Letters from ABA, Freshfields. See also definitions of “issuer” and “registrant,” *supra* notes 521 and 526.

⁵⁴³ Letter from Freshfields.

⁵⁴⁴ Letter from ABA.

⁵²⁹ Letter from KPMG.

⁵³⁰ Letter from Andrew Tuch.

⁵³¹ Letter from CII.

⁵³² Letter from Better Markets.

⁵³³ Letter from NASAA.

⁵³⁴ Letters from ABA, Davis Polk, Freshfields, Job Creators Network, NYC Bar, Skadden, Vinson & Elkins.

⁵³⁵ Letter from Davis Polk.

⁵³⁶ Letter from ABA.

⁵³⁷ Letters from ABA (“It is unclear if the Co-Registrant Amendment would meaningfully enhance disclosures and protections for investors in practice”), Davis Polk (“we do not expect that the disclosure practice will be improved by such amendments”), Job Creators Network.

SPAC and the target company.⁵⁴⁵ This commenter also said that in a de-SPAC transaction “no new proceeds are being received by the Combined Company,” which is a “notable difference” from Rule 140.⁵⁴⁶

Other commenters on the co-registration proposal requested certain clarifications. One commenter supported the co-registration requirement but suggested the Commission clarify whether “liability correctly or mistakenly extends to anyone other than unaffiliated, non-redeeming SPAC shareholder[s].”⁵⁴⁷ A different commenter asked the Commission to clarify “which entities would be considered co-registrants in these types of transactions and therefore subject to the applicable requirements under the securities laws.”⁵⁴⁸

Several commenters addressed issues related to the scope of section 11 liability that may stem from the co-registration proposal. One commenter suggested that, as drafted, the proposal would make the target company a signer but not a co-registrant.⁵⁴⁹ Specifically, this commenter said that the proposed change to Instruction 1 to the Signatures section of the forms purports to make the target company a registrant “for purposes of this instruction” but that “the change would solely require that the target company, along with its specified officers and directors, sign the registration statement,” citing for purposes of comparison “existing Instruction 3 to the Signatures section of the forms, which the commenter said is not limited solely to the Signatures section.”⁵⁵⁰ The commenter opposed the proposed co-registration requirements and said that, “if the regulatory goal is exposing the target company and its officers and directors, as signatories, to Section 11 liability for material misstatements or omissions in the registration statement, the proposed amendment to Instruction 1 of the forms accomplishes that.”⁵⁵¹

Other commenters expressed views on which entity and which officers and directors should be required to sign the de-SPAC transaction registration statement. One commenter said that the Commission should “clarify that directors and executive officers of the target company, who will not be directors or executive officers of the target company following the consummation of the de-SPAC transaction, are not required to sign the registration statement used for the de-SPAC transaction and are not deemed to be directors or executive officers of the target company for purposes of the liability provisions of the securities laws.”⁵⁵² Another commenter stated that the “required signatories should be the surviving company, which might be a new registrant and the directors and officers of that entity.”⁵⁵³ In contrast, another commenter expressed the view that “[t]arget company managers and directors are responsible for providing the information necessary for investor approval of a de-SPAC merger, and must provide accounting information as well as current operations and forecasts,” because they “also profit significantly from selling private shares and/or receiving significant ownership positions in the post-SPAC entity.”⁵⁵⁴ A different commenter suggested that liability under the co-registration proposal would be both over-inclusive and under-inclusive, because new officers or directors may be appointed⁵⁵⁵ and because target company officers or directors may resign.⁵⁵⁶ Finally, one commenter pointed out that in a de-SPAC

transaction structured as an acquisition of assets, the assets acquired could not sign a registration statement.⁵⁵⁷

A number of commenters addressed Exchange Act reporting company obligations of the target company as a result of proposed co-registration requirements. Several commenters raised concerns that if the target company is a co-registrant on a de-SPAC registration statement, the target company would become an Exchange Act reporting company at the time of effectiveness.⁵⁵⁸ Specifically, commenters raised concerns about the target company being required to file Exchange Act reports during the interim period between when the registration statement for the de-SPAC transaction becomes effective and the closing of the de-SPAC transaction.⁵⁵⁹

A different commenter said “the proposed rules should clarify that a target company that will ultimately not be the public company parent following the de-SPAC transaction does not become subject to the periodic reporting requirements of Section 13 of the Exchange Act as a result of being a co-registrant in the registration statement for the de-SPAC transaction.”⁵⁶⁰ If a

⁵⁵⁷ Letter from Vinson & Elkins.

⁵⁵⁸ Letters from ABA (noting that, in the time between effectiveness and closing of the merger, “there is a risk that the parties may terminate a De-SPAC Transaction subsequent to the Merger Registration Statement effectiveness date, including (among other reasons) for failure to obtain stockholder approval, failure to satisfy a ‘minimum cash’ or ‘maximum redemption’ closing condition, or failure to obtain a required regulatory or third-party approval. However, once the Merger Registration Statement has been declared effective, under the Co-Registrant Amendment, the Target would nonetheless be subject to ongoing Exchange Act reporting obligations for at least 12 months, even if a De-SPAC Transaction is terminated.”), Crowe, Davis Polk, Freshfields (“[I]f the Form S-4 or Form F-4 is declared effective by the SEC, but the de-SPAC transaction does not close, the target, previously a private company, would be burdened with disclosure obligations as if it was a public company for at least the remainder of the year but would have no securities trading in the public markets.”), Grant Thornton, KPMG.

⁵⁵⁹ Letters from ABA (“The Co-Registrant Amendment, if adopted as proposed, would subject Targets to reporting obligations pursuant to Section 15(d) of the Exchange Act following effectiveness of the Merger Registration Statement. Given the proposed 20-day minimum solicitation period prior to the SPAC stockholders’ meeting, it is entirely possible that the SPAC acquirer and the Target could each be required to file a quarterly report on Form 10-Q or annual report on Form 10-K prior to the Closing date.”), KPMG (“The Proposed Rules indicate that the target operating company would be an issuer, therefore subjecting it to the reporting obligations of a public company and requiring it to file a periodic report for that recently ended reporting period. This would create circumstances where multiple periodic filings, such as Forms 10-K or 10-Q, are required to be filed for the same period for multiple entities involved in the transaction.”), PwC.

⁵⁶⁰ Letter from Davis Polk.

⁵⁵² Letter from Freshfields (“This would be consistent with the obligations in a traditional IPO, where the registrant identifies in the prospectus who will be its directors following the IPO”).

⁵⁵³ Letter from Vinson & Elkins (“Putting aside the signatory/registrator distinction, we believe that the SEC should not make the target company sign the registration statement or be a full co-registrant”).

⁵⁵⁴ Letter from NASAA (“With this in mind, [the commenter] supports the attachment of Section 11 responsibilities to the managers and directors of target companies.”).

⁵⁵⁵ Letter from ABA (“in many (if not substantially all) De-SPAC Transactions, given the minimum 20-day gap period between the Merger Registration Statement’s effectiveness and Closing, and significant Closing uncertainty at the time of registration statement effectiveness, additional directors (such as ‘outside’ independent directors or Sponsor designees) will join the Combined Company board just prior to or concurrent with Closing.”).

⁵⁵⁶ Letter from ABA (“In many De-SPAC Transactions, certain legacy Target directors (and sometimes officers) will resign immediately prior to Closing. So the group of individuals to whom Securities Act liability attaches (i.e., the persons signing the Merger Registration Statement) under the Co-Registrant Amendment is at the same time both under-inclusive and over-inclusive.”).

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ Letter from CFA Institute (“For example, could such liability extend to various SPAC ‘insiders’ who may claim they are unaffiliated and do not redeem, even though they have conducted detailed due diligence and have negotiated special deal terms with the SPAC such as anchor and PIPE investors. Moreover, would this provision extend the target company liability to its own, private company shareowners.”).

⁵⁴⁸ Letter from KPMG (specifically noting that “SPACs may acquire more than one operating company as part of a de-SPAC transaction”).

⁵⁴⁹ Letter from Vinson & Elkins.

⁵⁵⁰ Letter from Vinson & Elkins. *See also supra* note 526 (describing Instruction 3 to the Signatures sections of Forms S-4 and F-4).

⁵⁵¹ Letter from Vinson & Elkins.

target company that does not become the public company parent does become subject to periodic reporting, the commenter said that “upon effectiveness of such registration statement, the target company would, as a result of Section 15(d) of the Exchange Act, automatically be required to begin filing 10-Ks, 10-Qs and other periodic reports required by the Exchange Act, and this would be an Exchange Act reporting obligation that is separate from the public company Exchange Act reporting obligation. These reports would be essentially the same reports as filed by its public parent company and would create significant additional compliance costs while resulting in no substantive additional public disclosure.” The commenter expressed the view that this was not an intended consequence of the rule proposal and said the Commission should clarify this aspect of the co-registration proposal.

Some commenters suggested the Commission should clarify in any final rules whether, in a situation where the de-SPAC transaction is not ultimately consummated, a target company that is a co-registrant for a de-SPAC registration statement that has been declared effective may suspend its periodic reporting obligations under procedures similar to those set out in Staff Legal Bulletin 18 regarding abandoned IPOs and acquired issuers.⁵⁶¹ A number of commenters raised concerns about costs for target companies as co-registrants, particularly with respect to the cost of directors and officers insurance.⁵⁶² One commenter stated, “Targets will be forced to substantially enhance their D&O [directors and officers] liability insurance coverage . . . [and], if the De-SPAC Transaction is never completed

for some reason, Targets would likely not be able to ‘ratchet down’ their coverage to more typical private company levels until the next policy renewal date.”⁵⁶³ One commenter stated that co-registration would result in disclosure requirements that are inconsistent with the proposed revisions to Regulation S-X, raising the issue of whether, if there were multiple target companies, if each company would be required to provide financials audited in accordance with the standards of the Public Company Accounting Oversight Board (United States) (“PCAOB”), rather than solely the predecessor pursuant to proposed Rule 15-01(a) of Regulation S-X.⁵⁶⁴ This commenter indicated that co-registration would result in inconsistencies with IPOs where there are multiple target companies and queried whether all target companies “should be required to sign the registration statement or just the accounting predecessor or acquiror, the one whose shareholders own the largest amount of the surviving company, etc.”⁵⁶⁵ A different commenter asked for guidance regarding a target company’s section 15(d) reporting obligation in the case where there are multiple targets.⁵⁶⁶

One commenter suggested the Commission create a new form for de-SPAC transactions.⁵⁶⁷ The commenter, who supported “the SEC’s stance that SPAC business combinations should be treated as de facto IPOs,” suggested the Commission align SPAC disclosures with Form S-1 by creating a SPAC-specific form that would “closely resemble a traditional IPO S-1, rather than the traditional S-4 used for merger transactions.”⁵⁶⁸ The commenter proposed that, in this new SPAC-specific form, “management projections should not be disclosed to public SPAC shareholders . . . even if management projections have been reviewed by the SPAC board of directors in their role as shareholder fiduciaries.”⁵⁶⁹

3. Final Rules

After considering the comments received, we are adopting the co-registration proposal substantially as proposed, with some modifications.

Under existing rules, when a SPAC or a holding company offers and sells its securities in a registered de-SPAC

transaction, staff observed a majority of the relevant disclosure in the de-SPAC transaction registration statement is about the target company, but only the SPAC or holding company, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, and at least a majority of its board of directors (or persons performing similar functions) are required to sign the registration statement for the de-SPAC transaction. These signers are subject to liability under section 11 of the Securities Act (along with other persons who have liability under section 11). In these situations, the private operating company and its officers and directors may therefore not incur liability as signatories to the registration statement under section 11 of the Securities Act, even though information about the target company is highly significant to investors and this result is unlike if the target company had conducted a traditional IPO registered on Form S-1 or Form F-1. As discussed in more detail below, it is our view that in a de-SPAC transaction the target company is an issuer of securities under section 2(a)(4) of the Securities Act, and, therefore, the target company along with its required officers and directors must sign a registration statement filed by a SPAC or another shell company for the de-SPAC transaction, because both in substance and by operation of new Securities Act Rule 145a, the target company is issuing or proposing to issue securities in a de-SPAC transaction, regardless of the transaction structure. In addition, the business operations of the target company will be those that are carried on by the combined company going forward. The co-registration requirements will therefore enhance investor protection by aligning Federal securities law liability with the entity that is the primary source of the information disclosed about the new public operating company.⁵⁷⁰

Section 2(a)(4) of the Securities Act broadly defines the term “issuer” to include every person who issues or proposes to issue securities. The

⁵⁷⁰ Although target companies’ Federal securities law liability is not currently aligned with the liability of a company in a traditional IPO, they may be exposed to other liability (as are companies in a traditional IPO) from Commission enforcement actions or potentially to investors under anti-fraud statutory provisions and rules that require scienter or negligence to the extent the elements of the relevant cause of action are met. *See, e.g.*, Exchange Act section 10(b) and Rule 10b-5 thereunder (imposing liability for false or misleading statements made in connection with a purchase or sale of securities) and, where applicable, Rule 14a-9 (for false and misleading statements made in connection with the solicitation of proxies).

⁵⁶¹ Letters from Crowe, Grant Thornton. *See also* KPMG (“It is also possible that a SPAC merger is terminated after the effective date of a Form S-4 or F-4 registration statement, due to the vote from shareholders or for other reasons. In this situation, the Proposal indicates that the target operating company is a registrant, with ongoing filing obligations, but without having completed the merger. We recommend the Commission consider clarifying the reporting obligations of target operating companies in such circumstances.”). *See Staff Legal Bulletin No. 18 (CF)* (Mar. 15, 2010).

⁵⁶² Letters from ABA; Anonymous (Apr. 7, 2022) (“Anonymous (Apr. 7, 2022)”; Skadden (“Given the potential for increased risk of liability to boards, we also expect D&O liability insurance premiums to increase significantly, further diluting the value of the transaction to stockholders.”). *See also* letters from ABA, Goodwin, White & Case (each discussing directors and officers insurance premium costs in connection proposed Item 1606(a) and Job Creators Network (noting that costs generally will increase, as “SPACs and target companies should expect extensive diligence requests from financial institutions, advisors, and their counsel in connection with a de-SPAC transaction” (citations omitted)).

⁵⁶³ Letter from ABA.

⁵⁶⁴ Letter from Vinson & Elkins.

⁵⁶⁵ Letter from Vinson & Elkins.

⁵⁶⁶ Letter from PwC.

⁵⁶⁷ Letter from Bullet Point Network.

⁵⁶⁸ *Id.*

⁵⁶⁹ *Id.*

legislative history of this broad definition suggests that the identification of the “issuer” of a security should be based on the economic reality of a transaction to ensure that, in service of the disclosure purpose of the Securities Act, the person(s) that have access to the information most relevant to investors are responsible as an “issuer” for providing such information.⁵⁷¹ However, certain commenters asserted that a target company cannot fall within the definition of issuer in a de-SPAC transaction because “[t]he [t]arget in a De-SPAC Transaction ordinarily is not issuing or proposing to issue any securities pursuant to the Merger Registration Statement—it is the SPAC’s securities to be issued.”⁵⁷² We disagree. As explained below, even in transaction structures where a target company does not issue its own securities in the course of the de-SPAC transaction, it will always be proposing to issue the securities of the combined company in connection with the Rule 145a transaction that is occurring when the SPAC conducts a business combination that changes it from a shell company to an operating company.⁵⁷³

The final rules will ensure that, when a registration statement is filed for a de-SPAC transaction, a target company, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and a majority of its board of directors or persons performing similar functions sign the registration statement.⁵⁷⁴ These signatories, among others, will be liable under section 11, for any material misstatements or omissions in the registration statement (subject to a due diligence defense for all parties other than an issuer) and will thereby be held accountable to investors for the accuracy of the disclosures in the registration statement that previously would have been signed only by the SPAC or a holding company and its officers and directors.⁵⁷⁵ We continue to

believe such liability, and the corresponding accountability to investors, is appropriate given that it is the private operating company that, in substance, issues or proposes to issue its securities, as securities of the newly combined public company. We expect that this requirement will improve the reliability of the disclosure provided to investors in connection with de-SPAC transactions by creating strong incentives for such additional signing persons (among others who would have liability under section 11 as a result of these requirements, such as non-signing directors) to conduct thorough diligence in connection with the de-SPAC transaction and review more closely the disclosure about the target company.

As noted above, the final rules reflect certain modifications to the proposed rules. First, we are requiring that the names of all co-registrants appear on the cover page. Second, we are clarifying that the target company is a registrant and not merely a signatory to the registration statement, as suggested by some commenters. Third, we are addressing scenarios where the target company is a business or assets. Finally, we are expanding the instructions to Forms S–4 and F–4 to also require that the target company and its related section 6(a) signatories sign a registration statement for a de-SPAC transaction filed by a holding company. This change is intended to ensure that the target company signs the registration statement in a transaction structure involving a holding company given that, as noted above, the target company is an “issuer” of the securities in any registered de-SPAC transaction. We have also added the same requirements to Form S–1 and Form F–1. We discuss these changes to the final rules and the comments received on the proposal in more detail below.

Several commenters suggested that there are already strong incentives under the existing framework to ensure that disclosures in registration statements for de-SPAC transactions are accurate and complete.⁵⁷⁶ A few of these commenters suggested it is unnecessary to impose additional liability because target company officers and directors, by virtue of their roles in the combined company, will effectively “own” any Exchange Act liabilities related to the disclosure in the de-SPAC

transaction registration statement inherited by the combined company.⁵⁷⁷

As commenters noted, currently when a SPAC⁵⁷⁸ files a registration statement in connection with a de-SPAC transaction that becomes effective, the SPAC is exposed to strict liability for material misstatements regarding all disclosures in the registration statement, including the disclosures related to the target company. In addition, the SPAC and/or target company may be exposed to liability from Commission enforcement actions or potentially to investors under anti-fraud statutory provisions and rules that require scienter or negligence.⁵⁷⁹

We disagree with the commenters who suggested that existing liability protections make it unnecessary for the target company to have strict liability for statements in the de-SPAC registration statement. In the Securities Act, Congress determined that an issuer that offers and sells its securities to the public using a registration statement should be strictly liable to investors for any material misstatements and omissions in the effective registration statement.⁵⁸⁰ Furthermore, strong private liability in registered transactions is one of the central tenets of the Securities Act.⁵⁸¹ As discussed throughout this release, in a de-SPAC transaction, the target company is an issuer because it, in substance, issues or proposes to issue its securities, as securities of the newly combined public company. As an issuer and the primary source of information disclosed about the combined operating company in registered de-SPAC transactions, the

⁵⁷⁷ See *supra* note 539.

⁵⁷⁸ The discussion, with respect to SPACs filing a registration statement, applies equally to de-SPAC transaction structures where a holding company is created and files a registration statement.

⁵⁷⁹ See *supra* note 570.

⁵⁸⁰ Under section 6(a) of the Securities Act, each “issuer” must sign the registration statement, and “every person who signed the registration statement” has liability under section 11(a) of the Securities Act. See 15 U.S.C. 72(a) and 77k(a). The provisions of section 11(b) of the Securities Act provide limited situations where no liability under section 11(a) will attach but exclude issuers from applying that provision. See 15 U.S.C. 77k(b) (“Notwithstanding the provisions of subsection (a) no person, *other than the issuer*, shall be liable as provided therein who shall sustain the burden of proof. . . .” (Emphasis added)).

⁵⁸¹ See William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 173 (1933) (“The civil liabilities imposed by the Act are not only compensatory in nature but also in terrorem. They have been set high to guarantee that the risk of their invocation will be effective in assuring that the ‘truth about securities’ will be told.”). See also *supra* note 850 and accompanying text (noting the importance of private rights of action in addition to Commission enforcement mechanisms as part of the Federal securities law statutory scheme, which provides for several private rights of action).

⁵⁷¹ See, e.g., H.R. Rep. 73–85, 12 (“Special provisions govern the definition of ‘issuer’ in connection with security issues of an unusual character. . . . [For example, in the case of an investment trust], although the actual issuer is the trustee, the depositor is the person responsible for the flotation of the issue. Consequently, information relative to the depositor and to the basic securities is what chiefly concerns the investor—information respecting the assets and liabilities of the trust rather than of the trustee.”).

⁵⁷² Letter from ABA.

⁵⁷³ See *infra* section IV.A.

⁵⁷⁴ See section 6(a) of the Securities Act [15 U.S.C. 77f].

⁵⁷⁵ In this regard, we note that the target company’s officers and directors are the parties most similarly situated to the officers and directors of a private company conducting a traditional IPO,

in terms of their knowledge of, and background in, the company going public through a de-SPAC transaction.

⁵⁷⁶ Letters from ABA, Kirkland & Ellis, NYC Bar, Skadden, Vinson & Elkins, Winston & Strawn. See *supra* note 538.

target company and its officers and directors are best situated to ensure the accuracy and completeness of such disclosures. Accordingly, investors in de-SPAC transactions are entitled to the protections arising from having the target company and other issuers sign the de-SPAC registration statement, including strict liability for statements in the effective registration statement, regardless of any other liabilities that may apply.

With respect to commenters' argument that the target company, and its officers and directors, will "own" liability for statements made in the de-SPAC registration statement going forward, we acknowledge that, under the existing framework, in specific situations where the target company survives and/or the officers and directors of the target company are officers and directors of the surviving company, they would potentially have liability, including strict liability, for statements in the de-SPAC registration statement. However, that assumption of liability under current regulations does not change the fact that in other transaction structures, the target company and its officers and directors may not be strictly liable for the statements made in any registration statement filed in connection with the de-SPAC transaction, notwithstanding that the target company is, in substance, an issuer in these transaction structures for the reasons discussed above. So that target company liability is consistent across de-SPAC transaction structures, we are adopting the co-registration proposal as proposed, subject to the changes discussed herein.

A few commenters suggested the co-registrant proposal would create a disparity compared to traditional business combination transactions, because the target company is not a co-registrant in those transactions.⁵⁸² In contrast, another commenter said, "These are clearly different facts and circumstances than a non-SPAC merger" because the SPAC board is not deciding whether to change its operating business model via merger but rather is offering its shareholders the opportunity to invest in the surviving company.⁵⁸³ One commenter suggested that requiring the target company to sign a registration statement for a de-SPAC transaction would be inconsistent with how section 11 liability applies in a traditional IPO because, under the co-registrant proposal, the target company could be liable to its existing

shareholders for information about the target company included in the de-SPAC registration statement.⁵⁸⁴ As discussed above,⁵⁸⁵ the hybrid nature of de-SPAC transactions makes them distinguishable from other business combinations or traditional IPOs, because the transaction simultaneously: (i) functions as a form of public capital raising for the target company, (ii) transforms a shell company, that is not a business combination related shell company, into an operating company, and (iii) commonly represents the introduction of a formerly private company to the public markets for the first time. In a de-SPAC transaction, the target company is, in substance, acting as issuer of securities and therefore should incur section 11 liability for the disclosures about its business and its financial results and condition, which constitute critical information for investors making investment, redemption, and voting decisions.

As noted above, the de-SPAC transaction commonly marks the introduction of the target company to the U.S. public securities markets, and investors look to the business and prospects of the target company in evaluating an investment in the combined company.⁵⁸⁶ Moreover, new Rule 145a recognizes that a de-SPAC transaction involves a sale of the securities of the combined company to the SPAC's shareholders. Information relating to the target company is the most significant factor in investor decisions to participate in the de-SPAC transaction because the target company will become the operating business of the combined company upon consummation of the de-SPAC transaction. In addition, the target company is the principal beneficiary of the capital that the SPAC has previously raised and is contributing to the combined company. Co-registration is necessary in these circumstances so that appropriate levels of liability for the related disclosures attaches to the entity that is the primary source of the information disclosed—information that relates to and ultimately benefits the target company itself. Requiring the target company and its officers and directors to sign the registration statement will help to ensure that the information provided to investors in connection with a de-SPAC transaction is accurate, complete, and reliable by incentivizing such parties to exercise

more care in the preparation of that information.

One commenter suggested the co-registration proposal is inconsistent with Securities Act Rule 140, which according to the commenter "ensures that the requisite information about the underlying issuer is adequately disclosed," and does not apply to de-SPAC transactions, because de-SPAC registration statements already provide registrants with disclosures about the target company, and the target company already may be subject to some liability for disclosures contained therein.⁵⁸⁷ While Rule 140 and these new co-registration requirements both expose parties to liability, they do so in different factual situations and for different purposes, and therefore are not inconsistent. As discussed above, we acknowledge that disclosure about target companies is already included in de-SPAC registration statements and target companies may have liability under de-SPAC registration statements in some situations. However, target companies do not have liability as issuers in all transaction structures, notwithstanding the fact that a de-SPAC transaction marks the introduction of the target company to the U.S. public securities markets and investors look to the business and prospects of the target company in evaluating an investment in the combined company.

One commenter supported the proposal but suggested that the Commission clarify whether "liability correctly or mistakenly extends to anyone other than unaffiliated, non-redeeming SPAC shareholder[s]." ⁵⁸⁸ Under the final rules, the target company, its section 6(a) signing persons, and its directors will be subject to the same liability as any other issuer (including to affiliated shareholders).

A different commenter recommended that the Commission clarify "which entities would be considered co-registrants in these types of transactions and therefore subject to the applicable requirements under the securities laws." ⁵⁸⁹ We have provided additional clarification regarding which entities would be a co-registrant in connection with changes to the instructions to registration forms compared to the proposed instructions that we discuss below.

As noted above, one commenter suggested the proposal would make the target company a signer but not a co-

⁵⁸⁴ Letter from Freshfields.

⁵⁸⁵ See *supra* section I.

⁵⁸⁶ Less commonly, the target company may be a public company or may be a previously public company that went private.

⁵⁸⁷ Letter from ABA. See Rule 140.

⁵⁸⁸ Letter from CFA Institute.

⁵⁸⁹ Letter from KPMG (specifically noting that "SPACs may acquire more than one operating company as part of a de-SPAC transaction").

⁵⁸² Letters from ABA, Skadden. See *supra* note 540.

⁵⁸³ Letter from Bullet Point Network.

registrant on Forms S-4 and F-4.⁵⁹⁰ We do not agree with this assessment because, as an “issuer” of the securities in a registered de-SPAC transaction, the target company is both a required signatory of the registration statement pursuant to section 6(a) and a “registrant” under Rule 405. To that end, Rule 405 states that a “registrant” is a type of “issuer”—*i.e.*, “the issuer of the securities for which the registration statement is filed.”

The proposed instruction that the term “registrant” means the SPAC for purposes of the disclosure obligations of the form was not intended to mean that a target company would not also be considered a registrant. The purpose of that instruction was to make clear that the defined term “registrant” on the form refers to the “SPAC” and to allow for a different defined term to be used on the form when specialized disclosure with respect to the “target company” is required. The proposed instruction to the Signatures section was intended to clarify that both the SPAC and target company and their required officers and directors must sign the form but would not have made the target company a “signer not a registrant.”

Nevertheless, to clarify this point, in the final rules, we are making technical changes to the instructions to the forms. In connection with the request by a commenter to compare the proposed instructions to current Instruction 3 to the Signatures section, we are revising the instructions to Forms S-4 and F-4 to require that the names of each co-registrant appear on the cover page consistent with current Instruction 3. We are also revising the instructions to require that the target company and its related section 6(a) signatories sign a registration statement for a de-SPAC transaction filed by a holding company, to account for the fact that the target company is an “issuer” of the securities in any registered de-SPAC transaction. As a result, in the final rules, the last sentence of General Instruction L.1 of Form S-4 provides: “If the securities to be registered on this Form will be issued by a special purpose acquisition company (as such term is defined in Item 1601 of Regulation S-K) or another shell company in connection with a de-SPAC transaction, the registrants also include the target company (as such term is defined in Item 1601 of Regulation S-K), and it must be so designated on the cover page of this Form. In such a de-SPAC transaction, where the target company consists of a business or assets, the seller of the business or assets is deemed to be a

registrant instead of the business or assets and must be so designated on the cover page of this Form. Further, in such a de-SPAC transaction, the term ‘registrant’ for purposes of the disclosure requirements of this Form means the special purpose acquisition company, and the term ‘company being acquired’ for the purposes of the disclosure requirements of this Form means the target company.” Similarly, we are revising the last sentence of Instruction 1 of the Signatures section and revising proposed General Instruction I.1 to Form F-4 and the last sentence of Instruction 1 of the Signatures section of Form F-4 in the same manner as with Form S-4.

Also with respect to changes in the forms to implement the co-registration requirements, in the Proposing Release, the Commission solicited comment on whether Form S-1 and Form F-1 should be amended to include instructions as to signatures which, when used for a de-SPAC transaction, would align the signature requirements of these forms to Form S-4 and Form F-4.⁵⁹¹ Because Form S-1 and, where issuers are eligible, Form F-1, remain available for de-SPAC transactions, it is consistent with the protection of investors to include equivalent instructions as to signatures to ensure consistent liability for de-SPAC transactions regardless of which Securities Act form is used for registration. Accordingly, we are adopting amendments to the instructions to signatures in Form S-1 and Form F-1 that correspond to those in Form S-4 and Form F-4.

A number of commenters stated that liability under the co-registration proposal would be over and/or under-inclusive with respect to the target company’s officers and directors. As discussed above, the final rules make clear that the target company is a co-registrant (and not merely a signer) with respect to the de-SPAC transaction. Therefore, as with any registrant, the target company will be required to have its principal executive officer or officers, principal financial officer and controller or principal accounting officer, and at least a majority of its board of directors or persons performing similar functions sign the registration statement.

With respect to commenter suggestions that only continuing target company officers and directors should sign the registration statement,⁵⁹² we do not believe it would be necessary or

appropriate to adopt such a requirement for several reasons. First, to require signatures only from continuing target company officers and directors would be inconsistent with the statutory signature requirements under Securities Act section 6(a), which requires each issuer’s “principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions” to sign the registration statement.⁵⁹³ Moreover, non-continuing directors who did not sign the registration statement nonetheless may be liable under section 11, because section 11(a)(2) provides that the persons with liability to persons who acquired securities include “[e]very person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted.”⁵⁹⁴ Second, if a target company officer or director will not be a continuing officer or director in the combined company, it is within the control of the target company officer or director to resign prior to the effectiveness of the de-SPAC registration statement.⁵⁹⁵ Finally, we note that Securities Act section 6 requires only the issuer’s “principal executive officer or officers, its principal financial officer, [and] its comptroller or principal accounting officer,” but not other officers, to sign the registration statement.⁵⁹⁶ Accordingly, if the non-continuing target company officers are not one of these officers, they are not required to sign the registration statement.

The proposed definition of target company included a “business” or “assets” and the proposed definition of “de-SPAC transaction” included an “acquisition of assets.” One commenter pointed out that in a de-SPAC transaction structured as an acquisition of assets, the assets acquired could not sign a registration statement.⁵⁹⁷ We are not making any changes in the final definitions of those terms. However, to align the signature requirements for the

⁵⁹³ 15 U.S.C. 77f(a).

⁵⁹⁴ 15 U.S.C. 77k(a)(2).

⁵⁹⁵ See also 15 U.S.C. 77k(b)(1) (allowing for the potential removal of section 11 liability from persons who “before the effective date . . . had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and . . . had advised the Commission and the issuer in writing that he had taken such action”).

⁵⁹⁶ 15 U.S.C. 77f(a).

⁵⁹⁷ See *supra* note 557 and accompanying text.

⁵⁹⁰ Letter from Vinson & Elkins.

⁵⁹¹ See Proposing Release, *supra* note 7, at 29480 (request for comment number 69) (“Should we also adopt corresponding amendments to Form S-1 and Form F-1 in the event that these forms are used by a SPAC for a de-SPAC transaction?”).

⁵⁹² See letters from Freshfields, Vinson & Elkins.

acquisition of a business or assets as closely as possible to the signature requirements being adopted for all other target companies, we are revising the instructions to Forms S-4 and F-4 to provide that, in de-SPAC transactions involving the purchase of assets or a business, the term “registrant” includes the seller of the business or assets. As with target companies in non-asset deals, the signatories of the asset purchase agreement (or similar transaction agreement) would be the sellers required to sign the registration statement.⁵⁹⁸ When a de-SPAC transaction involves the sale of assets that meet the definition of a business in Article 11 of Regulation S-X,⁵⁹⁹ the seller of the assets must provide the historical financial information regarding the acquisition in the registration statement.⁶⁰⁰ Thus, such seller of assets and its officers and directors are similarly situated to the target company and its officers and directors (*i.e.*, the seller of a business that will continue as the combined company) in a de-SPAC transaction not structured as an asset sale.⁶⁰¹

Several commenters raised concerns that, if the target company is a co-registrant on a de-SPAC registration statement, then the target company would become an Exchange Act reporting company at the time of effectiveness and would be required to file reports during the interim period between when the registration statement for the de-SPAC transaction becomes effective and the closing of the de-SPAC transaction.⁶⁰² Relatedly, several commenters noted that the target company would incur this reporting obligation even if the de-SPAC transaction does not ultimately close.⁶⁰³

⁵⁹⁸ This is consistent with the functional approach taken in the language of section 6(a) of the Securities Act, whereby the signatories of a registration statement, who incur section 11 liability, must include “the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer).”

⁵⁹⁹ 17 CFR 210.11-01(d) (“Rule 11-01(d)” of Regulation S-X).

⁶⁰⁰ In the unusual event that the assets do not meet the definition of a business, registrants may wish to contact the Division of Corporation Finance about the reporting of historical financial information for the assets.

⁶⁰¹ The disclosure provided as to the assets acquired that constitute a business would be that which is required for 17 CFR 210.3-05(e), as applicable.

⁶⁰² Letters from ABA, KPMG, PwC (also noting this would be the case in de-SPAC transactions involving multiple target companies). *See supra* note 559.

⁶⁰³ Letters from ABA, Crowe, Davis Polk, Freshfields, Grant Thornton, KPMG. *See supra* note 558.

In response to these concerns, some commenters suggested the final rules should either clarify that a target company that is a co-registrant on a de-SPAC registration statement does not become subject to periodic reporting requirements,⁶⁰⁴ or, in a situation where the de-SPAC transaction is not ultimately consummated, a target company that is a co-registrant for a de-SPAC registration statement may suspend its periodic reporting obligations under procedures similar to those set out in Staff Legal Bulletin 18 regarding abandoned IPOs and acquired issuers.⁶⁰⁵

As “registrants” and “issuers,” target companies will be required by applicable Exchange Act provisions to file periodic reports after the effectiveness of the de-SPAC registration statement and until the target company terminates and/or suspends its Exchange Act report obligations. We do not believe an exemption from the Exchange Act’s reporting requirements is necessary or appropriate in the public interest or consistent with the protection of investors because, during the pendency of the de-SPAC transaction, SPAC investors will benefit from receiving updated information about the target company that, in substance and as reflected in Rule 145a, proposes to issue securities of the newly combined public company, through which the formerly private company will operate its business. In the event that a target company that is not the predecessor⁶⁰⁶ to the shell company is required to file a periodic report such as a Form 10-K or 10-Q as a standalone issuer, the periodic report would be required to comply with the form requirements and doing so could require the disclosure of updated information about the target company that is not the predecessor that would not have been required in the registration statement.⁶⁰⁷

⁶⁰⁴ Letter from Davis Polk.

⁶⁰⁵ Letters from Crowe, Grant Thornton. *See supra* note 561. *See also* KPMG, *supra* note 561.

⁶⁰⁶ The term “predecessor” when used in this section has the same meaning as applied under Regulation S-X and the determination of financial statement requirements. To have a target company that is not the predecessor, the de-SPAC transaction must include multiple targets. We note that the overwhelming majority of de-SPAC transactions only involve one target. *See infra* discussion at note 1226 (indicating that approximately 97% of de-SPAC transactions involve only one target).

⁶⁰⁷ For example, a Form 10-K would require the financial statements of a non-predecessor target company to be audited in accordance with the standards of the PCAOB (17 CFR 210.1-02(d)) as well as disclosure of certain information specified in Regulation S-K, such as executive compensation (17 CFR 229.402).

We agree with commenters,⁶⁰⁸ however, that a target company (that became a reporting company by virtue of being a co-registrant for a de-SPAC transaction registration statement that has been declared effective) may look to 17 CFR 240.12h-3 (Exchange Act Rule 12h-3) and Staff Legal Bulletin 18 for guidance regarding how it can suspend its reporting obligations under section 15(d) of the Exchange Act in situations in which: (1) the de-SPAC transaction does not close, or (2) at the closing of the de-SPAC transaction, the target company is acquired and another company has become a public reporting company with respect to the combined business created by the de-SPAC transaction.

A number of commenters raised concerns about costs for target companies as co-registrants, particularly with respect to the cost of directors and officers insurance.⁶⁰⁹ We recognize that the final rules, in particular the co-registration requirements, could result in increased costs for target companies. Based on Commission staff’s experience, target companies that enter de-SPAC transactions may have directors and officers insurance, and business combination agreements in connection with de-SPAC transactions may contain provisions regarding the provision of directors and officers insurance to target company officials.⁶¹⁰ As a result, any increased costs incurred by target companies in connection with de-SPAC transactions with respect to directors and officers insurance under the final rules will be incremental to those already incurred. Furthermore, we believe these incremental costs are justified by the enhanced investor protections that will be realized by the co-registration requirements. We discuss our analysis of the costs and benefits of the final rules in more detail in section VIII below.

One commenter said that co-registration would result in disclosure requirements that are inconsistent with the proposed revisions to Regulation S-X, raising the issue of whether, if there were multiple target companies, each company would be required to provide

⁶⁰⁸ *See supra* note 561.

⁶⁰⁹ Letters from ABA, Anonymous (Apr. 7, 2022), Skadden. *See supra* note 562. *See also* ABA, Job Creators Network, Goodwin, White & Case. *See supra* note 562.

⁶¹⁰ De-SPAC transaction agreements (such as merger agreements) commonly contain a target company covenant, representation, or similar provision that the target company will maintain its directors and officers insurance or contain a representation or warranty that the target company’s directors and officers insurance listed on the target company’s disclosure schedules to the agreement is in force and effect.

financial statements audited in accordance with PCAOB standards in the de-SPAC registration statement, rather than solely the predecessor pursuant to proposed Rule 15–01(a) of Regulation S–X.⁶¹¹ This commenter indicated that co-registration would result in inconsistencies with IPOs where there are multiple target companies.

As the commenter notes, in the case of multiple companies being acquired by the SPAC, if each of those companies meets the definition of “target company” being adopted,⁶¹² then each would be required to be a co-registrant on the de-SPAC registration statement. Under the final rules all target companies are issuers, as defined by section 2(a)(7) of the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley Act”),⁶¹³ and therefore, under current 17 CFR 210.1–02(d) (“Rule 1–02(d)” of Regulation S–X), any audit of the target’s financial statements would be required to be performed in accordance with PCAOB standards by a PCAOB-registered audit firm. However, also as noted by the commenter, proposed Rule 15–01(a) provided that only target companies that would constitute the predecessor for financial reporting purposes would be required to comply with Rule 15–01 of Regulation S–X in connection with a de-SPAC transaction and provide financial statements audited in accordance with PCAOB standards.⁶¹⁴ We continue to believe this is the appropriate outcome given the hybrid nature of de-SPAC transactions, as it aligns the de-SPAC transaction financial reporting to that of an IPO that includes multiple companies.⁶¹⁵ All target companies provide information that is included in the registration statement and therefore should face Securities Act liability as co-registrants and issuers on the de-SPAC registration statement.⁶¹⁶

⁶¹¹ Letter from Vinson & Elkins.

⁶¹² See Item 1601(d) of Regulation S–K, adopted herein.

⁶¹³ Public Law 107–204, Sec. 404(b) 116 Stat. 745 (2002).

⁶¹⁴ See Rule 15–01 of Regulation S–X, adopted herein.

⁶¹⁵ In an IPO where a shell company acquires multiple businesses in a “put together” transaction, only the predecessor(s) (in some transactions, there may be more than one predecessor) would be required to provide historical financial statements audited in accordance with PCAOB standards. See Rule 1–02(d) of Regulation S–X for the audit requirements and Rule 3–02(a) of Regulation S–X which incorporates a predecessor into these requirements.

⁶¹⁶ Entities for which their financial statements are included in the Form S–4 or F–4 through application of Rule 3–05 of Regulation S–X, Rule 3–14 of Regulation S–X, or 17 CFR 210.8–04 (“Rule 8–04” of Regulation S–X) that are not target

In order to address the tension identified by the commenter, and to clarify that all target companies are co-registrants and issuers but only target companies that are predecessors⁶¹⁷ must provide financial statements audited in accordance with PCAOB standards, we are modifying the proposed revisions to the definition of “audit (or examination)” in Rule 1–02(d) to clarify that Rule 15–01(a) governs the audit requirements for all issuers (both predecessors and non-predecessors) that combine with a shell company.⁶¹⁸ We have also added language to Rule 15–01(a) to clarify that for non-predecessor issuers—in the context of a registration statement or proxy statement filed for the combination with an issuer that is a shell company⁶¹⁹ (e.g., in a de-SPAC transaction, non-predecessor co-registrant target companies)—the term “audit (or examination)” is defined as “an examination of the financial statements by an independent accountant in accordance with either the standards of the PCAOB or U.S. generally accepted auditing standards (“U.S. GAAS”) as specified or permitted in the regulations and forms applicable to those entities for the purpose of expressing an opinion thereon.”⁶²⁰ In addition to adopting the proposed changes to Item 17 of Form S–4 or Form F–4 that direct companies to Article 15 for the financial statements required in a de-SPAC transaction, we have revised the proposed Instruction L to Form S–4 and Instruction I to Form F–4 to clarify that for purposes of the disclosure requirements in those forms, the target company is the “company being acquired.”

As stated in the proposal,⁶²¹ the proposed financial reporting requirements were intended to more closely align the de-SPAC transaction disclosures to the disclosures made where a shell company acquires multiple businesses in a “put together”

companies would not be considered a registrant to the Form S–4 or F–4.

⁶¹⁷ See *supra* note 606.

⁶¹⁸ See Rule 1–02(d) of Regulation S–X, adopted herein.

⁶¹⁹ In the event a non-predecessor issuer is required to file a Form 10–K on a standalone basis, the financial statements would be required to be audited under PCAOB standards, pursuant to Rule 1–02(d) of Regulation S–X because the entity is filing an Exchange Act report for itself and not as a non-predecessor issuer under Rule 15–01(a).

⁶²⁰ See Rule 15–01(a) of Regulation S–X, adopted herein. An issuer that is not a predecessor that is already registered under Exchange Act sections 13(a) or 15(d) would be required to file financial statements audited in accordance with PCAOB standards pursuant to Rule 1–02(d) of Regulation S–X.

⁶²¹ See Proposing Release at section IV.B.

transaction before an IPO. This approach recognizes the hybrid nature of the de-SPAC transaction and the fact that the historical financial statements of the predecessor(s), and in some circumstances the SPAC, would be the historical financial information that would be presented in the combined company’s Exchange Act reporting. The Commission proposed Article 15 of Regulation S–X instead of proposing a requirement that all target companies provide audited financial statements under the registrant disclosure requirements of Item 14 of Form S–4 and Form F–4, which apply to the information required to be provided by registrants other than Form S–3 and Form F–3 eligible registrants, respectively.

To illustrate application of the final rules, assume a SPAC files a Form S–4 to register the issuance of shares to acquire two unrelated businesses and only one of the businesses will be the predecessor for financial reporting purposes. Under the final rules, each “issuer” (the SPAC and the two unrelated businesses) must sign the registration statement.⁶²² The pro forma financial statements included in the Form S–4 depict a reverse recapitalization with the predecessor and an acquisition of the other business. Subsequent Exchange Act reports, such as the next Form 10–K, will include the historical financial statements of the predecessor. In this scenario, the Form S–4 would require two to three years of historical financial statements for the business that will be the predecessor audited in accordance with PCAOB standards. By contrast, the non-predecessor business will be a company being acquired under Item 17 of Form S–4 and its financial statements may be audited in accordance with either PCAOB standards or U.S. GAAS standards, despite it being an issuer.

We recognize that predecessor determinations in de-SPAC transactions may include scenarios that differ from the above illustrative example. For example, a transaction with two target companies could instead result in a determination that there are two predecessors. In that example, the financial statements of both target

⁶²² In addition, section 6(a) requires the issuer’s principal executive officer or officers, principal financial officer, comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer) to sign a registration statement. When the issuer is a foreign entity, the registration statement must also be signed by the issuer’s duly authorized representative in the United States.

companies must be audited in accordance with PCAOB standards.⁶²³

Section 102 of the Sarbanes-Oxley Act makes it “unlawful for any person that is not a registered public accounting firm to prepare or issue . . . any audit report with respect to any issuer.”⁶²⁴ The final rules do not change this requirement for issuers to engage PCAOB-registered accounting firms, and therefore all issuers, including non-predecessor target companies, will need to engage a PCAOB-registered audit firm when the de-SPAC transaction requires audited historical financial statements (but, as discussed above, the PCAOB-registered firm could audit the financial statements of non-predecessor target companies either under the standards of the PCAOB or U.S. GAAS). We acknowledge commenter concerns that, because PCAOB Rule 3211 requires a registered audit firm to file a Form AP with the PCAOB when its audit report for an issuer is included in a filing with the Commission,⁶²⁵ multiple Forms AP may be required for a single transaction where the related registration statement requires audit reports for multiple issuers and when more than one registered audit firm was involved.⁶²⁶ To the extent that the PCAOB deems it necessary to provide guidance or take other action in response to the final rules, the Commission and its staff will work with the PCAOB, as appropriate.

Regarding a commenter’s suggestion that the Commission create a new S-1-like form for de-SPAC transactions, which should not include management projections,⁶²⁷ we do not believe that is necessary. The amendments to existing registration statement forms that we are adopting in this release accomplish our enhanced disclosure goals, including addressing similarities between IPOs and de-SPAC transactions, and appropriately take into account the business combination context of de-SPAC transactions. With respect to projections in registration statements, as

we discuss in detail below, our final definitions of “blank check company” should address the commenter’s concerns regarding the use of projections in de-SPAC transaction registration statements.⁶²⁸ In addition, as noted below, there is no prohibition under current rules on including projections in registration statements on Form S-1 or F-1.⁶²⁹

D. Re-Determination of Smaller Reporting Company (SRC) Status

1. Proposed Rules

SRCs constitute a category of registrants that are eligible for scaled disclosure requirements in Regulation S-K and Regulation S-X and in various forms under the Securities Act and the Exchange Act.⁶³⁰ For example, SRCs are not required to provide quantitative and qualitative information about market risk pursuant to 17 CFR 229.305 (Item 305 of Regulation S-K).⁶³¹ In general, an SRC is a company that is not an investment company, an asset-backed issuer or a majority-owned subsidiary of a parent that is not an SRC and (1) had a public float of less than \$250 million, or (2) had annual revenues of less than \$100 million during the most recently completed fiscal year for which audited financial statements are available and either had no public float or a public float of less than \$700 million.⁶³² SRC status is determined at the time of filing an initial registration statement under the Securities Act or Exchange Act for shares of common equity and is re-determined on an annual basis.⁶³³ Once a company determines that it is not an SRC, it will retain this non-SRC status unless it determines, when making its

⁶²⁸ See *infra* section III.E discussion of PSLRA Safe Harbor.

⁶²⁹ See *infra* discussion in section III.E proximate to notes 836 and 858.

⁶³⁰ See, e.g., 17 CFR 229.10(f) (“Item 10(f)” of Regulation S-K); 17 CFR 210.8-01 (“Rule 8-01” of Regulation S-X), 17 CFR 210.8-02 (“Rule 8-02” of Regulation S-X), 17 CFR 210.8-03, 17 CFR 210.8-07, and 17 CFR 210.8-08 (“Rule 8-08” of Regulation S-X); Item 1A of Form 10 and Form 10-K; Item 3.02 of Form 8-K. An FPI is not eligible to use the scaled disclosure requirements for SRCs unless it uses the forms and rules designated for domestic issuers and provides financial statements prepared in accordance with U.S. GAAP. Instruction 2 to Item 10(f) of Regulation S-K; Instruction 2 to definition of “smaller reporting company” in Securities Act Rule 405 and Exchange Act Rule 12b-2.

⁶³¹ 17 CFR 229.305(e) (Item 305(e) of Regulation S-K).

⁶³² The definition of “smaller reporting company” is set forth in Securities Act Rule 405, Exchange Act Rule 12b-2, and Item 10(f) of Regulation S-K.

⁶³³ See 17 CFR 229.10(f)(2)(i) and (f)(2)(ii) (“Item 10(f)(2)(ii)” of Regulation S-K). In re-determining SRC status annually, a registrant is required to measure its public float as of the last business day of its most recently completed second fiscal quarter.

annual determination, that its public float was less than \$200 million or, alternatively, that its public float and annual revenues fell under certain thresholds.⁶³⁴

The Commission proposed to require a re-determination of SRC status following the consummation of a de-SPAC transaction through proposed amendments to the definition of “smaller reporting company” in each of Securities Act Rule 405, Exchange Act Rule 12b-2, and Item 10(f) of Regulation S-K. Specifically, the Commission proposed that the post-de-SPAC transaction registrant must re-determine its SRC status prior to the time it makes its first Commission filing, other than the Form 8-K filed with Form 10 information,⁶³⁵ and reflect this re-determination in the issuer’s next periodic report.⁶³⁶

The Commission also proposed, in connection with this re-determination: (a) that public float be measured as of a date within four business days after the consummation of the de-SPAC transaction;⁶³⁷ and (b) that annual revenues be measured using the annual revenues of the target company as of the most recently completed fiscal year reported in the Form 8-K filed with Form 10 information.⁶³⁸ The Commission did not propose any changes to the float and revenue thresholds in the current definitions of “smaller reporting company.”

2. Comments

Broadly categorized, commenters on the SRC re-determination proposal focused on four areas: (1) general comments, including those with general expressions of support for or opposition to the proposals, (2) timing and re-determination of public float, (3) ramifications of loss of SRC status, and (4) requests for guidance. In addition, in response to a request for comment from

⁶³⁴ See 17 CFR 229.10(f)(2)(iii); Securities Act Rule 405; Exchange Act Rule 12b-2.

⁶³⁵ A Form 8-K with Form 10 information is filed pursuant to Items 2.01(f), 5.01(a)(8), and/or 9.01(c) of the form.

⁶³⁶ Proposed Item 10(f)(2)(iv) of Regulation S-K; proposed paragraph (3)(iv) in the definition of “smaller reporting company” in Securities Act Rule 405; proposed paragraph (3)(iv) in the definition of “smaller reporting company” in Exchange Act Rule 12b-2.

⁶³⁷ Proposed Item 10(f)(2)(iv)(A) of Regulation S-K; proposed paragraph (3)(iv)(A) in the definition of “smaller reporting company” in Securities Act Rule 405; proposed paragraph (3)(iv)(A) in the definition of “smaller reporting company” in Exchange Act Rule 12b-2.

⁶³⁸ Proposed Item 10(f)(2)(iv)(B) of Regulation S-K; proposed paragraph (3)(iv)(B) in the definition of “smaller reporting company” in Securities Act Rule 405; proposed paragraph (3)(iv)(B) in the definition of “smaller reporting company” in Exchange Act Rule 12b-2.

⁶²³ Determination of the predecessor(s) in a de-SPAC transaction, as in any other transaction, is a facts and circumstances driven determination made by the registrant(s).

⁶²⁴ See 15 U.S.C. 7212(a).

⁶²⁵ See PCAOB Rule 3211, Auditor Reporting of Certain Audit Participants, available at <https://pcaobus.org/about/rules-rulemaking/rules/section-3/section-3-auditing-and-related-professional-practice-standards-rule-3211-amended>. Note 2 to PCAOB Rule 3211 states that the rule requires the filing of a report on Form AP regarding an audit report only the first time the audit report is included in a document filed with the Commission. Subsequent inclusion of precisely the same audit report in other documents filed with the Commission does not give rise to a requirement to file another Form AP. See *id.*

⁶²⁶ Letters from Crowe, Grant Thornton.

⁶²⁷ Letter from Bullet Point Network.

the Commission in the Proposing Release, several commenters addressed issues of re-determination of the following: accelerated filer and large accelerated filer status, EGC status, and FPI status.

A few commenters generally supported the proposed re-determination of SRC status following a de-SPAC transaction.⁶³⁹ One commenter noted that such re-determination would “generally align that determination with that of an IPO.”⁶⁴⁰ Another commenter noted that such re-determination was a signal that “the Commission appears to be forestalling a situation in which a company that would not have been eligible to use the scaled disclosures and other accommodations available to a smaller reporting company if it had become public through a traditional initial public offering would, nonetheless, be eligible to take advantage of those accommodations based on the smaller reporting company status of the pre-merger SPAC.”⁶⁴¹

Others opposed, or raised concerns regarding, the proposed re-determination of SRC status following a de-SPAC transaction.⁶⁴² One commenter stated that such a re-determination immediately after the de-SPAC transaction is inconsistent with the Commission’s objective of aligning the requirements with those of IPOs.⁶⁴³ Another commenter indicated that the change could be problematic for certain transactions, such as “where (1) the SPAC is an SRC and the legal acquirer, (2) the target company was an SRC prior to the closing of the de-SPAC transaction and filed two years of audited financial statements and (3) the post-closing public float exceeds \$700 million.”⁶⁴⁴

One commenter stated they did not object to re-determination based on public float within a short time following closing of the de-SPAC transaction.⁶⁴⁵

Another commenter recommended an alternative approach to re-determining SRC status similar to the determination of SRC status used by an IPO company filing its initial registration statement under Item 10(f)(2)(ii) of Regulation S-K but based on “the revenues and public float of the target company that will be the predecessor for financial reporting purposes.”⁶⁴⁶ This commenter proposed the public float

should be calculated “as the agreed value of the equity consideration payable to the owners of the target company, plus the total outstanding shares of the SPAC (valued at \$10 per share, or whatever the agreed per-share valuation of the equity consideration is), plus any common equity to be issued to finance the de-SPAC transaction.”⁶⁴⁷ The commenter further stated, “The surviving company should have the option to redetermine its status based on the number of shares outstanding after the closing of the de-SPAC transaction (*i.e.*, reflecting redemptions and any equity not issued in the financing transaction or as equity consideration), consistent with the last sentence of S-K Item 10(f)(2)(ii)(C).”⁶⁴⁸

Several commenters addressed the ramifications of the loss of SRC status. Commenters observed that one such ramification is that a registration statement filed after the point at which non-SRC status must be reflected could require incremental disclosure for a non-SRC, such as an additional year of financial statements beyond what was provided in the Form S-4 in connection with a de-SPAC transaction.⁶⁴⁹ One of these commenters suggested, “An alternative approach would be for a company, upon completion of a de-SPAC transaction, to transition into or out of SRC status in conjunction with the annual report to be filed for the year of the transaction based upon the public float as of the later of four business days after the merger transactions or the end of the second fiscal quarter.”⁶⁵⁰ The commenter also added, “Such a revision could still result in an SRC merging with a public shell exiting SRC status more quickly than under current rules while mitigating the burden and inconsistency of providing incremental information not previously required for companies accessing the public market

shortly after the de-SPAC transaction.”⁶⁵¹

Another commenter recommended that the Commission consider whether “accommodations may be warranted to the post-combination entity regarding presentation of audited financial statements and related information (such as MD&A or separate financial statements of significant equity method investees) for periods prior to those presented in the Form S-4 or F-4 for the private operating company.”⁶⁵²

One commenter recommended that the Commission clarify whether an amendment to a Form 8-K with Form 10 information (often referred to as a “super 8-K”) to include pre-acquisition annual financial statements of the private operating company “will be deemed to be the first periodic report for the purposes of effectiveness of the SRC status in connection with a de-SPAC transaction” in circumstances where a de-SPAC transaction is consummated shortly after the fiscal year-end of the private operating company but before its financial statements for that annual period are required in a Form 10 registration statement.⁶⁵³

Another commenter recommended, for purposes of determining whether the post-de-SPAC registrant may exclude management’s assessment of internal control over financial reporting in the Form 10-K covering the fiscal year in which the transaction was consummated, that the Commission codify the staff’s view⁶⁵⁴ that a SPAC’s need to file an amended super 8-K to update the target company’s financial statements for its most recent year-end is the equivalent to the first annual report.⁶⁵⁵

Another commenter stated that the Commission “should revisit and revise

⁶⁵¹ Letter from Ernst & Young.

⁶⁵² Letter from Grant Thornton (“We note that while the provision in Section 7(a)(2)(A) of the Securities Act for providing only two years of audited financial statements is limited to initial registration statements, the SEC staff does not object if emerging growth companies (EGCs) do not present, in other registration statements, audited financial statements for any periods prior to the earliest audited period presented in its initial registration statement,” *citing* Generally Applicable Questions on Title I of the JOBS Act, Question 12).

⁶⁵³ Letter from Grant Thornton.

⁶⁵⁴ Letter from BDO USA, LLP (June 13, 2022) (“BDO”). See CDI 215.02 Division of Corporation Finance, *Compliance and Disclosure Interpretations: Regulation S-K, Section 215.02*, available at <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

⁶⁵⁵ The Commission views this comment from BDO, which discussed considering the amended “super 8-K” as the first annual report following the de-SPAC transaction, as a different comment than the one from Grant Thornton, *supra* note 653, which discussed considering the amended “super 8-K” as the first periodic report following the de-SPAC transaction.

⁶³⁹ Letters from KPMG, PwC.

⁶⁴⁰ Letter from KPMG.

⁶⁴¹ Letter from PwC.

⁶⁴² Letters from Ernst & Young, Vinson & Elkins.

⁶⁴³ Letter from Ernst & Young.

⁶⁴⁴ Letter from Vinson & Elkins.

⁶⁴⁵ Letter from ABA.

⁶⁴⁶ Letter from Vinson & Elkins.

⁶⁴⁷ Letter from Vinson & Elkins.

⁶⁴⁸ Letter from Vinson & Elkins.

⁶⁴⁹ Letters from Ernst & Young (“For example, the proposed redetermination timing could result in a post-business combination company losing its SRC status and having to provide an additional year of audited financial statements (*i.e.*, for the year preceding the earliest period included in the Form S-4/proxy) in a follow-on registration statement. . . .”), Grant Thornton (“the proposed rule would preclude the post-combination entity to use scaled disclosure alternatives in registration statements filed after it files the first periodic report on Form 10-Q but before it files its first annual report on Form 10-K.”), Vinson & Elkins (“If the post-closing public float exceeds \$700 million, the post-closing company would be required to include three years of audited financial statements in its annual report and any registration statement, which may be more than what was included in the Form S-4 or proxy statement filed in connection with the de-SPAC transaction.”).

⁶⁵⁰ Letter from Ernst & Young.

its guidance in 5230.1 of the Division of Corporation Finance's Financial Reporting Manual, which could result in more information being required in a Super 8-K . . . than would be required in a Form S-1 for the target company."⁶⁵⁶

In response to a request for comment in the Commission in the Proposing Release,⁶⁵⁷ several commenters addressed issues of re-determination of filer status, EGC status, and FPI status.

Some commenters recommended that the Commission should put post-de-SPAC transaction registrants on the same footing with respect to filer status as a company that has recently undertaken an IPO, because, otherwise, where a post-de-SPAC transaction registrant inherits the SPAC's reporting history, this could impact the timing of when the post-de-SPAC transaction registrant becomes subject to accelerated filing obligations.⁶⁵⁸ Other commenters suggested the Commission should further analyze or consider the issue.⁶⁵⁹

⁶⁵⁶ Letter from Vinson & Elkins.

⁶⁵⁷ Proposing Release, *supra* note 7, at 29481 (request for comment number 74) ("Should we similarly require a re-determination of emerging growth company status, accelerated filer status, large accelerated filer status and/or foreign private issuer status upon the completion of a de-SPAC transaction?").

⁶⁵⁸ See letters from BDO ("If a de-SPAC transaction is considered the equivalent of an IPO, it is not clear why the post-merger filer status would be treated differently for a company that chooses one going-public transaction over the other."), Ernst & Young ("We recommend aligning the determination of EGC status, filer status and foreign private issuer status for the post-business combination company with the requirements that apply to a traditional IPO. We believe that, if the post-business combination company is not eligible to file a Form S-3 shelf registration statement, it would be consistent to disregard the SPAC's reporting history for purposes of determining filer status (*i.e.*, a post-business combination company would generally be a non-accelerated filer). Such entities should also be permitted to 'reset' the EGC clock of five years for considering their status as an EGC. We have observed an evolution in the structuring of SPAC transactions (*e.g.*, use of a double-dummy structure) that can achieve certain financial reporting results (*e.g.*, filer status and foreign private issuer status). Therefore, we support aligning the re-determination requirements so that the transaction structure would not result in financial reporting differences."), Fenwick & West LLP (June 7, 2022) ("Fenwick") ("The de-SPAC Issuer should benefit from the transition, grace periods and other accommodations following the Closing Date that IPO Issuers benefit from following the Effective Date (for example, the de-SPAC Issuer should benefit from the same exemption from Sarbanes-Oxley Act Section 404(a) compliance under Item 308 of Regulation S-K [17 CFR 229.308] in respect of its first Annual Report on Form 10-K filed after the Closing Date."), Vinson & Elkins.

⁶⁵⁹ Letters from KPMG ("we recommend the Commission consider clarifying the determination of the combined company's filer status upon consummation of the de-SPAC transaction."), PwC ("We believe that the underlying policy objectives associated with each type of filer status should be evaluated to determine whether the goals would be

A few commenters recommended that the EGC status of the combined company following a de-SPAC transaction should be re-determined upon consummation of the de-SPAC transaction.⁶⁶⁰

Several commenters, including some who made recommendations regarding EGC status, recommended that the Commission provide for re-determination of FPI status in connection with the de-SPAC transaction.⁶⁶¹

One commenter noted that they have "observed an evolution in the structuring of SPAC transactions (*e.g.*, use of a double-dummy structure) that can achieve certain financial reporting results (*e.g.*, filer status and foreign private issuer status)" and expressed support for "aligning the re-determination requirements so that the transaction structure would not result in financial reporting differences."⁶⁶²

Another commenter stated: "Allowing re-determination of foreign private issuer status would result in disclosure requirements and filer status determinations that are consistent with what would apply if the target company went public via an IPO, without regard to the de-SPAC transaction structure. A de-SPAC transaction may be structured so that an entity other than the SPAC is the acquiror for tax reasons, due to the domicile of the surviving company, or due to required consents and approvals applicable to the target company. Aligning the disclosure requirements so that, for example, a target company that would have qualified as a foreign private issuer could be acquired by a domestic SPAC and then the surviving company could be immediately eligible

furthered by re-determination. . . . For instance, in proposing that the post-business combination company re-determine its smaller reporting company status shortly after consummating the de-SPAC transaction. . . . We support the proposal to require timely re-determination in this circumstance. We believe a similar analysis should be undertaken with respect to other statuses."

⁶⁶⁰ Letters from Ernst & Young ("We recommend aligning the determination of EGC status, filer status and foreign private issuer status for the post-business combination company with the requirements that apply to a traditional IPO. . . . Such entities should also be permitted to 'reset' the EGC clock of five years for considering their status as an EGC."), KPMG (recommending the Commission consider clarifying the determination of a combined company's filer status, including EGC status, upon consummation of a de-SPAC transaction), PwC (supporting SRC re-determination proposal and stating that "We support the proposal to require timely re-determination in this circumstance. . . . We believe a similar analysis should be undertaken with respect to other statuses."), Vinson & Elkins.

⁶⁶¹ Letters from Ernst & Young, KPMG, Vinson & Elkins.

⁶⁶² Letter from Ernst & Young.

for foreign private issuer status would allow de-SPAC transactions to be structured in the best interests of shareholders."⁶⁶³ Similar views were expressed by another commenter.⁶⁶⁴

3. Final Rules and Guidance

After considering the comments received, we are adopting amendments regarding SRC re-determination as proposed with certain modifications discussed below. We are not adopting requirements, as suggested by several commenters, to re-determine filer status, EGC status, or FPI status upon the completion of a de-SPAC transaction. We are providing guidance, however, concerning FPI status, as discussed further below.

Currently, most SPACs qualify as SRCs,⁶⁶⁵ and Commission rules permit a post-business combination company after a de-SPAC transaction⁶⁶⁶ to retain this status until its next annual determination date in cases where the legal entity that was the SPAC is the legal entity that is the combined company in connection with the de-SPAC transaction. Under current rules, the absence of a re-determination of SRC status upon the completion of these de-SPAC transactions has permitted certain post-business combination companies to avail themselves of scaled disclosure and other accommodations when they otherwise would not have qualified as a SRC had they become public companies through a traditional IPO. The final rules will help level the playing field with a traditional IPO in this respect and reduce information asymmetries that result when a target company

⁶⁶³ Letter from Vinson & Elkins.

⁶⁶⁴ See letter from Freshfields.

⁶⁶⁵ Based on data from SPACInsider (using fields "IPO Date" (2021) and "SPAC Status" (Searching)), the Commission staff observed that out of 163 SPACs that had an IPO in 2021 and had not found a target company by the end of 2021, only two SPACs had outstanding shares of more than 70,000,000. Assuming a per share price of \$10 at the time of the IPO and no changes in outstanding shares since the time of the IPO, the Commission staff views this data as indicating that the 161 other SPACs among that cohort did not have a float at the time of IPO of more than \$700 million, the threshold under paragraph (2)(ii) of the definition of "smaller reporting company" in Rule 12b-2. (In an actual public float calculation for purposes of the "smaller reporting company" definition, affiliate shares would be subtracted from total outstanding shares used in this example, resulting in a lower value than produced in this example, because the applicable value would be multiplied by fewer shares.) With respect to the \$100 million revenue test under paragraph (2) of the definition of "smaller reporting company" in Rule 12b-2, income statement items such as "Interest earned on marketable securities held in trust account" and "Unrealized gain on marketable securities held in trust account" are generally not revenue for SPACs and SPACs typically do not record revenue.

⁶⁶⁶ See Item 10(f)(2) of Regulation S-K; Securities Act Rule 405; Exchange Act Rule 12b-2.

chooses to go public through a de-SPAC transaction.⁶⁶⁷

As adopted, a post-de-SPAC transaction registrant must re-determine its SRC status prior to the time it makes its first Commission filing, other than the Form 8-K filed with Form 10 information, with public float measured as of a date within four business days after the consummation of the de-SPAC transaction and annual revenues measured using the annual revenues of the target company as of the most recently completed fiscal year reported in such Form 8-K.

We disagree with the commenter who recommended an alternative approach similar to the SRC determination for IPO companies under Item 10(f)(2)(ii) of Regulation S-K but based on the revenues and public float of the target company that will be the predecessor for financial reporting purposes.⁶⁶⁸ In an IPO, with respect to public float, Item 10(f)(2)(ii) looks to: the estimated offering price per share at the time of filing of the registration statement; the number of shares of common stock outstanding that are held by non-affiliates before the offering; and the number of shares of common stock to be sold at the estimated offering price. Item 10(f)(2) of Regulation S-K also gives the registrant the option to recalculate its public float at the time the company completes the IPO. As described above, under the commenter's suggested approach, the SRC determination would be made prior to the filing of the de-SPAC registration statement or proxy statement using an "agreed value" method.⁶⁶⁹ Although Item 10(f)(2)(ii) does allow for the use of estimations in the IPO context, we believe that the approach we are adopting, which focuses on a determination of SRC status based on actual post-transaction

public float, is a more effective measure of the registrant's size in the context of a de-SPAC transaction. While in many cases the commenter's suggested recalculation after closing to capture the actual number of shares outstanding would result in the same determination of SRC status post-transaction, the adopted approach helps to ensure the appropriate level of disclosures to investors both before and after the closing of the transaction.

Pursuant to the final rules, the four-business-day window to calculate the public float threshold following a de-SPAC transaction would begin the first business day after the day of closing of the de-SPAC transaction and end four business days later (on the due date for the Form 8-K with Form 10 information that the post-de-SPAC transaction combined company registrant is required to file after the completion of a de-SPAC transaction). Each of the number of shares outstanding that are held by non-affiliates and the price per share would be determined on the same day within the four-business-day window. This window will provide some flexibility for issuers to measure public float compared to the annual re-determination of SRC status (which is determined based on a single business day, the last business day of the most recently completed second fiscal quarter). This four-business-day window will allow for a more accurate reflection of a post-business combination company's public float in view of the limited trading history of the common equity securities of the post-business combination company following a de-SPAC transaction.

Under the proposed rule, a post-de-SPAC transaction registrant would be required to reflect its re-determined SRC status in its next periodic report after the filing of the Form 8-K with Form 10 information (often referred to as a "super 8-K"). We are aware that, if a registrant loses SRC status upon re-determination, there may be certain ramifications. Several commenters observed that one such ramification is that a registration statement filed after the point at which non-SRC status must be reflected could require incremental disclosure for a non-SRC, such as an additional year of financial statements beyond what was provided in the Form S-4 in connection with a de-SPAC transaction.⁶⁷⁰ Inclusion of such incremental disclosure as a result of losing SRC status might present challenges for some registrants in situations where a periodic report

becomes due shortly after the closing of the de-SPAC transaction.⁶⁷¹

In response to these comments, in a change from the proposal, the final rules provide that a registrant does not need to reflect non-SRC status in any filing that is due in the 45-day period following the consummation of the de-SPAC transaction; the registrant would begin to reflect non-SRC status in filings made no later than after the end of this 45-day period. In contrast, under the proposal, a registrant would have needed to reflect non-SRC status in its next periodic report that could be due as soon as one day after the filing of the "super 8-K," which is due a maximum of four days after the consummation of the de-SPAC transaction. We believe the final rule represents a reasonable compromise between the proposed rule's transition period (until the next periodic report, which could be as soon as one day after the de-SPAC transaction) and a commenter's recommended transition period (until filing of the next Form 10-K, which could be as long as nearly 15 months). Another benefit of affording this additional time to registrants that lose SRC status upon re-determination is that, where the registrant intends to file a resale registration statement shortly after the de-SPAC transaction, the registrant will retain its SRC status for purposes of any such resale registration statement filed during this additional time period.⁶⁷²

We are not adopting the commenter's recommendation to exclude, in post-de-SPAC transaction filings, any financial statements that predate the financial statements presented in the Form S-4.⁶⁷³ In our view a registrant that is re-determined to be a non-SRC should not be able to avail itself of the scaled-down requirements applicable to SRCs.

⁶⁷¹ See letters from Vinson & Elkins (indicating that the issue is particularly acute "if the post-closing company's first annual report is due shortly after closing or the company is required to file a registration statement after the company's first periodic report," and advocating for a redetermination based on Item 10(f)(2)(ii) (as discussed above), but stating that "longer periods or accommodations could ameliorate the issues with the proposed amendments to S-K Item 10(f)"), Ernst & Young (indicating that "companies [could be] required to provide additional information in a follow-on registration statement as soon as four days after the de-SPAC transaction").

⁶⁷² Section 230.401(a) of title 17 of the CFR states that a registration statement shall conform to the applicable rules and forms in effect on the initial filing date of such registration statement, and the rule would apply to SRC status. Accordingly, if the registrant is an SRC at the initial public filing date of the resale registration statement, then it may comply with rules for an SRC in subsequent amendments of that registration statement.

⁶⁷³ Letter from Grant Thornton. See *supra* note 652 and accompanying text.

⁶⁶⁷ In the Proposing Release, the Commission said, if a SPAC qualified as an SRC before a de-SPAC transaction and was the legal acquirer in the de-SPAC transaction, the post-business combination company would continue to be able to rely on the scaled disclosure accommodations for SRCs when filing a registration statement between the re-determination date and the post-business combination company's first periodic report. Proposing Release, *supra* note 7, at 29480. For the avoidance of any doubt on the part of registrants related to the references to "legal acquirer" in the Proposing Release, the Commission is clarifying that the final rules we are adopting—that provide re-determined SRC status be reflected in filings 45 days after consummation of the de-SPAC transaction—are not strictly limited to that particular transaction structure for the de-SPAC transaction and apply to any post-de-SPAC transaction combined company registrant that is the same legal entity as the legal entity that was a SPAC (prior to the de-SPAC transaction) regardless of the structure of the de-SPAC transaction.

⁶⁶⁸ Letter from Vinson & Elkins. See *supra* notes 646, 647, and 648 and accompanying text.

⁶⁶⁹ See *id.*

⁶⁷⁰ Letters from Ernst & Young, Grant Thornton, Vinson & Elkins. See *supra* note 649.

Furthermore, we believe the adopted approach will provide registrants with sufficient time to prepare the additional incremental information that may be required in a situation where the registrant has lost its SRC status. We further note that a registrant that loses SRC eligibility may continue to be an EGC, which includes certain scaled reporting accommodations. In light of new Rule 15–01(b), which requires a business combining with a shell company to comply with Regulation S–X as if the transaction were an IPO of common equity securities, we believe that if the registrant retained its EGC status after the transaction, then the registrant would not be required to present audited financial statements for any period prior to the earliest audited period presented in connection with the de-SPAC transaction. We evaluated whether a minimum transition period should be longer or shorter than 45 days. We concluded that 45 days provided an appropriate balance between providing investors with the scaled-up information as soon as reasonably possible and providing registrants with time to prepare for compliance and the ability, in a limited number of instances,⁶⁷⁴ to avoid the costs of preparing an additional year of audited financial statements beyond what was required in the Form S–4.

Commenters also requested guidance on certain issues. One commenter recommended that the Commission clarify whether an amendment to a “super 8–K” could be the first periodic report for the purposes of effectiveness of the SRC status.⁶⁷⁵ Under the final rules, any filing made 45 days after the consummation of the de-SPAC transaction must reflect re-determined SRC status, including a filing to amend a “super 8–K.”

Unrelated to SRC re-determination, other commenters recommended codification of, or revisions to, staff guidance relating to the position that a SPAC’s need to file an amended Form 8–K to update the target company’s financial statements for its most recent year-end is the equivalent to the first annual report⁶⁷⁶ and, separately, the

guidance in FRM 5230.1, which summarizes the Commission’s basis for requiring Form 10 information under Item 2.01(f) of Form 8–K and how the staff looks to the accounting acquirer’s SRC-eligibility at the time of the transaction for purposes of the disclosure in the Form 8–K.⁶⁷⁷ We do not believe that such codification or revisiting of the referenced staff guidance is necessary in connection with the final amendments. We believe the guidance in FRM 5230.1 is consistent with the final rules because the final rules look to the target company’s SRC-eligibility in all shell company transactions, including where the target company is the accounting acquirer.

Rule 12b–2 provides the definitions of accelerated filer and large accelerated filer, including requisite conditions.⁶⁷⁸ Accelerated filer and large accelerated filer status are re-determined annually as of the end of the issuer’s fiscal year.⁶⁷⁹ For a new registrant that just completed an IPO, however, a period of at least twelve months would need to elapse before it would be required to comply with rules as an accelerated filer or a large accelerated filer.⁶⁸⁰ In contrast, after consummation of the de-SPAC transaction, depending on the timing of the SPAC IPO and the de-SPAC transaction, because of the SPAC’s reporting history, where the legal entity that was the SPAC is the same legal entity that is the post-de-

further discussion of the application of ICFR at *infra* note 685.

⁶⁷⁷ Letter from Vinson & Elkins.

⁶⁷⁸ The four existing conditions for qualifying as an accelerated filer are that an issuer: (i) had an aggregate worldwide public float of \$75 million or more, but less than \$700 million, as of the last business day of the issuer’s most recently completed second fiscal quarter; (ii) has been subject to the requirements of 15 U.S.C. 78m (Exchange Act section 13(a)) or 15 U.S.C. 78o(d) (Exchange Act section 15(d)) for a period of at least twelve calendar months; (iii) has filed at least one annual report pursuant to those sections; and (iv) the issuer is not eligible to use the requirements for SRCs under the revenue test in paragraph (2) or (3)(iii)(B) of the “smaller reporting company” definition in Rule 12b–2, as applicable. For a large accelerated filer, conditions (ii) through (iv) are the same, but condition (i) is that an issuer had an aggregate worldwide public float of \$700 million or more, as of the last business day of the issuer’s most recently completed second fiscal quarter. See paragraphs (1) and (2) in the definition of “accelerated filer and large accelerated filer” in Rule 12b–2.

⁶⁷⁹ See paragraphs (1), (2), and (3) in the definition of “accelerated filer and large accelerated filer” in Rule 12b–2.

⁶⁸⁰ See paragraph (1)(ii) in the definition of “accelerated filer and large accelerated filer” in Rule 12b–2 (“The issuer has been subject to the requirements of section 13(a) or 15(d) of the Act (15 U.S.C. 78m or 78o(d)) for a period of at least twelve calendar months;”) and paragraph (2) in the definition.

SPAC transaction combined company, the post-de SPAC transaction combined company may not have the same period until it must make filings pursuant to accelerated filer or large accelerated filer status as compared to a registrant that just completed an IPO.⁶⁸¹ By virtue of being an accelerated or large accelerated filer, among other differences compared to a non-accelerated or non-large accelerated filer, the post-de-SPAC transaction combined registrant would be required to: (a) file its periodic reports sooner than otherwise required;⁶⁸² and (b) subject its management’s assessment of internal controls over financial reporting to auditor attestation.⁶⁸³ As noted above, several commenters recommended that the Commission put post-de-SPAC transaction registrants on the same footing with respect to filer status as a company that has recently undertaken an IPO.⁶⁸⁴

One of the main consequences of the approach suggested by these comments—that the reporting history of the SPAC should be disregarded such that the post-de-SPAC transaction combined company could recommence the 12-month period that must elapse (pursuant to paragraphs (1)(ii) and (2)(ii) in the definition of “accelerated filer and large accelerated filer” in Rule 12b–2) before it is possible to acquire accelerated or large accelerated filer status—would be to delay management’s assessment of internal control over financial reporting and outside auditor attestation of management’s assessment for companies that are not EGCs. We do not believe it is necessary or appropriate to amend the filer status requirements for this reason; however, we note that the Commission staff has taken the position that under certain conditions, the Commission staff would not object if the post-combination registrant were to exclude management’s assessment of internal control over financial reporting in the Form 10–K covering the fiscal

⁶⁸¹ If a new holding company is created to effect the de-SPAC transaction and the new holding company is the post-de-SPAC transaction combined company that will continue to be an Exchange Act reporting company, the same logic applies because the holding company would be the Exchange Act reporting successor to the SPAC. See definition of “Succession” in Exchange Act Rule 12b–2, 17 CFR 240.12g–3.

⁶⁸² See Form 10–Q, General Instruction A.1; Form 10–K, General Instruction A(2).

⁶⁸³ 17 CFR 229.308(b). A registrant’s status as an accelerated filer or a large accelerated filer triggers the requirement contained in section 404(b) of the Sarbanes-Oxley Act to have the auditor provide an attestation report on internal control over financial reporting.

⁶⁸⁴ See letters from BDO, Ernst & Young, Fenwick, Vinson & Elkins.

⁶⁷⁴ We understand that most post-de-SPAC registrants would be EGCs and would not be required to file the additional year of financial statements in reliance on the EGC accommodations.

⁶⁷⁵ Letter from Grant Thornton. See *supra* note 653.

⁶⁷⁶ Letter from BDO that references Division of Corporation Finance, Compliance and Disclosure Interpretations: Regulation S–K, Section 215.02, which discusses the application of management’s assessment of internal control over financial reporting (ICFR) in Item 308(a) of Regulation S–K when there has been a reverse acquisition between an issuer and a private operating company. See

year in which the transaction was consummated.⁶⁸⁵ Since the staff position about management's assessment of internal control over financial reporting is broader than the transactions covered by this rulemaking, as it applies to reverse acquisitions between an issuer and a private operating company, we did not codify it as part of this rulemaking.

In 2012, the Jumpstart Our Business Startups Act amended the Securities Act and Exchange Act to add provisions regarding and to define an "emerging growth company."⁶⁸⁶ Commission rules also define an "emerging growth company."⁶⁸⁷ The Commission has

⁶⁸⁵ See Division of Corporation Finance, *Compliance and Disclosure Interpretations: Regulation S-K, Section 215.02*, available at <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>, which states that the staff would not object if a surviving issuer in a reverse acquisition were to exclude management's assessment of internal control over financial reporting (ICFR) in the Form 10-K covering the fiscal year in which the reverse acquisition was consummated when it is not possible to conduct an assessment of the private operating company's ICFR in the period between the consummation date of the reverse acquisition and the date of management's assessment of ICFR required by Item 308(a) of Regulation S-K and when the internal controls of the shell company may be insignificant when compared to the consolidated entity.

⁶⁸⁶ Section 101(a) of the JOBS Act amended the Securities Act and the Exchange Act to provide in section 2(a)(19) of the Securities Act (15 U.S.C. 77b(a)(19)) and section 3(a)(80) of the Exchange Act (15 U.S.C. 78c(a)(80)) a definition of "emerging growth company." These statutes provided as follows. An "emerging growth company" is an issuer that had total annual gross revenues of less than \$1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of—(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of \$1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more; (B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under this subchapter; (C) the date on which such issuer has, during the previous 3-year period, issued more than \$1,000,000,000 in non-convertible debt; or (D) the date on which such issuer is deemed to be a "large accelerated filer", as defined in 17 CFR 240.12b-2, or any successor thereto.

⁶⁸⁷ Pursuant to Securities Act Rule 405 and Exchange Act Rule 12b-2, the term "emerging growth company" means an issuer that had total annual gross revenues of less than \$1.235 billion during its most recently completed fiscal year. Pursuant to these rules, if an issuer qualifies as an "emerging growth company" on the first day of its fiscal year, it maintains that status until the earliest of: (i) the last day of the fiscal year of the issuer during which it had total annual gross revenues of

amended the definition of "emerging growth company" in the past to adjust the total annual revenue threshold in these rules for inflation.⁶⁸⁸

A SPAC typically qualifies as an EGC.⁶⁸⁹ A post-de-SPAC transaction combined company would lose EGC status on the last day of its fiscal year following the fifth anniversary of the first sale of its common equity securities pursuant to an effective Securities Act registration statement.⁶⁹⁰ A post-de-SPAC transaction combined company may also lose EGC status on the last day of a fiscal year during which it had total annual gross revenues of \$1.235 billion or on the date on which it has issued more than \$1 billion in nonconvertible debt during the previous three-year

\$1.235 billion or more; (ii) the last day of its fiscal year following the fifth anniversary of the first sale of its common equity securities pursuant to an effective registration statement under the Securities Act; (iii) the date on which the issuer has, during the previous three-year period, issued more than \$1 billion in nonconvertible debt; or (iv) the date on which the issuer is deemed to be a "large accelerated filer" (as defined in Exchange Act Rule 12b-2).

⁶⁸⁸ In 2017, the Commission changed the \$1 billion revenue threshold in these rules to \$1.07 billion to account for inflation and, effective Sept. 20, 2022, the Commission further changed this \$1.07 billion threshold to account for inflation to \$1.235 billion. See *Inflation Adjustments and Other Technical Amendments Under Titles I and III of the Jobs Act*, Release No. 33-10332 (Mar. 31, 2017) [82 FR 17545 (Apr. 12, 2017)]; *Inflation Adjustments under Titles I and III of the JOBS Act*, Release No. 33-11098 (Sept. 9, 2022) [87 FR 57394 (Sept. 20, 2022)].

⁶⁸⁹ With respect to the \$1.235 billion revenue threshold in the definition of "emerging growth company" under Securities Act Rule 405 and Exchange Act Rule 12b-2, a pre-IPO SPAC may have limited or no revenue and post-IPO SPACs typically do not record revenue (because income statement items such as "Interest earned on marketable securities held in trust account" and "Unrealized gain on marketable securities held in trust account" are generally not revenue). With respect to the large accelerated filer provision in these rules: (a) paragraph (2)(ii) in the definition of "accelerated filer and large accelerated filer" in Rule 12b-2 requires that the issuer has been subject to the requirements of Exchange Act section 13(a) or 15(d) for a period of at least twelve calendar months, a period that generally would not yet have elapsed for a newly public SPAC after an IPO and (b) paragraph (2)(i) in the definition of "accelerated filer and large accelerated filer" in Rule 12b-2 requires aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates be \$700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter, a value threshold that many SPACs may be below. See *supra* note 665 (discussing frequency of SPACs with a market capitalization of greater than \$700 million).

⁶⁹⁰ Paragraph (2)(ii) of the definition of "emerging growth company" under Securities Act Rule 405 and Exchange Act Rule 12b-2. For example, in a case where the legal entity that is the SPAC becomes the post-de-SPAC transaction combined company, the five-year reference period would run from the date of the IPO of the SPAC and not the date of the de-SPAC transaction.

period.⁶⁹¹ Finally, a post-de-SPAC transaction combined company may also lose EGC status on the date on which it is deemed to be a "large accelerated filer" (as defined in Exchange Act Rule 12b-2).⁶⁹²

Several commenters recommended that the EGC status of the combined company following a de-SPAC transaction should be re-determined upon consummation of the de-SPAC transaction.⁶⁹³ As with filer status, we are not adopting any amendments concerning EGC status at this time but will consider whether future adjustments are appropriate.

Several commenters addressed determination of FPI status issues raised in a request for comment.⁶⁹⁴

A new registrant, such as a SPAC in an IPO, makes the determination of its FPI status⁶⁹⁵ as of a date within 30 days prior to filing its initial registration statement.⁶⁹⁶ A reporting registrant that seeks to file as an FPI is required to determine its FPI status once a year on the last business day of its second fiscal quarter.⁶⁹⁷ A registrant that qualifies as an FPI upon such determination is immediately able to use the forms and rules designated for FPIs.⁶⁹⁸

A domestic SPAC (*e.g.*, incorporated in a U.S. State) that intends to enter a de-SPAC transaction with a foreign target company would be required to file a Form S-4 (and not a Form F-4), because a domestic issuer cannot qualify as an FPI.⁶⁹⁹ Accordingly, where a domestic SPAC combines with a target company that is an FPI, the financial statements of the foreign target company would have to be presented in accordance with U.S. GAAP in Form S-4,⁷⁰⁰ among other differences that exist

⁶⁹¹ Paragraphs (2)(i) and (iii) of the definition of "emerging growth company" under Securities Act Rule 405 and Exchange Act Rule 12b-2.

⁶⁹² Paragraph (2)(iv) of the definition of "emerging growth company" under Securities Act Rule 405 and Exchange Act Rule 12b-2.

⁶⁹³ See letters from Ernst & Young, KPMG, PwC, Vinson & Elkins, *supra* note 660.

⁶⁹⁴ Proposing Release, *supra* note 7, at 29481 (request for comment number 74). See letters from Ernst & Young, KPMG, Vinson & Elkins.

⁶⁹⁵ See *supra* note 442.

⁶⁹⁶ Paragraph (2) of the definition of "foreign private issuer" in Securities Act Rule 405.

⁶⁹⁷ Paragraph (3) of the definition of "foreign private issuer" in Securities Act Rule 405.

⁶⁹⁸ Paragraph (3) of the definition of "foreign private issuer" in Securities Act Rule 405.

⁶⁹⁹ See definitions of "foreign issuer" and "foreign private issuer" in Securities Act Rule 405.

⁷⁰⁰ As the target will be the predecessor to the SPAC and will report as a domestic registrant after the de-SPAC transaction, including reporting its financial statements on an Item 2.01 Form 8-K within four business days after the transaction, the target should comply with Regulation S-X and provide financial statements in accordance with U.S. GAAP.

between the requirements of Form S-4 and Form F-4.⁷⁰¹

If such a domestic SPAC registrant were to reincorporate under the laws of a foreign country prior to the filing of the registration statement in connection with a de-SPAC transaction, that reincorporation may require the foreign SPAC, as a new entity, to file an initial registration statement. The new entity's FPI status would be determined as of a date within 30 days prior to the filing of the initial registration statement, as described above. If the new foreign entity were to qualify as an FPI, it may be eligible to file a Form F-4 registration statement in connection with the de-SPAC transaction. Currently, the FPI status of the post-de-SPAC transaction combined company would not affect the registration form to be filed in connection with the de-SPAC transaction, regardless of whether the SPAC was an existing registrant or a new foreign entity. Also, currently, where the legal entity that was the SPAC is not an FPI and is the legal entity that is the combined company following the de-SPAC transaction, even where the combined company may meet the definition of an FPI after the de-SPAC transaction, the combined company would need to wait until the end of the next second fiscal quarter to re-determine its status as an FPI.

Several commenters recommended that we should provide for re-determination of FPI status in connection with a de-SPAC transaction.⁷⁰²

We have considered these comments and recognize that, depending on the structure of a specific de-SPAC transaction, there may be some fact-specific circumstances in which an FPI registration statement may be used. For example, a SPAC's use of an FPI registration statement (e.g., Form F-4) and compliance with FPI rules in connection with the de-SPAC transaction may be appropriate when, as of a date within 30 days prior to the filing of the de-SPAC transaction registration statement, the SPAC is a foreign issuer that is entering a de-SPAC transaction with a target company that is an FPI but is not a shell company, the legal entity that is the SPAC will be the legal entity that is the combined company registrant following the de-SPAC transaction, and the combined company registrant created in connection with the de-SPAC transaction is expected to be an FPI at

the time of consummation of the de-SPAC transaction.

Contrary to the suggestion of some commenters,⁷⁰³ we believe that earlier re-determination of FPI status would be inappropriate when a SPAC is a domestic SPAC (and therefore not a foreign issuer) prior to the de-SPAC transaction but enters a de-SPAC transaction with an FPI target company. If the legal entity that is the SPAC is a domestic entity, the combined company following the de-SPAC transaction would also be a domestic entity, in which case use of FPI forms would not be appropriate.

E. PSLRA Safe Harbor

1. Proposed Rules

The PSLRA provides a safe harbor for forward-looking statements under the Securities Act and the Exchange Act, under which a company is protected from liability for forward-looking statements in any private right of action under the Securities Act or Exchange Act when, among other conditions, the forward-looking statement is identified as such and is accompanied by meaningful cautionary statements.⁷⁰⁴ Under the PSLRA, the safe harbor is not available, however, when a forward-looking statement is made in connection with, among other things, an offering by a blank check company, an offering by an issuer of penny stock, or an IPO.⁷⁰⁵

The Proposing Release discussed the Commission's concerns about the use of forward-looking statements, such as projections, in connection with de-SPAC transactions.⁷⁰⁶ The Commission

stated that some market participants in de-SPAC transactions may not exercise the same level of care in preparing forward-looking statements, such as projections, as in a traditional IPO.⁷⁰⁷ The Commission also noted that a number of commentators had raised concerns about the use of projections that they believe to be unreasonable in de-SPAC transactions.⁷⁰⁸ In addition, the Commission stated that it saw no reason to treat blank check companies differently for purposes of the PSLRA safe harbor depending on whether they raise more than \$5 million in a firm commitment underwritten IPO and thus are not selling penny stock.⁷⁰⁹

To address these concerns, the Commission proposed using its statutory authority under the PSLRA to amend the definition of "blank check company"⁷¹⁰ to include companies that would otherwise meet the Securities Act Rule 419 definition of "blank check company," except that they are not issuers of penny stock (such as a SPAC in a de-SPAC transaction).⁷¹¹ Specifically, the Commission proposed a revised definition of "blank check company" to be located in Securities Act Rule 405 that would, for purposes of the PSLRA, remove the "penny stock" condition from the rule and define the term as "a company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person."⁷¹²

⁷⁰⁷ Proposing Release, *supra* note 7, at 29482, n.162 and preceding text, *citing, see, e.g.*, Matt Levine, *Money Stuff: Maybe SPACs Are Really IPOs*, Bloomberg, Apr. 12, 2021; Eliot Brown, *Electric-Vehicle Startups Promise Record-Setting Revenue Growth*, Wall St. J., Mar. 15, 2021; Public Statement on SPACs, IPOs and Liability Risk under the Securities Laws (Division of Corporation Finance, Apr. 8, 2021).

⁷⁰⁸ Proposing Release, *supra* note 7, at 29482, n.163 and preceding text, *citing, see, e.g.*, Dambra, Even-Tov & George, *supra* note 36; AFR Letter, *supra* note 30; Park Testimony, *supra* note 30; Usha R. Rodrigues & Michael Stegemoller, *SPACs: Insider IPOs* (SSRN Working Paper, 2021).

⁷⁰⁹ Proposing Release, *supra* note 7, at 29482.

⁷¹⁰ *See, e.g.*, Securities Act section 27A(b)(7) ("The terms 'blank check company', 'rollup transaction', 'partnership', 'limited liability company', 'executive officer of an entity' and 'direct participation investment program', have the meanings given those terms by rule or regulation of the Commission.").

⁷¹¹ The target company typically cannot rely on the PSLRA safe harbor because at the time the statement is made it is not subject to the reporting requirements of section 13(a) or section 15(d) of the Securities Exchange Act of 1934 and thus does not meet the requirements of section 27A(a)(1) of the Securities Act.

⁷¹² The Commission also proposed to amend the definition to remove the reference to "development stage company" on the basis that the reference was unnecessary for purposes of the proposed definition.

⁷⁰¹ Item 17 of Form S-4.

⁷⁰² Letters from Ernst & Young, Freshfields, KPMG, Vinson & Elkins. *See supra* notes 662, 663, and 664 and accompanying text.

⁷⁰³ Letters from Freshfields, Vinson & Elkins. *See supra* notes 663 and 664 and accompanying text.

⁷⁰⁴ Section 27A of the Securities Act and section 21E of the Exchange Act. The PSLRA does not impact the Commission's ability to bring enforcement actions relating to forward-looking statements.

⁷⁰⁵ Section 27A(b) of the Securities Act and section 21E(b) of the Exchange Act. The Commission has defined the term "blank check company" for purposes of and in Rule 419 as a development stage company that is issuing "penny stock," as defined in Exchange Act Rule 3a51-1, and that has no specific business plan or purpose, or has indicated that its business plan is to merge with or acquire an unidentified company or companies, or other entity or person. SPACs that raise more than \$5 million in a firm commitment underwritten IPO may be excluded from this definition of "blank check company" because they are not selling "penny stock." *See Penny Stock Definition for Purposes of Blank Check Rule*, Release No. 33-7024 (Oct. 25, 1993) [58 FR 58099 (Oct. 29, 1993)]. The Commission's definition of "blank check company" in Rule 419 was adopted in 1992 to implement provisions of the Penny Stock Reform Act relating to registration statements filed by blank check companies offering penny stock. This definition predates the PSLRA (which was enacted in 1995) and has not been amended since it was adopted by the Commission.

⁷⁰⁶ Proposing Release, *supra* note 7, at 29482.

The Commission proposed corresponding technical changes to Rule 419, the rule the Commission adopted to implement provisions of the Penny Stock Reform Act relating to registration statements filed by blank check companies offering penny stock, that were intended to maintain consistency with that rule's historic scope which is limited to blank check companies that issue penny stock. Similarly, the Commission proposed a new definition in Rule 405, "Blank check company issuing penny stock," and proposed conforming amendments to existing references to "blank check company" as defined in Rule 419 in various Securities Act rules in order to maintain the scope of those rules.⁷¹³

2. Comments

A number of commenters expressed general support for the proposal.⁷¹⁴ One of these commenters said, "Both the regular IPO and de-SPAC approaches for taking a new, emerging company public should be treated similarly in this critical area for market integrity—the legitimacy of forward-looking projections."⁷¹⁵ Other commenters said they did not see a reason SPACs should be treated differently than traditional IPO participants⁷¹⁶ or companies that issue penny stock⁷¹⁷ with respect to forward-looking statements. One commenter focused on the benefits of mitigating the risk of harm to investors, stating that the proposal "would significantly curb SPAC sponsors' abilities to make overblown and false projections, and increase their liability when this fraud occurs."⁷¹⁸ Another

commenter said that "[t]his safe harbor enables SPAC sponsors and underwriters to make future projections of the performance of the SPAC to investors with relative impunity. This legal loophole enables SPAC sponsors to sell investors on bold projections that have little basis in reality. These legal loopholes, including the PSLRA safe harbor, among others, have created a regulatory arbitrated race-to-the-bottom IPO model. . . ." ⁷¹⁹ This commenter further said, "It is clear that far too many SPAC sponsors have utilized the PSLRA safe harbor to paint bold and enticing pictures of the financial outlook of their post-merger companies that were divorced from reality. . . . The safe harbor from the PSLRA for forward-looking statements in de-SPAC transactions has fueled this trend, undermined public confidence in our capital markets, and harmed investors by enabling SPAC sponsors to make reckless projections about future financial performance. In any final rule, the Proposal must retain the clarification that the PSLRA safe harbor does not apply in connection with de-SPAC transactions." A separate commenter similarly said that "amending the definition of a 'blank check' company in The Private Securities Litigation Reform Act of 1995 would prevent SPACs from exploiting the safe harbor provision to make overblown and fraudulent projections." ⁷²⁰ Another commenter said the proposal "would resolve ambiguities about how the law applies in this context and promote accountability for SPAC market participants." ⁷²¹

A number of commenters suggested that unreasonably optimistic or inflated projections are prevalent in de-SPAC transactions.⁷²² One of these commenters said that SPACs sometimes make "utterly absurd forward-looking projections." ⁷²³ This commenter also said, "Post-merger investors in SPACs, who are predominantly retail investors, are often lured by ambitious projections of growth—made with the protection of the safe harbor—and unfortunately have already lost significant amounts of money as a result." A different commenter said, "In fact, it is nearly impossible to ignore the research and findings of the wild and indiscriminate use of projections in de-SPAC

transactions by sponsors with seemingly little care given to the accuracy or reality of those projections." ⁷²⁴ Another of these commenters said that "too many of these de-SPAC forward-looking statements are an exercise in creative writing, baseless hype and embellishment." ⁷²⁵ Another commenter said, "We believe historical uncertainty surrounding the availability of the safe harbor may have contributed to the proliferation of unreasonably optimistic forward projections that would not have been made if liability had more clearly paralleled the traditional IPO regime." ⁷²⁶ Finally, one commenter said that "SPACs are rife with disclosures that border on or cross into outright fraud" and that "there have been multiple cases where companies used inflated information about their financials, their future business, or even their underlying technology." ⁷²⁷

Several commenters expressed support for the proposal because they believed it would curb the use of unrealistic and potentially misleading projections that harm investors.⁷²⁸ One of these commenters said, "We support the proposal's revision to the definition of 'blank check company' to ensure that the safe harbor against a private right of action for forward-looking statements under the PSLRA is not available. We believe this clarification may reduce the inclusion of unreasonably optimistic forward projections in SEC filings, which may in turn help SPAC investors avoid overestimating future revenues and other measures of future company performance." ⁷²⁹ Another of these commenters said that "the proposal's approach to amend the definition of blank check company for purposes of the PSLRA safe harbor for forward-looking statements" would "strengthen incentives for SPACs to avoid potentially unrealistic and potentially misleading forward-looking statements and to expend more effort or care in the preparation and review of forward-looking statements." ⁷³⁰ Another commenter said, "The Commission's proposal to amend the definition of 'blank check company' to remove the safe harbor in the Private Securities Litigation Reform Act of 1995 for

⁷¹³ Proposed amendments to 17 CFR 230.137 ("Rule 137"), 230.138 ("Rule 138"), 230.139 ("Rule 139"), 230.163A ("Rule 163A"), 230.164 ("Rule 164"), 230.174 ("Rule 174"), 230.430B ("Rule 430B"), and 230.437a ("Rule 437a"). The Commission proposed that the term "blank check company issuing penny stock" be defined as a company that is subject to Rule 419. Due to current Federal Register formatting requirements, the Commission also proposed technical changes to Rules 163A and 164 to move the Preliminary Note(s) in these rules to introductory paragraphs of the respective rules.

⁷¹⁴ Letters from Andrew Tuch, Americans for Financial Reform Education Fund ("Amending the definition of a 'blank check company' and ensuring that the forward-looking projections of SPACs are subject to the same level of legal liability that currently exists for IPOs is an important step to protect investors."), Better Markets ("Perhaps one of the most important provisions in the Proposal is the provision clarifying that the statutory safe harbor in the PSLRA does not apply to forward-looking statements made in connection with a de-SPAC transaction."), CFA Institute, CII, Consumer Federation, Senator Elizabeth Warren, ICGN, NASAA.

⁷¹⁵ Letter from CFA Institute.

⁷¹⁶ Letter from NASAA.

⁷¹⁷ Letters from Consumer Federation, NASAA.

⁷¹⁸ Letter from Senator Elizabeth Warren.

⁷¹⁹ Letter from Better Markets.

⁷²⁰ Letter from Senator Elizabeth Warren.

⁷²¹ Letter from Consumer Federation.

⁷²² Letters from Americans for Financial Reform Education Fund, Better Markets, CFA Institute, CII, Senator Elizabeth Warren.

⁷²³ Letter from Americans for Financial Reform Education Fund.

⁷²⁴ Letter from Better Markets.

⁷²⁵ Letter from CFA Institute.

⁷²⁶ Letter from CII.

⁷²⁷ Letter from Senator Elizabeth Warren.

⁷²⁸ Letters from Better Markets, CII, Consumer Federation, Senator Elizabeth Warren. See also letter from Anonymous (Oct. 11, 2022) ("Please do not permit SPAC sponsors, their CEO or their board members to engage with the public in such a way that could create a false representation of . . . [p]rojections of value. . . .").

⁷²⁹ Letter from CII.

⁷³⁰ Letter from Consumer Federation.

forward-looking statements would significantly curb SPAC sponsors' abilities to make overblown and false projections, and increase their liability when this fraud occurs." ⁷³¹

Other commenters were generally opposed to the proposal.⁷³² Some commenters who expressed general opposition to the proposal discussed the value of forward-looking information to investors. One of these commenters said, "This safe harbor incentivizes the disclosure of potentially valuable information as to a company's future outlook." ⁷³³ Another of these commenters said, "By removing the safe harbor provisions from SPAC mergers, the proposed rules would replicate the biggest flaw of IPOs, hindering investor visibility toward management expectations and related future prospects." ⁷³⁴ A number of commenters focused on comparing de-SPAC transactions to other kinds of transactions in their comments. One of the commenters who expressed general opposition to the proposal said, "We believe there are important distinctions between a De-SPAC Transaction and a traditional IPO that justify maintaining the PSLRA safe harbor in the form enacted by Congress." This commenter said, "The PSLRA safe harbor . . . does not cover all forward-looking statements. It contains a number of exclusions. . . . [One] category of exclusions cover[s] situations—like tender offers, roll-up and going-private transactions—where companies are compelled by law to share projections with investors. In such situations, there is less risk that liability will chill disclosure and the safe harbor exclusion can be understood as an effort to increase the accuracy of disclosures." Further, this commenter said, "Projections disclosure in De-SPAC Transactions fall under this . . . category." ⁷³⁵ Another commenter who generally opposed the proposal

questioned whether it would benefit investors, stating that "the Commission's proposal to remove the PSLRA safe-harbor for de-SPAC transactions is unnecessarily broad with no real benefit to investors." ⁷³⁶

A number of commenters on the proposal provided views related to the statutory authority of the Commission to amend the definition of blank check company as proposed. These comments fell into two main categories. First, some of these commenters suggested the Commission does not have discretion to adopt or amend a definition of blank check company for purposes of the PSLRA that differs from the current Rule 419 definition (which includes the qualification the relevant company is issuing penny stock).⁷³⁷ One of these commenters said, "The elimination of the safe harbor for forward-looking statements under the Private Securities Litigation Reform Act (PSLRA) is unlawful. The Proposal would—without any authorization by Congress—amend the definition of a 'blank check' company under the PSLRA to prevent SPACs from utilizing the PSLRA safe harbor for forward-looking statements. Given that de-SPAC transactions necessarily involve making a good deal of projections, there has been an underlying assumption that the PSLRA safe harbor applies to such projections. . . . The SEC should drop this idea and recognize that it has no legal authority under law to change Congressional statutes on its own." ⁷³⁸ Another of these commenters said that "this change alters the scope and effect of the PSLRA by substantially revising the definition that Congress relied on when it wrote the statute. Such an alteration to the statute's scope should be made by Congress, not the Commission." ⁷³⁹ Another of these commenters said, "I believe the SEC would be overreaching its authority in eliminating the availability of the PSLRA safe harbor for forward-looking statements in de-SPAC transactions. The Projection Proposal would change the existing definition of 'blank check company' for purposes of the PSLRA by removing the 'penny stock' condition. That was the definition Congress specifically relied upon when it wrote the PSLRA. I believe it would be improper for the SEC to willfully ignore statutory language in this manner." ⁷⁴⁰ Another commenter said that "de-SPAC

transactions were not within the scope of issuers and transactions excluded from the PSLRA by Congress. The PSLRA excludes from the safe harbor, among other things, forward-looking statements made in connection with an IPO, and an offering of securities by a blank check company or by an issuer that issues penny stock." ⁷⁴¹ This commenter also said that SPACs are not blank check companies subject to Rule 419 nor do SPACs issue penny stock. This commenter also stated, "In transactions where the de-SPAC transaction is structured with the SPAC as the surviving company, the transaction is not an IPO of the SPAC. As a result, we believe the proposed expansion of the exclusions from the PSLRA that were legislated by Congress are not merely clarifying or interpretive in nature; rather, they go beyond the Commission's rulemaking authority and should be addressed by statute." Finally, one commenter said the proposed changes regarding the definition of blank check company "appears inconsistent with the exemptive authority found in Section 27A(g) and (h), which makes clear the Commission's ability to extend the scope of the safe harbor protections rather than narrow them." ⁷⁴²

Second, some commenters suggested that the Commission's proposed definition of blank check company is inconsistent with the Penny Stock Reform Act's statutory definition of blank check company, which includes the qualification that the relevant company is issuing penny stock and which predated the PSLRA.⁷⁴³ One of these commenters stated, "As the Commission noted, the current definition of 'blank check company' predates the enactment of the PSLRA in 1995 and evidences a clear intent to exclude from that definition SPACs that raise more than \$5 million in a firm commitment underwritten IPO for not selling 'penny stock.'" ⁷⁴⁴ Another of these commenters said that "the SPAC Proposal's proposed elimination of the PSLRA safe harbor . . . is illegal for

⁷³¹ Letter from Senator Elizabeth Warren.

⁷³² Letters from ABA; Amanda M. Rose, Professor of Law, Vanderbilt University Law School (June 16, 2022) ("Amanda Rose"); American Securities Association; Bullet Point Network; Cato Institute; Cowen; Goodwin; Job Creators Network; Loeb & Loeb; Michael Dambra, Omri Even-Tov, and Kimberly George; Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Regulatory Affairs, Managed Funds Association (June 13, 2022) ("Managed Funds Association"); NYC Bar; Paul Swegle; SPAC Association; Kristi Marvin, SPACInsider (June 13, 2022) ("SPACInsider"); Vinson & Elkins; Winston & Strawn. Also, the Small Business Capital Formation Advisory Committee recommended that projections in de-SPAC transactions should be covered by the liability safe harbor provisions of the PSLRA, *supra* note 40.

⁷³³ Letter from Cato Institute.

⁷³⁴ Letter from SPAC Association.

⁷³⁵ Letter from Goodwin.

⁷³⁶ Letter from Cowen.

⁷³⁷ Letters from ABA, Cato Institute, Paul Swegle, Winston & Strawn.

⁷³⁸ Letter from American Securities Association.

⁷³⁹ Letter from Cato Institute.

⁷⁴⁰ Letter from Paul Swegle.

⁷⁴¹ Letter from Winston & Strawn.

⁷⁴² Letter from ABA. *See also* letter from Goodwin.

⁷⁴³ Letters from ABA, Job Creators Network, Kirkland & Ellis. Section 508 of the Penny Stock Reform Act amended Securities Act section 7 to provide for new section 7(b)(3) that provides: "For purposes of paragraph (1) of this subsection, the term 'blank check company' means any development stage company that is issuing a penny stock (within the meaning of section 3(a)(51) of the Securities Exchange Act of 1934) and that—(A) has no specific business plan or purpose; or (B) has indicated that its business plan is to merge with an unidentified company or companies."

⁷⁴⁴ Letter from ABA.

[the] reason [that]: it proposes an unreasonable definition of ‘blank check company.’ The PSLRA generally provides a safe harbor for forward-looking statements, but the safe harbor is not available for ‘blank check companies.’ The PSLRA states that the term ‘blank check company’ has ‘the meaning[] given . . . by rule or regulation of the Commission,’ but of course the SEC does not have carte blanche to define the term however it wants—its proposal must be ‘reasonable.’”⁷⁴⁵ The commenter also said, “The SEC’s discretion in defining blank check company is accordingly cabined and informed by other relevant statutory provisions.”⁷⁴⁶ This commenter also said, “In particular, Congress has already defined a blank check company in the Securities Act, and the only absolute requirement in that definition is that the company issue ‘penny stocks.’”⁷⁴⁷ This commenter further stated that “the SPAC Proposal would eliminate the penny stock requirement, even though Congress has made clear that that requirement is the core aspect that defines a blank check company. The SPAC Proposal’s definition of blank check company is hardly ‘reasonable’ when it eliminates the core of Congress’s definition of that term within the same statutory regime, nor is it ‘consistent with the statute’s purpose’ to allow the SEC to relabel any entity it chooses as a blank check company by disregarding the core aspect of what makes a blank check company.”⁷⁴⁸ Another of these commenters said, “The Proposal to redefine ‘blank check company’ is not a clarification of existing law. We disagree with the Commission that the proposed amendment to the definition of ‘blank check company’ is a clarification that the statutory safe harbor of the PSLRA is not available for forward-looking statements made in connection with offerings by SPACs. As noted by the Commission, the current definition of a ‘blank check company’ predates the enactment of the PSLRA and this amendment changes the applicability of the PSLRA safe harbor.”⁷⁴⁹

Finally, in addition to these two main groups of comments related to statutory

authority issues, one commenter expressed the view that the proposed changes to the definition of “blank check company” are contrary to the Administrative Procedure Act of 1946⁷⁵⁰ because “the SEC is seeking to amend the PSLRA on its own without any explicit statutory authority or directive from Congress.”⁷⁵¹ A different commenter argued that the proposal was “unlawful, arbitrary, and capricious” because Congress already defined blank check company in the Securities Act and “the only absolute requirement in that definition is that the company issue ‘penny stocks.’”⁷⁵²

A number of commenters focused on comparing de-SPAC transactions to two categories of other kinds of transactions: (1) traditional IPOs and (2) other business combinations. Some commenters supported the proposal with respect to rules related to the PSLRA safe harbor on the basis that it would level the playing field with IPOs.⁷⁵³ Other commenters, however, expressed concerns regarding how the playing field for traditional IPOs operates with respect to the interaction of issuers who provide projections, research analysts, and investors. These commenters generally observed that, in traditional IPOs, issuers often provide projections to securities analysts who often share these projections with certain institutional investors (on a private and informal basis, *i.e.*, not in the form of published research reports) but these issuers do not make this information available to other investors, particularly retail investors.⁷⁵⁴ One

commenter said, “The [PSLRA] Safe Harbor, and subsequently Regulation FD, . . . had the desirable effect of leveling the playing field so that certain investors with access to management meetings and sell-side research analysts do not have an information advantage over less well-resourced retail investors.”⁷⁵⁵ But the commenter indicated that, because “IPOs . . . are expressly excluded from the [PSLRA] Safe Harbor and Regulation FD is only applicable to companies that are already public, . . . companies do not provide any projections or forward-looking statements in the S–1s relating to their IPOs but generally do hold private meetings with qualified institutional investors.” Some commenters suggested that, instead of the proposed rule changes, IPO regulation should be put on a level playing field with de-SPAC transactions by Commission rule amendments or through statutory amendment to extend the PSLRA safe harbor to IPOs.⁷⁵⁶

bank’s key and favored clients (which usually pay the bank a lot of money in trading fees). This is a far less democratic and equitable process to the investing public, and in particular, retail investors This is in contrast to the SPAC process in which all investors get a free look at projections by filing them publicly, not just the wealthiest investors.” (Emphasis in the original); Ropes & Gray (“a key challenge of the traditional IPO market is that it ends up depriving retail investors from participating in IPOs through an IPO allocation, and such investors are often unable to purchase at the same price as institutional investors. Retail investors in companies that access the public markets through traditional IPOs also do not have the same access to third-party analysis as larger institutional investors who have ready access to the research analyst community. SPAC transactions have served to democratize the process in enabling prospective investors to have the ability to participate on equal footing with initial investors . . . by way of . . . access to information.”); SPAC Association (“we believe that an opposite result may take place if these proposed rules were to be promulgated: the public may be deprived of potentially helpful information and that same information will only be made available to institutional investors in private settings, like what happens in the IPO market”); Vinson & Elkins (“Projections are used in IPOs—they are just customarily not included in the registration statement and prospectus. Instead, they are disclosed to analysts at the investment banks, who use them to assist in pricing the securities and in building the analysts’ models for disclosure to institutional investors.”); White & Case (“issuers in IPOs indirectly provide investors with financial projections by sharing their financial models, including projections, with research analysts, who then provide their models to their institutional investor clients considering whether to participate in the IPO.”).

⁷⁵⁵ Letter from Bullet Point Network. *See also* letter from Ropes & Gray (“if these proposed rules were to be promulgated: the public may be deprived of potentially helpful information and that same information will only be made available to institutional investors in private settings, like what happens in the IPO market”).

⁷⁵⁶ Letters from Bullet Point Network (recommending that the PSLRA safe harbors

⁷⁵⁰ 5 U.S.C. 551 *et seq.*

⁷⁵¹ Letter from American Securities Association.

⁷⁵² Letter from Job Creators Network.

⁷⁵³ Letters from Bullet Point Network, CFA Institute (“both the regular IPO and de-SPAC approaches for taking a new, emerging company public should be treated similarly in this critical area for market integrity—the legitimacy of forward-looking projections.”), NASAA (“We see no reason why de-SPAC transactions should be treated differently than penny stock issuers or traditional IPO participants with respect to forward looking statements.”).

⁷⁵⁴ Letters from Bullet Point Network (expressing the view that the inapplicability of the PSLRA safe harbor to traditional IPOs “effectively prohibit[s] management projections from S–1 filings” and that “[t]his relegates the topic to the game of ‘20 questions’ privileged investors play. Asking the right questions in the right way allows these investors to get valuable information others don’t get, while technically staying on the right side of the published rules. Issuers can essentially transmit projections by helping research analysts employed by their underwriters develop financial estimates, the substance of which are communicated verbally to privileged investors in private meetings ahead of an IPO.”); SPACInsider (“It’s quite common for a company that is going through the traditional IPO process to talk to a bank’s research analyst, discuss their forward earnings, at which point, the analyst then models out the company into the future and then . . . ONLY distributes that information to the

⁷⁴⁵ Letter from Job Creators Network, *citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (statutory citations have been omitted from the quotation).

⁷⁴⁶ *Id.*, *citing see, e.g., Van Hollen, Jr. v. FEC*, 811 F.3d 486, 492 (D.C. Cir. 2016) (for the principle, according to the commenter, that “[at] Chevron step two, courts look at how Congress ‘elsewhere defines’ the specific term at issue”).

⁷⁴⁷ *Id.* (statutory citation omitted).

⁷⁴⁸ *Id.*, *citing Chem. Mfrs. Ass’n v. EPA*, 919 F.2d 158, 163 (D.C. Cir. 1990) (footnotes omitted).

⁷⁴⁹ Letter from Kirkland & Ellis.

Other commenters, however, suggested de-SPAC transactions should be treated differently than IPOs because de-SPAC transactions involve business combinations, which may be subject to disclosure obligations under State law.⁷⁵⁷ One of these commenters said that “unlike companies undertaking a traditional IPO, SPACs are compelled by a combination of federal securities regulation and state corporate law to share Target projections with stockholders.”⁷⁵⁸ This commenter also said, “To truly place De-SPAC Transactions on a ‘level playing field’ with traditional IPOs in connection with forward-looking statements, the Commission would have to change its disclosure requirements in connection with De-SPAC Transactions and somehow override the state fiduciary obligations that compel disclosure of projections.” Another of these commenters said that “SPACs will not be able to avoid liability by refraining from speaking, as many traditional IPOs do. SPAC sponsors generally must provide forward-looking information in connection with the de-SPAC transaction to satisfy state fiduciary requirements in connection with mergers.”⁷⁵⁹ Another of these commenters said, “With respect to forward looking statements, the SEC’s ‘de-SPAC transactions are merely IPOs of the target company’ theory has flaws. Specifically, the SPAC is a publicly

“should be available for IPOs of all Types [defined by the commenter as traditional IPOs, SPAC business combinations and Direct Listings], but should only be available for projections that serve the public interest by clearly communicating the risk and uncertainty associated with the projections in a standardized format.”), Loeb & Loeb, Kirkland & Ellis, SPACInsider. See also letter from ABA (“This also appears inconsistent with the exemptive authority found in Section 27A(g) and (h), which makes clear the Commission’s ability to extend the scope of the safe harbor protections rather than narrow them.”), Amanda Rose (discussing “serious questions about the wisdom of the existing exclusion for communications made in connection with an IPO, which has the practical effect of silencing nearly all public disclosure of management projections in connection with IPOs to the detriment of reasonable investors”), SPAC Association (“By removing the safe harbor provisions from SPAC mergers, the proposed rules would replicate the biggest flaw of IPOs, hindering investor visibility toward management expectations and related future prospects.”).

⁷⁵⁷ Letters from ABA, Amanda Rose, Cato Institute, Cowen, Goodwin, Vinson & Elkins, NYC Bar. Also, the Small Business Capital Formation Advisory Committee recommended that projections in de-SPAC transactions should be covered by the liability safe harbor provisions of the PSLRA, because management projections are an important part of the rationale for companies in determining whether to engage in a merger with a SPAC and they are necessary when financial intermediaries provide fairness opinions related to de-SPAC transactions. See *supra* note 40.

⁷⁵⁸ Letter from ABA.

⁷⁵⁹ Letter from Cato Institute (footnotes omitted).

traded company . . . and the directors and officers of the SPAC have fiduciary duties. They are required to conduct substantial diligence (arguably more than underwriters in an IPO), and are required to disclose the material reasons for approving and proposing the de-SPAC transactions to the SPAC’s shareholders, which frequently include projections provided to the directors in connection with their evaluation of the de-SPAC transaction.”⁷⁶⁰ Another of these commenters said that “traditional IPOs and de-SPAC transactions are fundamentally different transactions. Financial projections are not required to be included, and are rarely included, in IPO registration statements. On the other hand, both Delaware jurisprudence and the Commission’s staff now require inclusion of management projections in proxy statements and registration statements on Form S-4/F-4 where such projections were relied upon by a board of directors in approving a transaction.”⁷⁶¹ This commenter also said, “The projections included in the de-SPAC transaction registration statement or proxy statement are not included in order to promote capital formation. In fact, such projections are generally only current as of the date a board of directors approved the execution of the acquisition agreement. Such projections are not typically updated because they are being provided to SPAC shareholders to evaluate the board of directors’ recommendation to approve the de-SPAC transaction, rather than to solicit a new investment. As such, projections are often out of date, or ‘stale’, by the time the SPAC’s shareholders receive them. Issuers generally include disclosure to the effect that investors should not consider projections to be financial guidance, and investors are generally cautioned not to place undue reliance on such projections.” Another commenter said, “Under Delaware case law, the Board has a fiduciary duty to disclose to investors in a merger proxy (often in an S-4 registration statement) the projections it utilized in making its decision. Moreover, if the SPAC receives a fairness opinion from a financial advisor (as the proposing release suggests will be required) that fairness opinion will be based on projections, which will have to be disclosed to investors. Therefore, unlike a typical IPO, in the vast majority of de-SPAC transactions, projections will have to be disclosed, which further underscores the reasonableness of

giving such statements PSLRA safe harbor protection, just as they would have in a typical M&A transaction that was not a de-SPAC.”⁷⁶²

Furthermore, other commenters suggested de-SPAC transactions should be treated differently than IPOs, because of concerns about the interaction of the proposed changes regarding availability of the PSLRA safe harbor with other proposals in the Proposing Release.⁷⁶³ One of these commenters said, “This aspect of the Proposal is in direct opposition to the provisions of the Proposal that require the SPAC to disclose the material reasons for which the SPAC believes its proposed de-SPAC transaction is fair to its public shareholders.”⁷⁶⁴ Another of these commenters said, “The combination of removing the safe harbor while adding amendments to Item 10(b) of Regulation S-K and Item 1609 of Regulation [S-K] essentially mandating some level of [forward-looking statement] projections, goes beyond leveling de-SPACs with IPOs.”⁷⁶⁵

Some commenters suggested the proposal would create inconsistency by making the PSLRA safe harbor unavailable for one kind of business combination transaction (de-SPAC transactions) but not for other kinds of business combination transactions.⁷⁶⁶ One of these commenters said, “The Commission stated that the proposed change to the PSLRA definition is necessary to align traditional IPOs more closely with de-SPAC transactions. However, the Commission’s position is inconsistent with the provisions of Regulation M-A, which actually require disclosure of target company projections if the SPAC’s board relied on such projections when approving the de-SPAC transaction. There is no similar requirement in the IPO context. We can see no justification for treating a de-SPAC transaction differently from any other stock-for-stock merger for this purpose.”⁷⁶⁷

A number of commenters suggested the proposal would have a chilling effect on the use of projections that investors find useful.⁷⁶⁸ One of the

⁷⁶² Letter from Cowen.

⁷⁶³ Letters from American Securities Association; CFA Institute; Cowen (“if the SPAC receives a fairness opinion from a financial advisor (as the proposing release suggests will be required) that fairness opinion will be based on projections, which will have to be disclosed to investors.”).

⁷⁶⁴ Letter from American Securities Association.

⁷⁶⁵ Letter from CFA Institute.

⁷⁶⁶ Letters from Cowen, SPAC Association, Winston & Strawn.

⁷⁶⁷ Letter from Winston & Strawn.

⁷⁶⁸ Letters from ABA, Amanda Rose, Cato Institute, CFA Institute, Goodwin, Kirkland & Ellis, Managed Funds Association, NYC Bar, SPAC

⁷⁶⁰ Letter from Vinson & Elkins.

⁷⁶¹ Letter from NYC Bar.

commenters said that “we believe the removal of the PSLRA safe harbor would have a significant chilling effect on De-SPAC Transactions” and that this “chilling effect is also demonstrated by the fact that IPO issuers rarely publicly include projections in the registration statement.”⁷⁶⁹ One of these commenters said the proposal “undoubtedly will” reduce “the amount of potentially relevant information presented to investors” and suggested this would negatively affect investor ability to accurately value combined companies in de-SPAC transactions.⁷⁷⁰ Another of the commenters said that “the proposed amendment may discourage the disclosure of projections—especially given the Commission’s broad statements on potential underwriter liability.”⁷⁷¹ A different commenter referred to an article that said, “Offering [mandated forward-looking] disclosures safe harbor protection may decrease their accuracy relative to a world in which safe harbor protection were not available, if companies emboldened by the liability shield approach the preparation of such disclosures with less care or honesty than they otherwise would. But it could also *increase* the quality of the disclosures by reducing an incentive that might otherwise exist to negatively bias projections or obfuscate them, which has the twin effects of making them less vulnerable to attack in litigation *and* less useful to investors.”⁷⁷² The same article also said allowing a safe harbor to apply to forward-looking statements in de-SPAC transactions “might also work to lower liability insurance premiums.”⁷⁷³

Commenters also expressed concerns about the combined effect of the proposed change in PSLRA safe harbor availability and proposed 17 CFR 230.140a (“Rule 140a”) concerning underwriters.⁷⁷⁴ One of these

commenters said, “In particular, when coupled with other proposed amendments that would require disclosure of a fairness determination (effectively mandating the provision of projections) as well as impose underwriter liability in a De-SPAC Transaction, we believe removal of the PSLRA safe harbor protections would have a chilling effect on De-SPAC Transactions and significantly disadvantage a De-SPAC Transaction compared to a traditional IPO.”⁷⁷⁵ Another of these commenters said, “We do have a concern that the proposed amendment may discourage the disclosure of projections—especially given the Commission’s broad statements on potential underwriter liability.”⁷⁷⁶ Another of these commenters said, “The elimination of the PSLRA safe harbor, combined with the Commission’s proposed Rule 140a, may have a chilling effect on the use of projections in de-SPAC transactions, which may preclude investors from receiving information that sponsors and boards of directors rely in part on in connection with valuation determination.”⁷⁷⁷

Other commenters, however, expressed the view that PSLRA safe harbor availability does not meaningfully affect existing disclosure practices.⁷⁷⁸ One of these commenters said that “the availability of the PSLRA safe harbor may not be a significant factor in determining the use of forward-looking statements in de-SPACs.”⁷⁷⁹ Another of these commenters said that “the safe harbor has never provided a meaningful shield from liability” and that “we do not expect that the absence of the safe harbor will have a substantial impact on current market disclosure practices and we do not object to the disapplication of the safe harbor to de-SPAC transactions.”⁷⁸⁰ Another of these commenters said, “In our experience,

projections, and more thorough discussion regarding the assumptions and considerations underlying the projections, as well as material risks that could cause such projections to not be satisfied. Where projections are not a material consideration for a SPAC board, under the Proposed Rules that SPAC will be less likely to disclose projections.”).

⁷⁷⁵ Letter from ABA.

⁷⁷⁶ Letter from Kirkland & Ellis.

⁷⁷⁷ Letter from NYC Bar.

⁷⁷⁸ Letters from Andrew Tuch, Davis Polk, Kirkland & Ellis. See also letter from Jeffrey M. Solomon, Chair and Chief Executive Officer, Cowen Inc. (June 8, 2022) (“Cowen”) (“If the perceived ‘problem’ is unreasonable projections or projections not being made in good faith, it should be noted that such unreasonable, bad-faith projections would not qualify for PSLRA (or any other) safe harbor protection in the first instance, irrespective of the stay of discovery. . . .”).

⁷⁷⁹ Letter from Andrew Tuch.

⁷⁸⁰ Letter from Davis Polk.

the availability of the PSLRA safe harbor for forward-looking statements in certain de-SPAC transactions does not alter the decision on the presentation of projections. Conversely, where the safe harbor is clearly available, such as for follow-on offerings by existing public companies, it remains rare to see the inclusion of projections in the actual offering documents.”⁷⁸¹

Several commenters observed that other safe harbors in Commission rules and legal doctrines protecting against liability under common law would continue to be available with respect to forward-looking statements notwithstanding the proposed changes regarding the availability of the PSLRA safe harbor.⁷⁸² One of these commenters said, “An issuer’s ability to rely on the judicial ‘bespeaks caution’ doctrine may mitigate to some extent liability concerns associated with providing projections.”⁷⁸³ Another of these commenters said that 17 CFR 230.175 (“Rule 175” under the Securities Act) and 17 CFR 240.3b–6 (“Rule 3b–6” under the Exchange Act), which were “adopted . . . prior to the PSLRA . . . provide safe harbor protection similar to that of the PSLRA safe harbor.”⁷⁸⁴ This commenter also said that under the “judicially-created ‘bespeaks caution’ doctrine . . . now accepted in 11 federal judicial circuits . . . forward-looking statements accompanied by sufficient cautionary language” are rendered “non-actionable under securities laws if such statements are proved incorrect in the future.” Under the bespeaks caution doctrine, this commenter said, “Essentially, the same requirements apply as would under the PSLRA to obtain protection—that the forward-looking statements be accompanied by ‘meaningful cautionary language.’” Another of these commenters said that “even if the proposed amendment is adopted, under the so-called ‘bespeaks caution’ doctrine, SPACs should still be able to make forward-looking statements in the absence of the PSLRA safe harbor.”⁷⁸⁵ A different commenter stated that the main difference between the PSLRA and the other safe harbors is that “the PSLRA safe harbor provides a stay of discovery while a motion to dismiss based upon the safe harbor protections is under review by the court,” and that

⁷⁸¹ Letter from Kirkland & Ellis.

⁷⁸² Letters from ABA, Cowen, Winston & Strawn.

⁷⁸³ Letter from ABA.

⁷⁸⁴ Letter from Cowen. Securities Act Rule 175 and Exchange Act Rule 3b–6 were adopted in 1979. See *Safe Harbor for Projections*, Release No. 33–6084 (June 25, 1979) [44 FR 38810 (July 2, 1979)]. The PSLRA was enacted in 1995.

⁷⁸⁵ Letter from Winston & Strawn.

Association, Vinson & Elkins, Winston & Strawn. See also letter from Davis Polk (stating that the absence of the safe harbor will not “have a substantial impact” but may “be an additional factor that will cause many investment banks to refuse to participate in de-SPAC transactions to avoid liability”).

⁷⁶⁹ Letter from ABA.

⁷⁷⁰ Letter from Cato Institute.

⁷⁷¹ Letter from Kirkland & Ellis.

⁷⁷² Letter from Amanda Rose, including attachment of a forthcoming article that was published as: Amanda M. Rose, *SPAC Mergers, IPOs, and the PSLRA’s Safe Harbor: Unpacking Claims of Regulatory Arbitrage*, 64 William & Mary L. Rev. 1757, 1806 (2023), available at <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3995&context=wmlr> (emphasis in original).

⁷⁷³ *Id.* at 1806.

⁷⁷⁴ Letters from ABA, Kirkland & Ellis, NYC Bar. See also letter from Vinson & Elkins (“However, the expansion of underwriter liability to cover de-SPAC transactions may cause an increased focus on

“[t]he Commission’s proposal, in stripping away the protection of the PSLRA safe harbor for projections in de-SPAC transactions, has in actuality not increased anyone’s exposure for the projections—it has simply increased the cost of defense.”⁷⁸⁶ Another of these commenters expressed the view that the proposal “would only increase transaction costs and administrative burdens on de-SPAC transactions.”⁷⁸⁷

Some commenters questioned the need for the amendments, expressing the view that investors are well-capable of assessing the reasonableness of projections used by SPACs.⁷⁸⁸ One of these commenters said, “The Commission is concerned that investors are misled by forward-looking statements, but some researchers have found that hype, if present, does not sway investors and that forecasts are often related to positive outcomes. These types of findings should lead the Commission to question whether an effective prohibition on forward-looking disclosure in traditional IPOs is itself a good policy idea where it may inhibit price discovery and capital formation.”⁷⁸⁹ Another commenter said that “the proposed amendment with respect to the PSLRA will not meaningfully affect the quality of projections made available for the review of the SPAC’s board of directors and PIPE investors, if any” and that, “the proposed revisions to Item 10(b) and Item 1609(a) will assist in the comparability of projections included in the disclosure of materials reviewed by the board of directors of a SPAC. In this way, investors will be able to assess for themselves whether underlying assumptions are reasonable rather than rely on the assertions of commentators in the market.”⁷⁹⁰ Another of these commenters said, “It is also already standard practice to disclose key underlying risks and assumptions regarding projections and I find it hard to believe that investors are incapable of thoughtfully weighing projections together with a company’s other

disclosures in their decision-making processes.”⁷⁹¹

Some commenters suggested that the need to alter the availability of the PSLRA safe harbor is overstated.⁷⁹² One of these commenters said that, because target companies may register securities in a de-SPAC transaction, in that situation, the PSLRA safe harbor is already not available to them.⁷⁹³ This commenter also suggested the need to alter the availability of the PSLRA is overstated because boards of directors of SPACs review projections, including related assumptions and cautionary language, consistent with their fiduciary duty of care.⁷⁹⁴ A different commenter suggested the need to alter the availability of the PSLRA safe harbor is overstated because the PSLRA safe harbor only affects private litigation and does not prevent the Commission from pursuing claims for misleading disclosure.⁷⁹⁵

Several commenters suggested that the proposal would invite litigation against SPACs.⁷⁹⁶ One commenter said, “The intent of removing the safe harbor for de-SPAC transactions is undeniable—it would open SPACs to a flood of private litigation that, when added to other provisions of the Proposal, would effectively kill the existing SPAC market.”⁷⁹⁷

Other commenters suggested alternative policy approaches and other recommendations in connection with projection disclosure. One commenter suggested the Commission should restrict the use of projections because “[a]s written, the Proposal would leave the door open for projections for which there are little to no reasonable basis, when an issuer has no historical operations, and when the company or asset acquisition is speculative in nature without any disclosure” and because “[s]ponsors, target companies and

underwriters that would become liable under the Proposal may attempt to evade liability by combining boilerplate risk factors with forward looking cautionary information that prefaces claims of unreasonable upside potential to investors.”⁷⁹⁸ Other commenters suggested the Commission should mandate qualifying language or additional disclosure around the use of projections.⁷⁹⁹ One of these commenters said, “Rather than barring forward-looking projections entirely, we recommend that the Commission instead consider requiring any such projections to include appropriate qualifying language, including the background and assumptions underlying such projections, along with any downside case analysis that was done in preparation of such projections.”⁸⁰⁰ This commenter said, “We believe that such an approach would be consistent with the disclosure-based approach the Commission has used in similar circumstances, including in the case of Regulation G [12 CFR part 244] with respect to the regulation of the use of financial measures that vary from those included within generally accepted accounting principles.” Another of these commenters said that “rather than barring such young growth firms from providing forward looking information, we feel that additional disclosure should be provided around these forecasts.”⁸⁰¹

One commenter suggested that, instead of adopting the PSLRA proposal, the Commission should require that earnings statements include a comparison of past projections in earning statements to actual results in order to enhance issuer accountability.⁸⁰² Other commenters suggested that market forces would hold accountable issuers with unmet projections by preventing future capital access.⁸⁰³

Two other alternative policy approaches suggested by commenters were that: (a) the safe harbor should be made unavailable only to the “maker” of the statement but that others such as “underwriters (or sellers) could continue to enjoy the full protection of the PSLRA;”⁸⁰⁴ and (b) the safe harbor

⁷⁸⁶ Letter from Cowen.

⁷⁸⁷ Letter from Winston & Strawn.

⁷⁸⁸ Letters from Cato Institute, Jonathan Kornblatt (“It is arguably much better to have a responsible party issuing projections rather than have a void of such filled by bloggers or posters on social media. Individual investors may be far better served by having the C-suite as an accountable source of information instead of an anonymous chat room. I hope the Commission will keep in mind that the purpose of the PSLRA safe harbor was to encourage companies to share their forecasts with investors, and that shielding the liability risk was necessary to encourage such disclosure.”), Kirkland & Ellis, Paul Swegle.

⁷⁸⁹ Letter from Cato Institute.

⁷⁹⁰ Letter from Kirkland & Ellis.

⁷⁹¹ Letter from Paul Swegle.

⁷⁹² Letters from Kirkland & Ellis, Winston & Strawn.

⁷⁹³ Letter from Kirkland & Ellis.

⁷⁹⁴ Letter from Kirkland & Ellis.

⁷⁹⁵ Letter from Winston & Strawn.

⁷⁹⁶ Letters from American Securities Association, Anonymous (Apr. 7, 2022). In addition, one commenter discussed generally the occurrence of litigation as a check against “inaccurate projections” already under the status quo. *See* letter from Vinson & Elkins (stating, “We do not believe an amendment (and the proposed change is not a ‘clarification’) would improve the quality of projections in connection with de-SPAC transactions. SPACs and target companies already have strong incentives to make sure that the projections are as reasonable as possible. They may face suits over inaccurate projections . . .,” and noting in a footnote, “The PSLRA safe harbor only protects against civil suits, and in a civil case it is not a shield against a fraud claim.”) (Other footnotes omitted).

⁷⁹⁷ Letter from American Securities Association.

⁷⁹⁸ Letter from NASAA.

⁷⁹⁹ Letters from Managed Funds Association; Michael Dambra, Omri Even-Tov, and Kimberlyn George.

⁸⁰⁰ Letter from Managed Funds Association.

⁸⁰¹ Letter from Michael Dambra, Omri Even-Tov, and Kimberlyn George.

⁸⁰² Letter from SPAC Association.

⁸⁰³ Letters from Jonathan Kornblatt, Vinson & Elkins.

⁸⁰⁴ Letter from Cowen.

should be unavailable for longer-term projections (where the commenter provided the example of a statement “we will penetrate 50% of [total addressable market] in 10 years”) but available for short-term projections (where the commenter provided the example of a statement “we expect to make revenue in 1 year or have positive [free cash flow] in 2 years”).⁸⁰⁵

One commenter said the Commission should “monitor the effects of the safe harbor removal for de-SPACs on the availability and quality of forward-looking information critical for SPAC investor decisions on merger approval votes and exercising redemption rights.”⁸⁰⁶ Finally, one commenter said, “While some de-SPAC transactions are in form ‘initial public offering[s]’ (e.g., where the target or a new company is formed to acquire the SPAC), it is inappropriate to deem a de-SPAC transaction where an existing public company stays public (e.g., where the SPAC survives the de-SPAC transaction as the publicly traded company) as an ‘initial public offering.’” This commenter suggested the Commission should provide an interpretation that de-SPAC transactions are “tender offers” which would make the PSLRA safe harbor unavailable.⁸⁰⁷

3. Final Rules

After considering the comments received, we are adopting a new definition of “blank check company” in Securities Act Rule 405 and Exchange Act Rule 12b–2 under the PSLRA. The new definition of “blank check company” in Rule 405 provides that for purposes of section 27A of the Securities Act of 1933 (15 U.S.C. 77z–2), the term *blank check company* means a company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person. The new definition of “blank check company” in Rule 12b–2 provides that for purposes of section 21E of the Securities and Exchange Act of 1934 (15 U.S.C. 78u–5), the term *blank check company* means a company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person.

We are not amending Securities Act Rule 419 as proposed. Instead, as

discussed in detail below, we are adopting a definition of “blank check company” under the PSLRA in Securities Act Rule 405 and Exchange Act Rule 12b–2 to clarify that such definitions are solely for purposes of the PSLRA and not for purposes of any other rules (including rules the Commission adopted pursuant to mandates under the Penny Stock Reform Act, such as Securities Act Rule 419). The final rules have the same substantive effect as the proposal, notwithstanding the different approach taken.⁸⁰⁸

We also are not adopting any amendments as proposed to Securities Act Rules 137, 138, 139, 163A, 164, 174, 405, 430B, and 437a, because the definition of blank check company in Rule 419 that these rules cross-reference will not be changed as a result of the final rules. In addition, we also are not adopting a definition of “blank check company issuing penny stock” in Securities Act Rule 405 as proposed. This proposed amendment is also unnecessary since the definition of “blank check company” in Rule 419 will not change.

Having considered the comments received, we continue to believe that it is appropriate that forward-looking statements made in connection with de-SPAC transactions should be treated similarly with forward-looking statements made in traditional IPOs, because the de-SPAC transaction results in public shareholders acquiring a formerly private company, similar to an IPO. In both IPOs and de-SPAC transactions, similar informational asymmetries exist between issuers (and their insiders and early investors) and public investors and there are similar risks of generating unfounded interest on the part of investors. In both IPOs and de-SPAC transactions, there is no track record of public disclosure to help investors evaluate projections. Moreover, these risks do not disappear merely because a blank check company raised more than \$5 million in a firm commitment underwritten IPO (and therefore may not be issuing penny stock). The definitions of “blank check company” we are adopting and the concomitant changes to the availability of the PSLRA will help protect investors because blank check companies⁸⁰⁹ may

take more care in avoiding the use of forward-looking statements that are unreasonable. As we discuss in detail below, we are not barring the use of forward-looking statements and recognize that forward-looking statements can provide useful and necessary disclosure.⁸¹⁰

We disagree, based on the text of the PSLRA, with the commenters who expressed the view that the PSLRA does not give the Commission authority to amend the Commission’s definition of “blank check company” that existed at the time the PSLRA was adopted. On the contrary, in providing in the PSLRA that definitions, including blank check company, “have the meanings given those terms by rule or regulation of the Commission,” Congress expressly provided the Commission the authority to define these terms and to amend those definitions, consistent with the text, structure, and purpose of the PSLRA.

The text of the PSLRA demonstrates in other ways as well that the Commission has the authority to define, and amend its definition of, “blank check company.” For example, Congress *did not* use tracking language in the PSLRA to define blank check companies, such as by a statutory definition of blank check company that closely resembles or mirrors the definition in the rules of the Commission at the time of the legislation. In contrast, with respect to other defined terms in the PSLRA, Congress *did provide* long-form definitions (rather than cross-referencing by citation an existing Commission rule) that closely resemble the content of definitions in Commission rules.⁸¹¹ Congress also *did not* define the term blank check company in the PSLRA by referencing the statutory definition in section 7(b)(3) of the Securities Act, as Congress *did* elsewhere in the PSLRA where it defined terms related to forward-looking statement safe harbors by cross-referencing to those terms.⁸¹² The absence in the PSLRA of such a

companies that are not limited by any qualification that the company is an issuer of penny stock.

⁸¹⁰ Depending on specific facts and circumstances, protections other than the PSLRA safe harbors may apply in connection with forward-looking statements. See letters from ABA, Cowen, Winston & Strawn, *supra* notes 782, 783, 784, and 785 and accompanying text, and discussion below proximate to note 840.

⁸¹¹ For example, the definition of “forward-looking statement” in the PSLRA is similar to the content of Securities Act Rule 175 (which pre-dated the PSLRA). Compare Securities Act section 27A(i)(1) (15 U.S.C. 77z–2(i)(1)), with 17 CFR 230.175(c).

⁸¹² See *infra* note 818 and accompanying text.

⁸⁰⁵ Letter from Charles Pieper.

⁸⁰⁶ Letter from CFA Institute.

⁸⁰⁷ Letter from Vinson & Elkins (footnotes omitted).

⁸⁰⁸ The final rules and concomitant unavailability of the PSLRA safe harbor for forward-looking statements are not intended to have any retroactive effect related to forward-looking statements made prior to the effective date of the final rules.

⁸⁰⁹ In this subsection III.E.3, where we refer to “blank check companies” in connection with our discussion of the final rules, unless otherwise indicated, we are referring to blank check

statutory cross-reference to define the term blank check company is consistent with Congress's express grant of authority to the Commission, as discussed above, to define these terms and amend them consistent with the text, structure, and purpose of the PSLRA.

In addition, the PSLRA safe harbors provide that they are unavailable to issuers that issue "penny stock."⁸¹³ The 1995 version of the definition of blank check company in Securities Act Rule 419 contained (and still contains) a restriction that it applies only to companies issuing penny stock. This suggests that Congress did not intend to permanently fix the Commission's definition of "blank check company" to the 1995 version of that definition in Securities Act Rule 419, because it would have been redundant for Congress to include a carve-out for blank check companies that are penny stock issuers and also carve out penny stock issuers.

Furthermore, we also do not agree, based on the legislative history of the PSLRA, with commenters that asserted that Congress fixed the definition of "blank check company" to the Commission's rules as they existed in 1995, when the PSLRA was enacted. Commission staff reviewed the complete legislative history of the PSLRA and found no evidence of any intent on the part of Congress to fix the definition of "blank check company" as the term was defined in Securities Act Rule 419 at the time of the adoption of the PSLRA in 1995.⁸¹⁴ The staff also found no evidence in the legislative history of the PSLRA of any intent on the part of Congress to restrict the authority of the Commission to amend the definition of this term.

One commenter said the proposed change regarding the definition of blank check company "appears inconsistent with the exemptive authority found in section 27A(g) and (h), which makes clear the Commission's ability to extend the scope of the safe harbor protections rather than narrow them."⁸¹⁵ We

disagree. While Securities Act sections 27A(g) and 27A(h) and Exchange Act sections 21E(g) and 21E(h) provide the Commission with authority to create new exemptions, subject to the conditions that they are in the public interest and protect investors, and clarify that the PSLRA did not limit the ability of the Commission to create new safe harbors for forward-looking statements, there is no limitation in these provisions on the express authority provided under Securities Act section 27A(i)(7) and Exchange Act section 21E(i)(5) to define "blank check company."⁸¹⁶

With respect to the commenters who expressed the view that the Commission's definition of "blank check company" under the PSLRA may not be broader than the statutory definition of this term in the Penny Stock Reform Act, nothing in the text of either statute limits the Commission's definition for the term "blank check company" for purposes of the PSLRA to be no broader (*i.e.*, not contain a qualification that the issuer issue penny stock) than how this term is defined in the Penny Stock Reform Act (*i.e.*, containing a qualification that the issuer issue penny stock).

Congress *did not* define "blank check company" in the PSLRA with language that tracks the definition of "blank check company" under the Penny Stock Reform Act.⁸¹⁷ In contrast, with respect to other defined terms in the PSLRA, Congress *did* define terms using language that closely tracks existing definitions in other sources, such as the definition of "forward-looking statement" in the PSLRA which is similar to Securities Act Rule 175 and Exchange Act Rule 3b-6 (which both pre-dated the PSLRA).

Also, Congress *did not* define "blank check company" in the PSLRA by cross-referencing the definition of "blank check company" in Securities Act section 7(b)(3) that was added by the Penny Stock Reform Act, but, instead, Congress defined "blank check company" and other defined terms in the PSLRA as having "the meanings given those terms by rule or regulation of the Commission." In contrast, with respect to other defined terms in the PSLRA, Congress *did* cross-reference

existing statutes as a means of supplying definitions for those terms.⁸¹⁸

Furthermore, the PSLRA legislative history does not evidence an intent by Congress to require the Commission's PSLRA "blank check company" definition to be fixed to a specific definition (*e.g.*, to be no broader than the Penny Stock Reform Act definition). In contrast, Congress did fix the definition in the Penny Stock Reform Act. The legislative history of the Penny Stock Reform Act documents Congress's concerns that overbroad restrictions on "blank check company" issuances, with respect to penny stock abuses, could interfere with legitimate capital raising in connection with *that* statute. The legislative history of the Penny Stock Reform Act—which mandated the Commission to adopt restrictions on blank check companies and ultimately led the Commission to adopt Rule 419⁸¹⁹—documents that Congress was concerned about blank check companies in connection with penny stock abuses (the focus of the legislation) because blank check companies were viewed as providing a large inventory of securities that fed into the market for penny stocks.⁸²⁰ The legislative history of the

⁸¹⁸ For example, Congress defined the terms "penny stock" and "investment company" in the PSLRA by cross-referencing existing statutory provisions providing definitions of those terms. The PSLRA added Securities Act section 27A(i)(2) (15 U.S.C. 77z-2(i)(2)) ("The term 'investment company' has the same meaning as in section 3(a) of the Investment Company Act of 1940.") and section 27A(i)(3) (15 U.S.C. 77z-2(i)(3)) ("The term 'penny stock' has the same meaning as in section 3(a)(51) of the Securities Exchange Act of 1934, and the rules and regulations, or orders issued pursuant to that section.").

⁸¹⁹ H.R. Rep. No. 101-617, at 23 (1990) ("The bill thus mandates that the Commission adopt new blank check rules which the Committee expects will contain at least three critical elements: (1) information regarding the company to be acquired by the blank check company prior to or after the date the registration becomes effective; (2) limitations on the use of proceeds of blank check offerings and the distribution of the securities of the issuer until such time as adequate disclosure has been made; and (3) a right of rescission for shareholders who disapprove of the disclosed acquisition."); Penny Stock Reform Act of 1990, H.R. 4497, 101st Cong., sec. 9(a)(2) (1990).

⁸²⁰ H.R. Rep. No. 101-617, at 22 (1990) ("nearly 70 percent of all penny stock issues offered in 1988 and through the third quarter of 1989 were blank checks; money raised with no purpose stated for its use."); Penny Stock Market Fraud (Part 2): Hearing on H.R. 4497 Before the Subcomm. on Telecomm. and Fin. of the Comm. on Energy and Com., 101st Cong. 31 (1990) (Statement of Hon. Richard C. Breiden, Chairman, Securities and Exchange Commission) ("The Commission recognizes that blank check offerings have been used extensively for abusive and fraudulent practices in the penny stock market. We empathize with the desire to ban these types of offerings."); The Securities Law Enforcement Remedies Act of 1989: Hearing on S. 647 Before the Subcomm. on Sec. of the Comm. On Banking, Housing, and Urban Aff., 101st Cong. 351 (1990) (testimony of Joseph Goldstein, Associate

⁸¹³ 15 U.S.C. 77z-2(b)(1)(C); 15 U.S.C. 78u-5(b)(1)(C).

⁸¹⁴ See, *e.g.*, S. Rep. No. 104-98 (1995); H.R. Rep. No. 104-369 (1995) (Conf. Rep.).

⁸¹⁵ Letter from ABA. See also letter from Goodwin. Securities Act section 27A(g) (15 U.S.C. 77z(g)) provides: "In addition to the exemptions provided for in this section, the Commission may, by rule or regulation, provide exemptions from or under any provision of this title, including with respect to liability that is based on a statement or that is based on projections or other forward-looking information, if and to the extent that any such exemption is consistent with the public interest and the protection of investors, as determined by the Commission." Securities Act section 27A(h) (15 U.S.C. 77z(h)) provides:

"Nothing in this section limits, either expressly or by implication, the authority of the Commission to exercise similar authority or to adopt similar rules and regulations with respect to forward-looking statements under any other statute under which the Commission exercises rulemaking authority."

⁸¹⁶ Regarding Securities Act section 27A(b)(7), see *supra* note 710.

⁸¹⁷ See *supra* note 710.

Penny Stock Reform Act indicates that members of Congress were aware of concerns expressed by hearing witnesses that, if regulation of blank check companies were unduly restrictive, this could disrupt funding for investment vehicles such as private equity investment entities, particularly in real estate, hydrocarbons and technology sectors.⁸²¹

Director, Division of Enforcement, Securities and Exchange Commission, stating that “from the enforcement side, we have seen widespread abuse with blank checks. They are a very popular vehicle for committing penny stock fraud.”).

⁸²¹ Penny Stock Market Fraud (Part 2): Hearing on H.R. 4497 Before the Subcomm. on Telecomm. and Fin. of the Comm. on Energy and Com., 101st Cong. 31–32 (1990) (Statement of Hon. Richard C. Breeden, Chairman, Securities and Exchange Commission) (“If blank checks were outlawed, it would be relatively easy for promoters to specify a particular field of investment, essentially turning what had been a blank check offering into a blind pool. While these, too, could be barred, the blind pool financing approach has been used for years by legitimate issuers in venture capital, real estate, oil and gas exploration, and equipment leasing programs. Thus, a proven mechanism for raising capital for productive uses could be eliminated or, at least, subjected to costs and additional regulation. While the bill grants the Commission powers to define which issuers could be subject to regulation we are concerned that, at least as it is currently written, any such definition would most likely be circumvented by unethical issuers.”); Penny Stock Market Fraud (Part 2): Hearing on H.R. 4497 Before the Subcomm. on Telecomm. and Fin. of the Comm. on Energy and Com., 101st Cong. 47–48 (1990) (Testimony of Richard C. Breeden, Chairman, U.S. Securities and Exchange Commission) (“H.R. 4497 would prohibit both blank check and certain blind pool offerings. However, blind pool financings have been used for years by issuers in venture capital, real estate, oil and gas exploration programs, equipment leasing and other areas. Thus, substantial costs and burdens could be imposed on this kind of financing technique for which disclosure regulation has been adequate in the past, and which has been an important source of producing capital.”) Penny Stock Market Fraud (Part 2): Hearing on H.R. 4497 Before the Subcomm. on Telecomm. and Fin. of the Comm. on Energy and Com., 101st Cong. 189 (1990) (Statement of John Guion, President, National Association of Publicly Traded Companies) (“There has been much said about blank check and blind pools. Our comment here is that they have been used legitimately by some organizations, particularly in gas and oil exploration, and I would assume that the subcommittee would take that into consideration in resolving that particular area.”). The U.S. House of Representatives documented these concerns in House Report No. 101–617 (1990) to accompany H.R. 4497. See H.R. Rep. No. 101–617, at 22 (1990) (“While Commission Chairman Richard Breeden and NASD enforcement director John Pinto agreed that blank check offerings were a source of problems, they were also of the view that blank check offerings could be and were used in legitimate business transactions outside of the penny stock arena. Accordingly, they opposed an outright ban of all blank check offerings.”). Ultimately H.R. 4497 was not approved by the House of Representatives. The House of Representatives and the Senate approved the same versions of S. 647, which became law when it was signed by the President. See govtrack (regarding H.R. 4497 and S. 647 in the 101st Congress), available at <https://www.govtrack.us/congress/bills/101/s647> and <https://www.govtrack.us/congress/bills/101/hr4497>.

Some commenters suggested that the proposed changes to the definition of “blank check company” are contrary to the Administrative Procedure Act of 1946, because the Commission does not have explicit statutory authority to make the changes.⁸²² The final rules are consistent with the express statutory authority of the Commission as discussed above.

Notwithstanding the foregoing, the final rules include technical changes from the proposal to clarify that the definitions of “blank check company” that we are adopting are solely for purposes of the PSLRA and not for purposes of any rules the Commission adopted pursuant to mandates under the Penny Stock Reform Act, such as Rule 419. In the Proposing Release, the Commission proposed moving the definition of blank check company out of Rule 419 (into Rule 405) and amending Rule 419 to use the proposed blank check company definition with a qualification in Rule 419 (that would be outside of that definition) limiting the applicability of Rule 419 to issuers of penny stocks.⁸²³ We are adopting a definition of “blank check company” that will be located in Securities Act Rule 405, as proposed, but that includes revised language stating that the definition is “For purposes of section 27A of the Securities Act of 1933 (15 U.S.C. 77z–2).” As a result, we are not amending Rule 419 as the Commission proposed; thus, the existing definition of “blank check company” in Rule 419 will remain unchanged.⁸²⁴ We are also adding to Exchange Act Rule 12b–2 a nearly identical definition of “blank check company” as with the final Securities Act Rule 405 definition, except that it provides that the definition is “For purposes of section 21E of the Securities and Exchange Act of 1934 (15 U.S.C. 78u–5).”⁸²⁵

⁸²² Letter from American Securities Association, *supra* note 751. See also letter from Job Creators Network, *supra* note 751.

⁸²³ Proposing Release, *supra* note 7, at 29481–29482.

⁸²⁴ The Proposing Release requested comment on the following: “Should we consider retaining a separate definition of ‘blank check company’ for purposes of Rule 419?” See Proposing Release, *supra* note 7, at 29482 (request for comment number 78).

⁸²⁵ Notwithstanding several references to section 21E of the Exchange Act in the Proposing Release, we did not propose an Exchange Act rules definition of “blank check company” in the Proposing Release to accompany the proposed amendments to the Securities Act rules and Regulation S–K. We are adopting an Exchange Act rule definition of “blank check company” as well as a Securities Act rule definition, because this approach should be clearer for registrants and other relevant parties and is more consistent with how the Commission has traditionally exercised its authority to define terms in the acts.

As discussed above, some commenters did not support the proposal or expressed a view it is inappropriate to adopt the proposal because of concerns related to the definition of “blank check company” in the Penny Stock Reform Act.⁸²⁶ We do not agree with the commenters that suggested we could not adopt the proposed definition of blank check company on these grounds. However, in order to make clear that we are using our authority to define terms under the PSLRA and not under the Penny Stock Reform Act, we are not amending Rule 419 as proposed. Rather, we are amending Securities Act Rule 405 and Exchange Act Rule 12b–2, as discussed above. The final rules have the same substantive effect as the proposal notwithstanding the different approach taken.

As discussed above, some commenters suggested that projections are rarely used in traditional IPOs.⁸²⁷ Traditional IPOs, however, may include projections. IPO issuers commonly provide certain disclosures about the future in their registration statements, including estimates in historical financial statements and disclosure provided pursuant to 17 CFR 229.303 (“Item 303” of Regulation S–K) (Management’s Discussion and Analysis of Financial Condition and Results of Operations) and Items 5 and 9 of Form 20–F. In an IPO, disclosures under Item 303 of Regulation S–K (for example, which may include statements about the effects of changing prices and future economic performance) are outside the bounds of the PSLRA safe harbor (which is not applicable to IPOs pursuant to Securities Act section 27A(b)(2)(D)). In any offering, including an IPO, estimates in financial statements prepared in accordance with generally accepted accounting principles are outside the bounds of the PSLRA safe harbor pursuant to Securities Act section 27A(b)(2)(A).

Issuers in certain types of IPOs also often include industry- or offering-specific projections. For example, Commission staff has observed that real estate investment trusts may disclose dividend distribution plans and anticipated cash available for distribution (sometimes referred to by industry participants as the “Magic Page”). One commenter also noted that “while it may not be common in certain

⁸²⁶ Letters from ABA, Job Creators Network. See *supra* notes 743, 744, 745, 746, 747, and 748 and accompanying text. See also letter from Kirkland & Ellis, *supra* note 749 and accompanying text.

⁸²⁷ Letter from Cato Institute, *supra* note 759 and accompanying text; letter from NYC Bar, *supra* note 761 and accompanying text.

industries, many types of IPO issuers (e.g., REITs [real estate investment trusts], yieldcos, and master limited partnerships) do regularly disclose projections in their IPO registration statements and those projections are expected, and relied upon, by underwriters and institutional and retail investors.”⁸²⁸ Furthermore, the fact that registrants in traditional IPOs (where there is no PSLRA safe harbor available) provide projections voluntarily and provide them to comply with applicable requirements reinforces our view that blank check companies will be able to provide projections where they may be required to disclose projections they have relied upon under Commission rules or may be required to disclose projections under State law.⁸²⁹

Some commenters expressed concern with the proposal because State law may require disclosure of certain projections⁸³⁰ or because of the interaction of the proposed change in safe harbor availability with other aspects of the proposal, such as Item 1609.⁸³¹ We do not believe, under the final rules, that registrants will be unable to provide a fair summary⁸³² of any projections considered material and reliable that the registrant considers to be required to be disclosed under State law or will be unable to provide the disclosure required by Item 1609. As discussed in detail below, the final rules we are adopting do not bar SPACs from making forward-looking statements or any required disclosures. The changes

to the availability of the PSLRA safe harbor in connection with the definition of blank check company we are adopting will help protect investors by incentivizing SPACs to take more care in avoiding the use of forward-looking statements that are unreasonable.

In addition, investors are likely to understand the difference between: (i) on one hand, third-party projections provided to the management of a SPAC about a target company prior to the business combination agreement with the target company; and (ii) on the other hand, disclosure by registrants in registration statements in connection with de-SPAC transactions that include SPAC or target company management projections regarding certain financial statement line items or financial measures in future years with respect to the target company that is intended to guide investors in connection with the de-SPAC transaction.⁸³³ To the extent a SPAC is concerned that security holders may rely on a summary of third-party projections that the SPAC believes it is required to disclose under State law in instances where the SPAC believes the projections are no longer reliable, a SPAC could provide supplemental disclosure advising and alerting security holders of this fact.⁸³⁴

Some commenters suggested that the proposal potentially would have a chilling effect on the use of projections in de-SPAC transactions and give rise to one of the perceived downsides of an IPO, where a limited group of institutional investors may receive issuer projections indirectly (i.e., from securities analysts who have received projections directly from the issuer).⁸³⁵ While we acknowledge that there may be increased liability for projections

disclosed in connection with de-SPAC transactions, we believe the rules we are adopting are necessary to protect investors receiving such projections. As we discuss in connection with other comments expressing concerns there may be a chilling effect on projection use, the final rules do not prohibit the use of projections in connection with blank check company business combinations. As in an IPO and as SPACs have done in the past, SPACs will continue to be able to disclose projections in connection with de-SPAC transactions after the effective date of the final rules, and securities analysts may elect to use such forward-looking statements as appropriate. In some cases, a SPAC may decide to qualify its disclosure to put it in the proper context.⁸³⁶

Some commenters suggested the proposal would create inconsistency by making the PSLRA safe harbor unavailable for one kind of business combination transaction (de-SPAC transactions) but not for other kinds of business combination transactions.⁸³⁷ In contrast, another commenter said that “[t]he rationale for treating SPAC business combinations differently from other mergers with respect to the disclosure of projections is exactly that the SPAC is a shell company designed exclusively to merge with a private company seeking public listing and SPAC shareholders have an unconditional right to redeem for the initial price per share paid (typically \$10 per share).”⁸³⁸

As discussed above, there are certain differences between SPACs and other business combination transactions due to the hybrid nature of de-SPAC transactions.⁸³⁹ In light of these differences, we believe it is appropriate to take a different regulatory approach with respect to de-SPAC transactions—including in connection with the final definitions of “blank check company”—we are adopting—in order to ensure that investors in these hybrid transactions are adequately protected.

As discussed above, several commenters addressed protections from liability in Commission rules and in common law other than the PSLRA safe harbor.⁸⁴⁰ We agree with commenters that these protections for defendants

⁸²⁸ Letter from Winston & Strawn.

⁸²⁹ In connection with the disclosure of any determination of a board of directors under Item 1606(a), Item 1606(b) requires a discussion of financial projections relied upon by the board of directors. See *supra* section II.G. In certain situations, it is also possible a fair summary of projections would be required under State law. See, e.g., *In re Pure Resources Inc. S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002) (requiring a fair summary of the substantive work performed by investment bankers advising a board of directors); *In re Netsmart Technologies, Inc. S'holders Litig.*, 924 A.2d 171, 176 (Del. Ch. 2007) (“In the context of a cash-out merger, reliable management projections of the company’s future prospects are of obvious materiality to the electorate.”); *Louden v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 145 (Del. 1997) (“Speculation is not an appropriate subject for a proxy disclosure.”); *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006) (“our law has refused to deem projections material unless the circumstances of their preparation support the conclusion that they are reliable enough to aid the stockholders in making an informed judgment.”).

⁸³⁰ Letters from ABA, Amanda Rose, Cato Institute, Cowen, Goodwin, Vinson & Elkins, NYC Bar. See *supra* notes 757, 758, 759, 760, 761, and 762 and accompanying text. See also recommendation of the Small Business Capital Formation Advisory Committee, *supra* note 40.

⁸³¹ Letters from American Securities Association, CFA Institute, Cowen. See *supra* note 763.

⁸³² See *supra* note 829.

⁸³³ One commenter expressed similar views in connection with their comments on proposed Item 1609. See letter from Freshfields (“The projections are included in the de-SPAC offering document in order to describe the basis upon which the board of directors of the SPAC approved the de-SPAC transaction—not to serve as a basis for investors to make an investment decision.”).

⁸³⁴ For example, final Item 1609 requires certain disclosure where projections no longer reflect the views of a SPAC’s or a target company’s management or board of directors (or similar governing body) regarding the future performance of their respective companies.

⁸³⁵ Letters from Bullet Point Network, Ropes & Gray, SPACInsider, SPAC Association, Vinson & Elkins, White & Case. See *supra* note 754. In addition, certain comments also expressed concerns about the potential chilling effect on the use of projections in the SPAC market due to the combination of the change in the PSLRA safe harbor availability and proposed Rule 140a concerning underwriters. We expect the same incentives to take more care in avoiding the use of unreasonable forward-looking statements will apply to underwriters. See letter from NYC Bar, *supra* note 777 and accompanying text. See also letter from Vinson & Elkins, *supra* note 774.

⁸³⁶ See *supra* note 834 regarding required disclosures where projections no longer reflect views on future performance.

⁸³⁷ Letters from SPAC Association, Winston & Strawn.

⁸³⁸ Letter from Bullet Point Network.

⁸³⁹ See *supra* section III.C.

⁸⁴⁰ Letters from ABA, Cowen, Winston & Strawn. See *supra* notes 782, 783, 784, 785, 786, and 787 and accompanying text.

remain potentially applicable, depending upon specific facts and circumstances.⁸⁴¹ We disagree, however, with the commenters who stated that adopting a new definition of blank check company under the PSLRA will merely increase costs such as by eliminating the stay of discovery during the pendency of a motion for summary judgment.⁸⁴² Rather, we believe that removal of the procedural protections under the PSLRA will incentivize SPACs and other blank check companies to take greater care to avoid the use of forward-looking statements that are unreasonable. We analyze the impact of costs related to the final definition of blank check company in section VII (Economic Analysis).

With respect to commenters that expressed the view that the PSLRA safe harbor availability does not meaningfully affect existing disclosure practices,⁸⁴³ we do not agree that the PSLRA safe harbor has no effect on the

accuracy and reliability of disclosure. For example, with respect to knowingly misleading statements, courts are split on whether knowingly false or even fraudulent forward-looking statements are protected by the PSLRA safe harbor;⁸⁴⁴ whereas removing any doubt about the applicability of the safe harbor would incentivize parties to take care to avoid the use of unreasonable forward-looking statements. We do agree, however, as discussed above, that the removal of the PSLRA safe harbor will not eliminate forward-looking statements.

Some commenters suggested the need to alter the availability of the PSLRA safe harbor is overstated.⁸⁴⁵ One of these commenters said that, because target companies may register securities in a de-SPAC transaction, in that situation, the PSLRA safe harbor is already not available to them.⁸⁴⁶ We agree that,

since the PSLRA safe harbor is not applicable to non-reporting companies and is not applicable to IPOs, in certain deal structures where a non-publicly traded target company is registering securities that it is offering in the de-SPAC transaction, the PSLRA safe harbor is already unavailable. There are, however, a number of de-SPAC transactions that are not structured in this manner.

This commenter also suggested the need to alter the availability of the PSLRA is overstated because boards of directors of SPACs review projections, including related assumptions and cautionary language, consistent with their fiduciary duty of care.⁸⁴⁷ Despite these existing fiduciary duties, as discussed by commentators cited in the Proposing Release and by several commenters on the Proposing Release, there have been uses of projections in de-SPAC transactions that appear to be unreasonable, unfounded, or potentially misleading, particularly where the target company is an early stage company with no or limited sales, products, or operations.⁸⁴⁸ Therefore, we believe that the final rules will supplement such State legal or equitable doctrines imposing fiduciary duties and help ensure blank check companies take more care to avoid the use of unreasonable forward-looking statements.

A different commenter suggested the need to alter the availability of the PSLRA safe harbor is overstated because the PSLRA safe harbor only affects private litigation and does not prevent the Commission from pursuing claims for misleading disclosure.⁸⁴⁹ We disagree with this view to the extent that it implies there is no need for investor private rights of action under the Federal securities laws when Commission enforcement actions are available. We consider that view to be inconsistent with the Federal securities

⁸⁴¹ With respect to Securities Act Rule 175, which defines the term fraudulent statement to include, among other things, a statement which is an untrue statement of a material fact and a statement false or misleading with respect to any material fact, *see, e.g., Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 513 (7th Cir. 1989) (court determined that Rule 175 applies to actions under Securities Act section 11 even though liability under that section does not depend on fraud). *See also Arazi v. Mullane*, 2 F.3d 1456, 1468 (7th Cir. 1993) (“Bally’s public statements fell within the safe harbor created by Exchange Act Rule 3b-6, and the plaintiffs have failed to allege with the particularity required by Fed.R.Civ.P. 9(b) that these statements lacked a reasonable basis.”), *Roots Partnership v. Lands’ End, Inc.*, 965 F.2d 1411 (7th Cir. 1992) (“Defendants . . . are entitled to dismissal under Rule 175. . . .”). With respect to the bespeaks caution doctrine, *see, e.g., In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357, 371–373 (3d Cir. 1993) (upholding district court grant of defendant’s motion to dismiss claims that included section 11 claims and applying bespeaks caution doctrine), *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1427 n.3 (9th Cir. 1994) (“The plaintiffs appear to contend that, if the bespeaks caution doctrine is viable, it applies only to section 10(b) claims and not to section 11 claims. This argument is plainly wrong. . . . [C]ourts have applied the doctrine to section 11 claims as well as section 10(b) claims.”), *I. Meyer Pincus & Assoc., P.C. v. Oppenheimer & Co., Inc.*, 936 F.2d 759, 763 (2d Cir. 1991) (“The statements contained within the prospectus clearly ‘bespeak caution’. . . .” and “We conclude that Pincus can prove no set of facts which would demonstrate that the language . . . of the prospectus, read in context, is materially misleading. . . . The complaint thus fails to state a claim under either Section 11 of the 1933 Act [or] Section 10(b) of the 1934 Act.”).

⁸⁴² 15 U.S.C. 77z–2(f), 15 U.S.C. 78u–5(f). *See* letters from Cowen, Winston & Strawn. *See supra* notes 786 and 787 and accompanying text. We note these final rules do not affect the stay of discovery during the pendency of a decision on a motion to dismiss under Securities Act section 27(b)(1) (15 U.S.C. 77z–1(b)(1)) or Exchange Act section 21D(b)(3)(B) (15 U.S.C. 78u–4(b)(3)(B)).

⁸⁴³ Letters from Andrew Tuch, Davis Polk, Kirkland & Ellis. *See supra* notes 778, 779, 780, and 781 and accompanying text. *See also* letter from Cowen, *supra* note 778.

⁸⁴⁴ Compare *Miller v. Champion Enters., Inc.*, 346 F.3d 660, 672 (6th Cir. 2003) (“[I]f the statement qualifies as ‘forward-looking’ and is accompanied by sufficient cautionary language, a defendant’s statement is protected regardless of the actual state of mind.”), and *Harris v. Ivax Corp.*, 182 F.3d 799, 803 (11th Cir. 1999) (“[I]f a statement is accompanied by ‘meaningful cautionary language,’ the defendants’ state of mind is irrelevant.”), with *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 244 (5th Cir. 2009) (“Because the plaintiff adequately alleges that the defendants actually knew that their statements were misleading at the time they were made, the safe harbor provision is inapplicable to all alleged misrepresentations.”), and *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 235 F.Supp.2d 549, 576 (S.D. Tex. 2002) (“The safe harbor provision does not apply where the defendants knew at the time that they were issuing statements that the statements contained false and misleading information and thus lacked any reasonable basis for making them.”). Compare also Brief for Securities and Exchange Commission as Amicus Curiae, *Slayton v. Am. Express Co.*, No. 08–5442–cv (2d Cir. 2010) (“[T]o remove a forward-looking statement from the protection of the safe harbor, a plaintiff must show that the defendant (i) actually knew (ii) that the statement was misleading.”), with Amanda M. Rose, *SPAC Mergers, IPOs, and the PSLRA’s Safe Harbor: Unpacking Claims of Regulatory Arbitrage* (May 19, 2022), at 26–27, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3945975, submitted as attachment to letter from Amanda Rose (“Prongs A and B of the PSLRA’s safe harbor are written in the disjunctive, meaning that if either prong is met the suit must be dismissed. . . . This reading of the safe harbor was critiqued by some as giving rise to a ‘right to lie’ on the part of defendants, but it can be defended from a public policy perspective in light of the broader goals of the legislation . . . mistaken scienter determinations are a real risk in suits challenging forward-looking statements due to the phenomenon of hindsight bias, and the need to fight over this fact-laden issue may preclude early termination of the case, inviting strike suit litigation.”).

⁸⁴⁵ Letters from Kirkland & Ellis, Winston & Strawn.

⁸⁴⁶ Letter from Kirkland & Ellis. *See also* letter from Andrew Tuch (“Just as the legal structure of de-SPACs determines the threat of liability to transaction participants, it also determines the application of the PSLRA safe harbor.”).

⁸⁴⁷ Letter from Kirkland & Ellis.

⁸⁴⁸ Proposing Release, *supra* note 7, at 29462, n.33, and at 29482; letters from Americans for Financial Reform Education Fund, Better Markets, CFA Institute, CII, Senator Elizabeth Warren, *supra* notes 722–727 and accompanying text. The Commission has brought a number of enforcement actions involving SPACs alleging the use of baseless or unsupported projections about future revenues and the use of materially misleading underlying financial projections. *See, e.g., SEC v. Ulrich Kranz and Paul Balciunas*, No. 23–cv–06332 (C.D. Cal. filed Aug. 4, 2023); *In the Matter of Momentum, Inc., et al.*, Exchange Act Release No. 34–92391 (July 13, 2021); *SEC vs. Hurgin, et al.*, Case No. 1:19–cv–05705 (S.D.N.Y., filed June 18, 2019); *In the Matter of Benjamin H. Gordon*, Exchange Act Release No. 34–86164 (June 20, 2019); *SEC vs. Milton*, Case No. 1:21–cv–6445 (S.D.N.Y., filed July 29, 2021).

⁸⁴⁹ Letter from Winston & Strawn.

law statutory scheme, which provides for several private rights of action.⁸⁵⁰

Several commenters suggested that the proposal regarding the change in availability of the PSLRA safe harbor would invite litigation against SPACs.⁸⁵¹ While it is possible that litigation may increase as a result of the removal of the PSLRA safe harbor protections, it is also possible litigation may not increase or may decrease if some issuers who otherwise would have provided unreasonable projections instead provide reasonable projections as a result of the final rules.⁸⁵²

Several commenters provided a range of views on how the proposal could or should change the current use of forward-looking statements, such as projections. Some commenters expressed concerns that the proposal would bar issuers from using projections.⁸⁵³ These commenters suggested that, rather than barring the use of projections, the Commission should mandate qualifying language or additional disclosure around the use of projections.⁸⁵⁴ Other commenters expressed concerns that the proposal would have a chilling effect on the use of projections.⁸⁵⁵ Another commenter suggested the Commission should restrict the use of projections.⁸⁵⁶ Other commenters asked the Commission to expand the PSLRA safe harbor to cover IPOs.⁸⁵⁷

The final definition of “blank check company” we are adopting would not prohibit the use of projections in SPAC registration statements. In this respect, the final rules are not a departure from the Commission’s general policies towards projections held since 1973 when the Commission moved away from its previous “long standing policy

generally not to permit projections to be included in prospectuses and reports filed with the Commission.”⁸⁵⁸ That the final definition of “blank check company” does not prohibit projections is also consistent with existing 17 CFR 229.10(b) (“Item 10(b)” of Regulation S–K), which we are amending in this release, and new Regulation S–K Item 1609. These rules both relate to the use of projections, including those of SPACs—rules which would be unnecessary if projections were barred in registration statements of blank check companies.

We recognize that forward-looking statements can provide useful and necessary disclosure to investors, and that such statements may be mandated by State and/or fiduciary legal obligations. We also recognize that removing certain liability protections for these forward-looking statements could lead some blank check companies to provide fewer forward-looking statements or no forward-looking statements compared with what they might have provided in the absence of the final rules. However, we believe the definition of “blank check company” that we are adopting and the concomitant impact on the availability of the PSLRA safe harbors are necessary and appropriate to help address concerns over the misuse of forward-looking statements in de-SPAC transactions and other business combinations involving blank check companies.⁸⁵⁹ These risks to investors are present in de-SPAC transactions just as in IPOs; in both transactions, there is no track record of public disclosure for a target company to help investors evaluate forward-looking statements.⁸⁶⁰ The final definition of “blank check company” we are adopting will better protect these investors by incentivizing

blank check companies to take more care in avoiding the use of unreasonable forward-looking statements. In addition, we note that the final rules require a discussion of qualifying information, such as assumptions, in connection with the use of projections in de-SPAC transactions as recommended by one of the commenters, which will further enhance investor protections in connection with such forward-looking statements.⁸⁶¹

Some commenters suggested that market forces would hold issuers with unmet projections accountable by preventing future capital access.⁸⁶² While accountability-imposing market reactions potentially could limit future capital-raising ability of some SPACs that provide unreasonable projections, relying solely on such market-based protections would not provide investors with any recourse at the time the projections are made. In addition, some companies may not return to the capital markets in the future to raise additional cash. In such cases, to the extent that market accountability mechanisms may operate in the manner suggested by these commenters, we believe that the passage of time creates risks that such accountability mechanisms may be less likely to operate as theorized.

One commenter suggested allowing the PSLRA safe-harbor to apply to de-SPAC transactions might lower liability insurance premiums.⁸⁶³ We recognize that removal of PSLRA safe-harbor protection from SPACs could result in increased insurance costs for target companies. Based on Commission staff’s experience, companies that enter business combination agreements with blank check companies may have directors and officers insurance, and such business combination agreements may contain provisions regarding the provision of directors and officers insurance to company officials.⁸⁶⁴ As a result, any increased costs incurred by companies in connection with business combinations with blank check companies with respect to directors and officers insurance under the final rules will be incremental to those already

⁸⁵⁰ See, e.g., Securities Act section 11 (15 U.S.C. 77k); Securities Act section 12 (15 U.S.C. 77l).

⁸⁵¹ Letters from Anonymous (Apr. 7, 2022), American Securities Association, Vinson & Elkins.

⁸⁵² See also *supra* note 844 (discussing splits among courts on whether knowingly false or fraudulent forward-looking statements are protected by the PSLRA safe harbor).

⁸⁵³ Letters from Managed Funds Association (referring to the proposal as “barring forward-looking projections entirely”); Michael Dambra, Omri Even-Tov, and Kimberlyn George (referring to the proposal as “barring . . . young growth firms from providing forward looking information.”). See *supra* notes 800 and 801 and accompanying text.

⁸⁵⁴ *Id.*

⁸⁵⁵ Letters from ABA, Amanda Rose, Cato Institute, CFA Institute, Goodwin, Kirkland & Ellis, NYC Bar, SPAC Association, Vinson & Elkins, Winston & Strawn. See *supra* notes 768, 769, 770, 771, and 772 and accompanying text.

⁸⁵⁶ Letter from NASAA. See *supra* note 798 and accompanying text.

⁸⁵⁷ See *supra* note 756 (letters from Bullet Point Network, Loeb & Loeb, Kirkland & Ellis, SPACInsider). See also letters from ABA, Amanda Rose, SPAC Association, *supra* note 756.

⁸⁵⁸ *Disclosure of Projections of Future Economic Performance*, Release No. 33–5362 (Feb. 2, 1973) [38 FR 7220 (Mar. 19, 1973)]. With respect to development of policies towards projections, see also *Guides for Disclosure of Projections of Future Economic Performance*, Release No. 33–5992 (Nov. 7, 1978) [43 FR 53246 (Nov. 15, 1978)]; *Rescission of Guides and Redesignation of Industry Guides*, Release No. 33–6384 (Mar. 16, 1982) [47 FR 11476 (Mar. 16, 1982)].

⁸⁵⁹ See letters from Americans for Financial Reform Education Fund, Better Markets, CFA Institute, CII, Senator Elizabeth Warren, *supra* notes 722–727 and accompanying text.

⁸⁶⁰ For the same reason, we disagree with the commenters who suggested the Commission should expand the PSLRA safe harbor to apply to IPOs. See letters from Bullet Point Network, Loeb & Loeb, Kirkland & Ellis, SPACInsider, *supra* note 756 and accompanying text. See also letters from ABA, Amanda Rose, SPAC Association, *supra* note 756. The concerns we have about the use of forward-looking statements in de-SPAC transactions and other business combinations involving blank check companies discussed above are equally prevalent in traditional IPOs.

⁸⁶¹ See Item 1609 of Regulation S–K. See also letter from Managed Funds Association *supra* note 800.

⁸⁶² Letters from Jonathan Kornblatt, Vinson & Elkins.

⁸⁶³ See letter from Amanda Rose.

⁸⁶⁴ Business combination agreements (such as merger agreements) between a company and a blank check company commonly contain a company covenant, representation, or similar provision that the company will maintain its directors and officers insurance or contain a representation or warranty that the company’s directors and officers insurance listed on the company’s disclosure schedules to the agreement is in force and effect.

incurred. Furthermore, we believe these incremental costs are justified by the enhanced investor protections that will be realized by the incentives created by the final rules for blank check companies to take care to avoid the use of forward-looking statements that are unreasonable. We discuss our analysis of the costs and benefits of the final rules in more detail in section VIII below.

One commenter suggested the Commission should require that earnings statements include a comparison of past projections to actual results in order to enhance issuer accountability.⁸⁶⁵ While we recognize the potential benefits of such disclosure, in order to achieve our goals of incentivizing SPACs and other blank check companies to take more care in avoiding the use of unreasonable forward-looking statements, we do not believe it is necessary to adopt the commenter's suggestion and believe that these goals will be achieved by the final rules.

Another commenter suggested that the safe harbor should be made unavailable only to the "maker" of the statement but that others such as "underwriters (or sellers) could continue to enjoy the full protection of the PSLRA."⁸⁶⁶ "Sellers" are not one of the enumerated persons whose forward looking statements are covered by the PSLRA safe harbors.⁸⁶⁷ With respect to underwriters, Securities Act section 27A(a)(4) provides that section 27A's safe harbor for forward-looking statements applies only to a forward-looking statement "made by" certain persons, including "an underwriter, with respect to information provided by such issuer or information derived from information provided by the issuer." Exchange Act section 21E(a)(4) contains similar provisions. Sections 27A(a)(4) and 21E(a)(4) do not explicitly discuss situations where an underwriter is not the maker of the statement. Securities Act section 27A(g) and Exchange Act section 21E(g) give the Commission exemptive authority to adopt rules or regulations to provide exemptions from

or under any provision of the PSLRA "with respect to liability that is based on a statement or that is based on projections or other forward-looking information if and to the extent that any such exemption is consistent with the public interest and the protection of investors, as determined by the Commission." We are not exercising that authority and are not adopting the commenter's suggestion with respect to sellers and underwriters because we do not believe that it is consistent with the public interest and the protection of investors to expand the protections of the PSLRA safe harbors in this manner and believe it would be inconsistent with the purpose of the final rules to incentivize blank check companies to take more care in avoiding the use of unreasonable forward-looking statements.⁸⁶⁸

Another commenter suggested that the safe harbor should be unavailable for longer-term projections (where the commenter provided the example of a statement, "we will penetrate 50% of [total addressable market] in 10 years") but available for short-term projections (where the commenter provided the example of a statement, "we expect to make revenue in 1 year or have positive [free cash flow] in 2 years.")⁸⁶⁹ We believe that it is equally important for investor protection purposes that blank check companies take care to avoid the use of unreasonable short-term projections as well as unreasonable longer-term projections.⁸⁷⁰ Therefore, we are not adopting this suggestion.

One commenter said it is inappropriate to deem a transaction to be a de-SPAC transaction where the SPAC survives as an IPO and suggested

the Commission should provide an interpretation that de-SPAC transactions are "tender offers" which would make the PSLRA safe harbor unavailable.⁸⁷¹ We disagree with the view de-SPAC transactions should not be considered the IPO of the target company. As we discuss in detail in this release,⁸⁷² the de-SPAC transaction is functionally the IPO of the target company. While redemption rights exercisable by security holders in connection with the de-SPAC transaction (or extension of the timeframe to complete a de-SPAC transaction) generally have indicia of a tender offer,⁸⁷³ the business combination component of the de-SPAC transaction is typically structured as a statutory merger, and not as a tender offer. Therefore, we disagree with the commenter's suggestion that entire de-SPAC transactions could be interpreted or viewed as tender offers.

F. Underwriter Status and Liability in Securities Transactions

1. Proposed Rule

The Commission proposed Rule 140a to clarify that anyone who acts as an underwriter in a SPAC IPO and participates in the distribution associated with a de-SPAC transaction by taking steps to facilitate such transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction is engaged in the distribution of securities of the surviving public entity and, therefore, is an "underwriter" within the meaning of section 2(a)(11) of the Securities Act.⁸⁷⁴ In this way, the proposed rule was intended to clarify that liability protections similar to those in traditional underwritten IPOs would apply to de-SPAC transactions in which a statutory underwriter has participated. The Commission also described in the Proposing Release some of the activities sufficient to establish a SPAC IPO underwriter as a participant in the distribution of target company securities, as securities of the combined company.⁸⁷⁵ The Proposing Release stated that the discussion of such activities was non-exhaustive and not intended to limit the definition of underwriter for purposes of section 2(a)(11) of the Securities Act.

⁸⁷¹ Letter from Vinson & Elkins. See *supra* note 807.

⁸⁷² In particular, see *supra* section III.C and *infra* section IV.A.

⁸⁷³ Proposing Release, *supra* note 7, at 29461, n.21.

⁸⁷⁴ Proposing Release, *supra* note 7, at 29483.

⁸⁷⁵ See Proposing Release, *supra* note 7, at 29486.

⁸⁶⁵ Letter from SPAC Association.

⁸⁶⁶ Letter from Cowen.

⁸⁶⁷ See, e.g., Securities Act section 27A(a) (15 U.S.C. 77z-2(a)) ("This section shall apply only to a forward-looking statement made by—(1) an issuer that, at the time that the statement is made, is subject to the reporting requirements of section 78m(a) or section 78o(d) of this title; (2) a person acting on behalf of such issuer; (3) an outside reviewer retained by such issuer making a statement on behalf of such issuer; or (4) an underwriter, with respect to information provided by such issuer or information derived from information provided by the issuer."). Exchange Act section 21E(a) contains similar provisions.

⁸⁶⁸ As noted by a commenter and as discussed above, other safe harbors, such as Securities Act Rule 175 and Exchange Act Rule 3b-6 and the bespeaks caution may continue to apply, depending on specific facts and circumstances. In contrast to the PSLRA, Rules 175 and 3b-6 do not explicitly refer to statements made by underwriters. Rules 175 and 3b-6 apply to statements "made by or on behalf of an issuer or by an outside reviewer retained by the issuer."

⁸⁶⁹ Letter from Charles Pieper.

⁸⁷⁰ We note that 17 CFR 229.10(b)(1), as amended in this release, sets out the policy of the Commission that registrant assessments of future performance must have a reasonable basis. In addition, 17 CFR 229.10(b)(2), as amended in this release, provides: "The period that appropriately may be covered by a projection depends to a large extent on the particular circumstances of the company involved. For certain companies in certain industries, a projection covering a two- or three-year period may be entirely reasonable. Other companies may not have a reasonable basis for projections beyond the current year." Blank check companies should consider whether projections that extend a substantial period into the future, such as the 10-year projection provided in the commenter's example, are consistent with this policy.

2. Comments

Several commenters generally supported proposed Rule 140a.⁸⁷⁶ However, several other commenters expressed concerns about the potential impact on transaction participants and the overall market if proposed Rule 140a were adopted.⁸⁷⁷ Several commenters also expressed concerns about increased costs if proposed Rule 140a were adopted.⁸⁷⁸ In addition, numerous commenters expressed concerns that the proposed rule could result in increased liability and/or litigation risk for transaction participants.⁸⁷⁹ Several commenters also expressed broader concerns about the effects of proposed Rule 140a on M&A transactions other than de-SPAC transactions.⁸⁸⁰ A Commission advisory committee recommended that participants who would have underwriter liability should be clearly identified and participants should be held accountable to the same extent they would be in traditional IPOs.⁸⁸¹

Several commenters disagreed with the discussion in the Proposing Release regarding what it means to participate in a distribution.⁸⁸² A number of commenters asserted that proposed Rule 140a was inconsistent with the statutory text of section 2(a)(11), other

Commission rules, and case law construing the application of section 11 to parties other than named underwriters.⁸⁸³ In particular, commenters argued that the term “underwriter” as used in section 2(a)(11) does not have unlimited applicability to capture anyone associated with an issuance of securities within its meaning.⁸⁸⁴ Some commenters argued that no person in a de-SPAC transaction purchases with a view to distribution or sells for an issuer or participates in any purchase, offer, or sale of securities for distribution or that a de-SPAC transaction generally does not involve underwriters.⁸⁸⁵

Some commenters questioned the scope of the section 11 liability that would attach to any underwriter under the proposed rule.⁸⁸⁶ In addition, commenters questioned how a court would apportion damages among underwriters were Rule 140a to be adopted as proposed.⁸⁸⁷ While some commenters stated that underwriter status would improve diligence performed by parties in a de-SPAC transaction,⁸⁸⁸ other commenters disagreed that proposed Rule 140a would improve diligence performed in de-SPAC transactions.⁸⁸⁹

To the extent the Commission were to adopt Rule 140a, some commenters requested specific changes or additional provisions related to the rule. Several commenters asked the Commission to limit the scope of proposed Rule 140a underwriter liability in a de-SPAC transaction to disclosures akin to those in a traditional IPO.⁸⁹⁰

Several commenters proposed alternatives to adopting Rule 140a, including:

- Relying on statutory “seller” liability under Securities Act section 12(a)(2);⁸⁹¹
- Requiring a SPAC to file a current report upon announcement of a signed

agreement to consummate a de-SPAC Transaction;⁸⁹²

- Mandating “a new role for an investment bank in de-SPAC transactions for all exchange-listed SPACs;”⁸⁹³ and

- Establishing a maximum threshold on redemptions in order for a de-SPAC transaction to proceed.⁸⁹⁴

Finally, several commenters asked the Commission to apply proposed Rule 140a on a prospective basis or to adopt a phase in period.⁸⁹⁵

3. Declining To Adopt Proposed Rule 140a; Commission Guidance on Underwriter Status in De-SPAC Transactions

As discussed in the Proposing Release, underwriters play an important role in the U.S. financial markets, acting as gatekeepers for the investing public in the distribution of a new issuer’s securities to the public markets for the first time.⁸⁹⁶ Section 2(a)(11) of the Securities Act defines underwriter as “any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking.”⁸⁹⁷ The Commission and courts generally have emphasized that such concepts should be applied broadly and not formulaically.⁸⁹⁸

⁸⁹² Letter from NYC Bar.

⁸⁹³ Letter from Vinson & Elkins.

⁸⁹⁴ Letter from Usha Rodrigues and Mike Stegemoller.

⁸⁹⁵ Letters from ABA, Committee on Capital Markets Regulation, Davis Polk, Ropes & Gray, SIFMA, Winston & Strawn.

⁸⁹⁶ *New High Risk Ventures*, Release No. 33–5275 (July 27, 1972) [37 FR 16011, 16013 (Aug. 9, 1972)] (“Also unique is the importance of the underwriter in the distribution of the securities. His role is central as the intermediary between the issuer and the investing public. Correspondingly, the public looks to the underwriter for protection and expects him to verify the accuracy of the statements in the registration statement.”).

⁸⁹⁷ 15 U.S.C. 77b(a)(11).

⁸⁹⁸ See *Definition of Terms “Underwriter” and “Brokers’ Transactions,”* Release No. 33–5223 (Jan. 11, 1972) [37 FR 591, 592 (Jan. 14, 1972)] (“Rule 144 Adopting Release”) (“The term underwriter is broadly defined in section 2(a)(11) of the Act. . . . Thus, an investment banking firm which arranges with an issuer for the public sale of its securities is clearly an ‘underwriter’ under that section. Not so well understood is the fact that individual investors who are not professionals in the securities business may be ‘underwriters’ within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public.”). See also *Harden v. Raffensperger, Hughes & Co.*, 65 F.3d 1392, 1400 (7th Cir. 1995) (“Both the Supreme Court and this court have interpreted broadly the phrases ‘participate in’ and ‘participation’ found in

⁸⁷⁶ Letters from Andrew Tuch, Americans for Financial Reform Education Fund, Better Markets, Bullet Point Network, CII, Consumer Federation, Senator Elizabeth Warren, ICGN, Mohammed Ali Rashid (May 7, 2022) (“Mohammed Ali Rashid”), NASAA, Public Citizen.

⁸⁷⁷ Letters from Andrew Tuch, ABA, Anonymous (May 9, 2022) (“Anonymous (May 9, 2022)”), American Securities Association, Committee on Capital Markets Regulation, CFA, Cleary Gottlieb Steen & Hamilton LLP (June 13, 2022) (“Cleary Gottlieb”), Cowen, Davis Polk, Fenwick, Freshfields, Goodwin, ICGN, Cato Institute, Job Creators Network, King & Wood Mallesons, Kirkland & Ellis, Loeb & Loeb, Managed Funds Association, NYC Bar, Paul Swegle, Ropes & Gray, Securities Industry and Financial Markets Association (June 10, 2022) (“SIFMA”), Skadden, SPAC Association, Usha Rodrigues and Mike Stegemoller (May 31, 2022) (“Usha Rodrigues and Mike Stegemoller”), Vinson & Elkins, White & Case, Winston & Strawn.

⁸⁷⁸ Letters from ABA, Anonymous (May 9, 2022), Committee on Capital Markets Regulation, Cowen, Davis Polk, Goodwin, Cato Institute, Managed Funds Association, Paul Swegle, SIFMA, Skadden, Vinson & Elkins.

⁸⁷⁹ Letters from ABA, Anonymous (May 9, 2022), American Securities Association, Cleary Gottlieb, Cowen, Davis Polk, Freshfields, Goodwin, King & Wood Mallesons, Kirkland & Ellis, Loeb & Loeb, Managed Funds Association, NYC Bar, Ropes & Gray, SIFMA, Skadden, Tony Crom (May 18, 2022), Usha Rodrigues and Mike Stegemoller, Vinson & Elkins, White & Case, Winston & Strawn.

⁸⁸⁰ Letters from Andrew Tuch, ABA, Davis Polk, Ropes & Gray, White & Case.

⁸⁸¹ See Small Business Capital Formation Advisory Committee recommendations, *supra* note 40.

⁸⁸² Letters from Davis Polk, Kirkland & Ellis, NYC Bar, SIFMA, Vinson & Elkins.

⁸⁸³ Letters from ABA, Cleary Gottlieb, Cowen, Davis Polk, Freshfields, Goodwin, SIFMA.

⁸⁸⁴ Letters from ABA, Cleary Gottlieb, Cowen, Davis Polk, Freshfields, Goodwin, SIFMA.

⁸⁸⁵ Letters from ABA, SIFMA.

⁸⁸⁶ Letters from ABA, American Securities Association, CFA, Cowen, Cleary Gottlieb, Davis Polk, Freshfields, Goodwin, Kirkland & Ellis, Managed Funds Association, Ropes & Gray, SIFMA, Skadden, Vinson & Elkins, White & Case, Winston & Strawn.

⁸⁸⁷ Letter from Cowen.

⁸⁸⁸ Letters from Americans for Financial Reform Education Fund, Better Markets, Consumer Federation, ICGN, Mohammed Ali Rashid, Managed Funds Association, NASAA.

⁸⁸⁹ Letters from ABA, Davis Polk, Freshfields, Goodwin, Kirkland & Ellis, Managed Funds Association, Skadden, Vinson & Elkins.

⁸⁹⁰ Letters from ABA, Better Markets, Davis Polk, ICGN, Ropes & Gray, Vinson & Elkins, White & Case.

⁸⁹¹ Letter from Cowen.

Having considered the comments received on proposed Rule 140a and given the broad nature of the definition of underwriter in section 2(a)(11), we are not adopting Rule 140a. Although we agree with commenters that the term underwriter does not have “unlimited applicability,” as further explained below, the statutory definition of underwriter, itself, encompasses any person who sells for the issuer or participates in a distribution associated with a de-SPAC transaction. To assist parties in applying section 2(a)(11) to de-SPAC transactions, we are providing the following general guidance regarding statutory underwriter status. For the avoidance of doubt, this guidance does not implement proposed Rule 140a. Rather than promulgate a rule clarifying when a specific party is an underwriter for de-SPAC transactions, we intend to follow the Commission’s longstanding practice of applying the statutory terms “distribution” and “underwriter” broadly and flexibly, as the facts and circumstances of any transaction may warrant.

i. A De-SPAC Transaction Is a Distribution of Securities

The concept of distribution within section 2(a)(11) is not limited to a transaction taking the form of a traditional IPO or traditional capital raising. For example, a spin-off is not traditional capital raising; yet, in certain circumstances, has been found to constitute a distribution of securities for the purposes of section 2(a)(11).⁸⁹⁹ In

the Proposing Release, the Commission stated that the de-SPAC transaction marks the introduction of the private operating company to the public capital markets and is effectively how the private operating company’s securities “come to rest”—in other words, are distributed—to public investors as shareholders of the combined company.⁹⁰⁰

Some commenters asked the Commission to better explain the distribution that occurs in a de-SPAC transaction.⁹⁰¹ Although the word “distribution” has no definition in the Securities Act, the term “distribution” refers to the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hands of the investing public.⁹⁰² In a traditional IPO, an underwriter distributes shares in a private company to investors thereby providing access to capital and the public markets. Although different in form from traditional capital raising in an IPO, the purpose of a de-SPAC transaction is to provide the target company with capital and access to the public markets.⁹⁰³ In the course of such a transaction, regardless of the transaction structure, public shareholders of the SPAC become owners of the combined operating company through the business combination.⁹⁰⁴ Given this, in the context of a de-SPAC transaction,

in Rule 145 is no longer necessary in most circumstances. However, based on our experience with transactions involving shell companies that have resulted in abusive sales of securities, we believe that there continues to be a need to apply the presumptive underwriter provision to reporting and non-reporting shell companies and their affiliates and promoters.”).

⁸⁹⁹ Proposing Release, *supra* note 7, at 29485.

⁹⁰⁰ Letter from ABA.

⁹⁰¹ See *Geiger v. SEC*, 363 F.3d 481, 487 (D.C. Cir. 2004) (finding that head trader and salesman, respectively, at a securities brokerage firm, who made resales in broker transactions over a two-week period of 133,333 shares of the roughly 25 million shares then outstanding, were engaged in a distribution within the meaning of section 2(a)(11) of the Securities Act and that one “did not have to be involved in the final step of [a] distribution to have participated in it”). See also *R.A. Holman v. SEC*, 366 F.2d 446, 449 (2d Cir. 1966) (finding that a distribution “comprises the entire process by which in the course of a public offering the block of securities is dispersed and ultimately comes to rest in the hands of the investing public”) (internal quotation marks omitted).

⁹⁰² Such transactions historically have been known as “going public through the back door.” See, e.g., Leib Orlanski, *Going Public Through the Back Door and the Shell Game*, 58 Va. L. Rev. 1451 (1972), available at https://heinonline.org/HOL/Page?public=true&handle=hein.journals/vallr58&div=72&start_page=1451&collection=usjournals&set_as_cursor=0&men_tab=srchresults.

⁹⁰³ For example, shareholders of a SPAC become shareholders of a combined operating company by operation of State or local law in a statutory merger.

interests in the typically private target company are dispersed to the public via a business combination with a SPAC. The distribution is therefore the process by which the SPAC’s investors, and therefore the public, receive interests in the combined operating company.

One commenter asserted that not every de-SPAC transaction would involve a distribution of securities because in at least some de-SPAC transactions the target company is not “selling” or “distributing” any securities in the transaction.⁹⁰⁵ As discussed elsewhere in this release, however, the statutory concepts of offer and sale have a very broad meaning and can encompass situations in which there is no actual exchange of securities.⁹⁰⁶ However, assuming, for the sake of addressing this commenter’s argument, that a distribution requires a “sale” that meets the definition of such term under section 2(a)(3), we are adopting Rule 145a, which deems there to be a sale from the combined company to the SPAC’s existing shareholders even in de-SPAC transaction structures where the target company is not “selling” or “distributing” its own securities into the market.⁹⁰⁷

ii. Statutory Underwriters in De-SPAC Transactions

While one commenter asserted that there is not always a distribution of securities associated with a de-SPAC transaction,⁹⁰⁸ another asserted that the de-SPAC distribution “occurs directly from the issuer to the counterparties to the business combination, without the involvement of underwriters.”⁹⁰⁹ It is well established that the statutory definition of underwriter is not limited to traditional underwriters in firm commitment IPOs, but also includes anyone who otherwise meets the statutory definition.⁹¹⁰ Anyone in this second category is generally known as a “statutory underwriter” because, although they may not be named as an underwriter in a given offering and may not engage in activities typical of a

⁹⁰⁵ Letter from ABA.

⁹⁰⁶ See the discussion regarding the broad definition of “sale” in section 2(a)(3) and the related examples in *infra* section IV.A.3.i.

⁹⁰⁷ See *infra* section IV.A. As discussed below, Rule 145a applies regardless of the structure the de-SPAC transaction may take.

⁹⁰⁸ Letter from ABA.

⁹⁰⁹ Letter from SIFMA.

⁹¹⁰ See 2 Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation* 3.A.3 (6th ed. 2019) (“The term underwriter is defined not with reference to the particular person’s general business but on the basis of his or her relationship to the particular offering. . . . Any person who performs one of the specified functions in relation to the offering is a statutory underwriter even though he or she is not a broker or dealer.”).

15 U.S.C. 77b(11). In *Pinter v. Dahl*, 486 U.S. 622, 108 S. Ct. 2063, 100 L.Ed.2d 658 (1988), for example, the Supreme Court discussed whether the Congress intended to impose liability under section 12(a)(1) of the Securities Act on those collateral to the offer or sale of a security. Rejecting the possibility, the Court commented, in dictum, that “Congress knew of the collateral participation concept and employed it in the Securities Act. . . . Liabilities and obligations expressly grounded in participation are found elsewhere in the Act, see, e.g., 15 U.S.C. 77b(11).” *Dahl*, 486 U.S. at 650 n. 26, 108 S. Ct. at 2080 n. 26. The Court’s footnoted discussion makes clear that, in its view, one who “participates,” or “takes part in,” an underwriting is subject to section 11 liability.”).

⁸⁹⁹ A “spin-off” is a transaction by which a parent company distributes shares of a subsidiary to the parent company’s shareholders. These transactions are frequently accompanied by the creation of a public market for the subsidiary’s securities via listing on a national securities exchange. See, e.g., *Spin Offs and Shell Corporations*, Release No. 33-4982 (July 14, 1969) [34 FR 11581 (July 15, 1969)] (“Spin Offs Release”) (“It is accordingly the Commission’s position that the shares which are distributed in certain spin offs involve the participation of a statutory underwriter and are thus, in those transactions, subject to the registration requirements of the Act. . . .”). See also *Revisions to Rules 144 and 145*, Release No. 33-8869 (Dec. 6, 2007) [72 FR 71546, 71559 (Dec. 17, 2007)] (“The presumptive underwriter provision

named underwriter, they nevertheless meet the definition of underwriter in the statute. As such, the statute applies to such parties in the same way as it would to a named underwriter in a firm commitment offering. In addition, the Commission has previously stated that “the statutory language of section 2(a)(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not purchase securities from an issuer with a view to their distribution. It must also be established that the person is not offering or selling for an issuer in connection with the distribution of the securities, does not participate or have a direct or indirect participation in any such undertaking, and does not participate or have a participation in the direct or indirect underwriting of such an undertaking.”⁹¹¹

Several commenters disagreed with the discussion in the Proposing Release regarding what it means to participate in a distribution.⁹¹² These commenters asserted that some courts have adopted a narrower view of the concept of “participation” than what was discussed in the Proposing Release.⁹¹³ We acknowledge that some courts have declined to find that parties other than named underwriters were acting as distribution participants. These cases, however, arose in more conventional capital raising contexts and were based on the particular facts and circumstances before the court. It is far from clear that the cases cited by the commenters should be determinative of how the concepts of “distribution” and “underwriter” apply in the context of a de-SPAC transaction, which combines elements of both a traditional IPO and an M&A transaction.

We acknowledge that in a de-SPAC transaction, there is generally no single party accepting securities from the issuer with a view to resell such securities to the public in a distribution in the same manner as a traditional

underwriter in traditional capital raising. Nevertheless, in a de-SPAC distribution, there would be an underwriter present where someone is selling for the issuer or participating in the distribution of securities in the combined company to the SPAC’s investors and the broader public. Depending on the facts and circumstances, such an entity could be deemed a “statutory underwriter” even though it may not be named as an underwriter in any given offering or may not be engaged in activities typical of a named underwriter in traditional capital raising. Section 11 would apply as it would to anyone acting as underwriter with respect to a registered de-SPAC transaction, and such person will have liability for any material misstatement or omission in the registration statement.⁹¹⁴ Similarly such person would have any defenses available to the parties upon whom the statute imposes liability.⁹¹⁵

The prior discussion is not intended to signal that we believe that every de-SPAC transaction or offering of securities generally involves or needs the involvement of an underwriter. But where a distribution and an underwriter are present, the party acting as underwriter will need to perform the necessary due diligence of the disclosures made in connection with the registered offering of securities or face full exposure to liability without the benefit of the due diligence defense under the Securities Act of 1933.⁹¹⁶

iii. A De-SPAC Transaction Is Distinguishable From Other M&A Transactions

By its terms, proposed Rule 140a would have applied only to SPAC IPO underwriters that took steps to facilitate a de-SPAC transaction or any related financing transaction, or otherwise participated (directly or indirectly) in the de-SPAC transaction. However, as noted above, commenters indicated that the proposal raised numerous questions about whether other parties that similarly facilitate de-SPAC transactions would be subject to liability and, whether a similar analysis applies to other types of transactions, such as more

“traditional” M&A transactions (*i.e.*, those not involving a SPAC).⁹¹⁷

In response to these comments, we note that Rule 140a was not intended to address any business combination transaction not involving a de-SPAC transaction. Similarly, the guidance presented in this release is not intended to influence current practice in traditional M&A, as the two situations are readily distinguishable. As discussed above,⁹¹⁸ although de-SPAC transactions have many of the same features of traditional M&A transactions, they have a different purpose. While they take the form of a business combination, de-SPAC transactions serve as the means by which a private company may enter the public market for the first time and thus are the equivalent of an IPO by the target company. Indeed, it is in recognition of this unique method of conducting a public offering that we are adopting Rule 145a and the co-registration requirements to account for the fact that the combined company in a de-SPAC transaction is effectively acting as an issuer engaged in a sale of its securities to the public shareholders of the SPAC. We reiterate, however, that nothing in this release is intended to limit or alter the definition of underwriter for purposes of section 2(a)(11) of the Securities Act.

IV. Business Combinations Involving Shell Companies

In response to concerns regarding the use of shell companies⁹¹⁹ as a means of accessing the U.S. capital markets, the Commission proposed new rules that would apply to business combination transactions involving shell companies, which include de-SPAC transactions. First, the Commission proposed new Rule 145a under the Securities Act that would deem such business combination transactions to involve a sale of securities to a reporting shell company’s shareholders. The Commission is adopting that rule as proposed as discussed below. Second, the Commission proposed new Article 15 of Regulation S-X and related amendments to more closely align the required financial statements of private operating companies in connection with these transactions with those required

⁹¹¹ Rule 144 Adopting Release, *supra* note 898, at 596.

⁹¹² Letters from Davis Polk, Kirkland & Ellis, NYC Bar, SIFMA, Vinson & Elkins.

⁹¹³ Many such commenters have pointed to *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167 (2d Cir. 2011) as evidence that the Second Circuit has more narrowly defined the concept of participant in a distribution. See letters from ABA, Cleary Gottlieb, Committee on Capital Markets Regulation, Kirkland & Ellis, SIFMA, Skadden, Vinson & Elkins, Winston & Strawn. There, the Court held that the various credit rating agency defendants could not be liable as underwriters section 2(a)(11). See also commenter references to *Silvercreek Mgmt., Inc. v. Citigroup, Inc.*, 346 F. Supp. 3d 473, 507–09 (S.D.N.Y. 2018); *In re REFCO, Inc. Sec. Litig.*, 2008 WL 3843343, at *4 (S.D.N.Y. Aug. 14, 2008).

⁹¹⁴ Similarly, section 12(a)(2) imposes liability upon anyone, including underwriters, who offers or sells a security, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, to any person purchasing such security from them. 15 U.S.C. 77(a)(2).

⁹¹⁵ See the defenses to section 11 liability in 15 U.S.C. 77k(b).

⁹¹⁶ 15 U.S.C. 77k(b)(3).

⁹¹⁷ Letters from ABA, Andrew Tuch, Davis Polk, Ropes & Gray, White & Case.

⁹¹⁸ See *supra* section I and *infra* section IV.A.3.

⁹¹⁹ As stated above, throughout this release, we use “shell company” and “reporting shell company” in lieu of the phrases “shell company, other than a business combination related shell company” and “reporting shell company, other than a business combination related shell company.” See *supra* note 41 for the definition of “reporting shell company.”

in registration statements on Form S-1 or F-1 for an IPO.⁹²⁰ The Commission is adopting those rules mostly as proposed, with certain changes discussed below. The issues the Commission is addressing with the adoption of both of these sets of final rules are common to these shell company transactions, regardless of whether the shell company is a SPAC.

A. Shell Company Business Combinations and the Securities Act of 1933

1. Proposed Rule

The Commission proposed Rule 145a to address the use of reporting shell companies as a means to enter the U.S. capital markets without Securities Act registration and the related disclosures which are intended to protect investors. The rule was proposed due to the significant increase in such reporting shell company business combination transactions, including through the use of a SPAC, in an effort to provide reporting shell company shareholders with more consistent Securities Act protections regardless of transaction structure.⁹²¹ Proposed Rule 145a would deem any direct or indirect business combination of a reporting shell company that is not a business combination related shell company involving another entity that is not a shell company to involve a sale of securities to the reporting shell company's shareholders. While nothing in proposed Rule 145a would prevent or prohibit the use of a valid exemption, if available, for the deemed sale of securities to the reporting shell company's shareholders, the Commission stated that the exemption under section 3(a)(9) of the Securities Act generally would not be available for the sales covered by the proposed rule.⁹²² The proposed rule would not apply to the merger of an existing reporting shell company into a new shell company where the surviving company remains a shell.

⁹²⁰ The requirements in Form S-4, Form F-4, and Schedule 14A for an acquisition of a business were developed at a time when acquirers were generally operating companies, and these requirements do not specifically address transactions involving shell companies. For example, Form S-4 was adopted by the Commission in 1985, which predates the origins of SPACs in the 1990s. *See Business Combination Transactions; Adoption of Registration Form*, Release No. 33-6578 (Apr. 23, 1985) [50 FR 18990 (May 6, 1985)].

⁹²¹ *See* Proposing Release, *supra* note 7, at 29488.

⁹²² *Id.* at 29489.

2. Comments

Several commenters generally supported proposed Rule 145a.⁹²³ Some of these commenters pointed to investor protection concerns related to SPACs and de-SPAC transactions and the benefits associated with registration under the Securities Act.⁹²⁴ In this regard, some commenters pointed out that the reform contemplated by Rule 145a would help prevent certain disparities in regulation for transactions that vary in legal structure but not in economic substance, ensuring that unaffiliated security holders enjoy the protections that come from investing in a registered offering.⁹²⁵ Other commenters noted that the likely registration of de-SPAC transactions as a result of Rule 145a would result in enhanced liabilities for signatories to any registration statement and underwriter and expert liability, thereby ensuring investors receive fair and reliable information.⁹²⁶

Other commenters generally opposed, or expressed concerns regarding, proposed Rule 145a.⁹²⁷ Some commenters discussed the potential costs and effects of proposed Rule 145a.⁹²⁸ Certain commenters questioned the Commission's authority to adopt Rule 145a where, in commenters' views, no distribution of securities actually occurs⁹²⁹ or for situations in which there is neither a vote nor any securities changing hands as there is no traditional "investment decision."⁹³⁰ Some commenters asserted that proposed Rule 145a is unnecessary for the protection of investors and that de-SPAC transactions, in particular, are already accompanied by a full set of disclosures.⁹³¹ Other commenters asserted that proposed Rule 145a conflicted with proposed Rule 140a because proposed Rule 140a implied that there is a single distribution occurring between a SPAC's IPO and the de-SPAC transaction.⁹³²

⁹²³ Letters from Andrew Tuch, Bullet Point Network, ICGN, Public Citizen. *See also* letter from Jorge Stolfi (May 30, 2022) ("Jorge Stolfi") ("Ideally, ANY merger involving a publicly traded company should require evaluation and approval of the stock of the proposed merged company's stock by the SEC, as if it was a new security.").

⁹²⁴ Letters from Andrew Tuch, ICGN, Jorge Stolfi, Public Citizen.

⁹²⁵ Letter from Andrew Tuch.

⁹²⁶ Letter from ICGN.

⁹²⁷ Letters from ABA, Freshfields, Kirkland & Ellis, NYC Bar, Vinson & Elkins, Winston & Strawn.

⁹²⁸ Letters from ABA, Freshfields, Loeb & Loeb, Vinson & Elkins. *See infra* section VIII.

⁹²⁹ Letter from Vinson & Elkins.

⁹³⁰ Letter from ABA.

⁹³¹ Letters from Freshfields, Kirkland & Ellis, NYC Bar, Vinson & Elkins.

⁹³² Letters from ABA, Kirkland & Ellis, SIFMA.

One commenter asserted that not all shell company business combinations are similar and, in particular, that de-SPAC transactions are not comparable to shell company transactions with microcap companies.⁹³³ Another commenter stated that it is unclear to them why de-SPAC transactions should be treated differently than other reverse mergers.⁹³⁴

A number of commenters requested that the Commission clarify and/or modify aspects of proposed Rule 145a. In particular, a commenter requested, if Rule 145a were adopted, that "[i]n the spirit of aligning treatment of IPOs and de-SPAC transactions, Rule 145 [17 CFR 230.145] should be revised to not apply to any transaction that Rule 145a applies to."⁹³⁵ The same commenter requested that the Commission limit the scope of proposed Rule 145a so as not to apply to business combination related shell companies.⁹³⁶ Another commenter asked us to further clarify the application or operation of proposed Rule 145a.⁹³⁷ In particular, this commenter asked that the Commission clarify the intended trigger for the application of Rule 145a in a de-SPAC transaction.

Finally, certain commenters questioned the Commission's explanation of the application of section 3(a)(9) in Rule 145a transactions.⁹³⁸ In particular one commenter stated that they did not agree that the "deemed exchange" should be integrated with the exchange of the private company's securities for interests in the SPAC, such that section 3(a)(9) would be unavailable because a proxy solicitor is paid to solicit proxies from SPAC shareholders in connection with the shareholder vote on a de-SPAC transaction.⁹³⁹ The commenter asserted that any vote associated with the de-SPAC transaction and the related proxy solicitation is irrelevant to whether the transaction would be deemed a sale under existing rules. A different commenter asserted that if there is an exchange it is embodied in the redemption decision, not the vote in connection with a de-SPAC transaction, and thus payment of compensation for a proxy solicitor should not prevent reliance on Securities Act section 3(a)(9).⁹⁴⁰

⁹³³ Letter from Kirkland & Ellis.

⁹³⁴ Letter from Winston & Strawn.

⁹³⁵ Letter from Vinson & Elkins.

⁹³⁶ *Id.*

⁹³⁷ Letter from ABA.

⁹³⁸ Letters from Kirkland & Ellis, Vinson & Elkins.

⁹³⁹ Letter from Kirkland & Ellis.

⁹⁴⁰ Letter from Vinson & Elkins.

3. Final Rule

We are adopting Rule 145a as proposed. Currently, investors in reporting shell companies may not always receive the disclosures and other protections afforded by the Securities Act at the time when there is a fundamental change in the nature of their investment due to the business combination involving another entity that is not a shell company.⁹⁴¹

To address this, Rule 145a specifies that a sale occurs from the post-transaction company to the existing shareholders of a reporting shell company in situations where a reporting shell company that is not a business combination related shell company enters into a business combination transaction involving another entity that is not a shell company.⁹⁴² In these situations, Rule 145a deems there to be a share exchange implicating the requirements and protections of section 5 of the Securities Act because the interests the former reporting shell company shareholders owned have been exchanged for something entirely different—interests in an operating company in the course of a transaction whereby the former reporting shell company provides the operating company with access to the public markets. The sale identified by the rule occurs regardless of whether securities are changing hands in the business combination transaction, and thus the transaction will need to be registered in accordance with the Securities Act unless an exemption from registration is available. The final rule also applies regardless of transaction structure or the form of business combination (e.g., statutory merger, share exchange, stock purchase, asset purchase, etc.).

As discussed in the Proposing Release, Rule 145a will apply to any reporting shell company that has assumed the appearance of having more than “nominal” assets or operations.⁹⁴³

⁹⁴¹ Although other private liability may apply in situations where disclosures are provided to investors in connection with business combinations involving reporting shell companies, such liability is not as extensive as the protections investors receive under the Securities Act. See Douglas & Bates, *supra* note 581.

⁹⁴² As noted above, certain commenters asserted that proposed Rule 145a was inconsistent with proposed Rule 140a because proposed Rule 140a implied that there is a single distribution occurring between a SPAC's IPO and its de-SPAC transaction. Letters from ABA, Kirkland & Ellis, SIFMA. As discussed in further detail above, we are not adopting proposed Rule 140a; rather, we have noted that the statutory definition of underwriter is sufficient to encompass any person who sells for the issuer or participates in a distribution associated with a de-SPAC transaction. See *supra* section III.F.

⁹⁴³ Proposing Release, *supra* note 7, at 29489. We reiterate the Commission's previous position on

However, as proposed and for the avoidance of doubt, the final rule will not have any impact on traditional business combination transactions between operating businesses, including transactions structured as traditional reverse mergers and traditional business combination transactions that make use of only business combination related shells.⁹⁴⁴ In addition, we note that Rule 145a is not intended to change the treatment of any transaction, whether or not involving a shell company, under State or other Federal laws, including, but not limited to, State corporate law and the Internal Revenue Code. Finally, because it is premised upon the change in the nature of a security when a reporting shell company changes its status to an operating company, Rule 145a specifically does not apply to a transaction where a reporting shell company combines with another shell company. Below we respond to various objections raised by commenters regarding the proposal and provide additional explanation to clarify the scope and application of Rule 145a.

structuring transactions to avoid shell company status in adopting the 2005 shell company limitations. See *Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies*, Release No. 33-8587 (July 15, 2005) [70 FR 42234, 42236, n.32 (July 21, 2005)] (“Shell Company Adopting Release”). Rule 145a as well as any other requirements applicable to reporting shell company business combinations apply in situations where, in substance, a shell company business combination is used to convert a private company into a public company. For example, the requirements applicable to reporting shell company business combinations adopted herein will apply to any company that sells or otherwise disposes of its historical assets or operations in connection with or as part of a plan to combine with a non-shell private company in order to convert the private company into a public one. This is true regardless of whether such sale or disposal of the legacy assets or operations occurs prior to or after the consummation of the business combination.

⁹⁴⁴ By its terms, Rule 145a only impacts business combinations involving shell companies that are not business combination related shell companies. The term “business combination related shell company” is defined in Securities Act Rule 405 and Exchange Act Rule 12b-2 as a shell company that is: “(1) Formed by an entity that is not a shell company solely for the purpose of changing the corporate domicile of that entity solely within the United States; or (2) Formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction (as defined in 17 CFR 230.165(f)) among one or more entities other than the shell company, none of which is a shell company.” Neither a SPAC nor any entity formed for facilitating a transaction with a SPAC is ever a business combination related shell company because neither of these entities would be a shell company formed solely for the purpose of changing the corporate domicile solely within the United States or formed solely for the purpose of completing a business combination transaction among one or more entities other than the shell company, none of which is a shell company. See Proposing Release, *supra* note 7, at 29489, n.243.

i. Arguments Regarding No Investment or Vote

Some commenters questioned the Commission's authority to adopt Rule 145a because, in the commenters' view, a sale cannot be deemed to occur in situations where no actual distribution of securities occurs⁹⁴⁵ or there is no traditional “investment decision.”⁹⁴⁶ Section 2(a)(3) of the Securities Act broadly defines the terms “sale” or “sell” to include every contract of sale or disposition of a security or interest in a security, for value.⁹⁴⁷ Finding it necessary for investors to have the protections of the Securities Act, the Commission has previously applied this definition broadly, including in cases where there is no affirmative decision from investors to buy or sell securities. For example, the Commission has previously determined that the following transactions may involve a sale even where there is no vote or investment decision: spin-offs, split-offs and similar transactions;⁹⁴⁸ short-form mergers;⁹⁴⁹ and distributions of “free stock.”⁹⁵⁰

⁹⁴⁵ See letter from Vinson & Elkins.

⁹⁴⁶ See letter from ABA.

⁹⁴⁷ 15 U.S.C. 77b(a)(3).

⁹⁴⁸ See Spin Offs Release, *supra* note 899, at 11581 (The Commission explained that the theory had been advanced that since a sale is not involved in the distribution of the shares in a spin off that registration is not required and that even if it is required, no purpose would be served by filing a registration statement and requiring the delivery of a prospectus since the persons receiving the shares are not called upon to make an investment judgment. However, such a theory ignores what appears to be the primary purpose of the spin off in numerous circumstances which is to create quickly, and without the disclosure required by registration, a trading market in the shares of the issuer. As the Commission explained, devices of this kind contravene the purpose, as well as the specific provisions, of the Securities Act, which are to provide full and fair disclosure of the character of the securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof.)

⁹⁴⁹ See *Registration of Certain Transactions Involving Mergers, Consolidations and Acquisitions of Assets*, Release No. 33-5316 (Oct. 6, 1972) [37 FR 23631, 23633 (Nov. 7, 1972)] (Short form mergers that do not require a vote or consent are not within the scope of Rule 145(a). However, if a security is to be issued in such short form mergers, the Commission stated that it is of the opinion that the transaction involves an “offer,” “offer to sell,” “offer for sale,” or “sale,” within the meaning of section 2(a)(3) of the Securities Act, and accordingly that such transactions are subject to the registration provisions of the Securities Act unless an exemption is available.)

⁹⁵⁰ See, e.g., *In the Matter of Capital General Corp.*, Release No. 33-7008 (July 23, 1993) (“*Capital General*”) in which the Commission concluded that Capital General's unregistered distributions of securities in a shell company as purported gifts were a sale in violation of section 5 because value accrued to the defendants “by virtue of the creation of a public market for the issuer's securities, and the fact that, as a public company, the issuer could be sold for greater consideration.”

Similarly, here, we have concluded that, notwithstanding the fact that there may be no traditional investment decision or vote in connection with a business combination transaction where a shell company changes its status from a shell company to an operating company through a business combination, such a change is nonetheless a sale of securities for the purposes of section 2(a)(3) because investors are exchanging their interests in a shell company for interests in a combined public operating company, which is a transaction “for value.”

a. The “For Value” Requirement

Several commenters questioned whether the constructive sale would be “for value,” within the meaning of this term in section 2(a)(3).⁹⁵¹ We disagree with the commenter that asserted that, similar to an ordinary M&A transaction, a de-SPAC transaction will not result in a fundamental change in the nature of the security held by SPAC stockholders that would constitute an exchange of value and, thus, should not be deemed to constitute consideration in connection with the business combination.⁹⁵² Likewise, we disagree with the commenter that asserted that even though the specific target company is unidentified at the time of the SPAC’s IPO, when acquired, a SPAC security represents an investment in a target company because the sole purpose of a SPAC is to engage in a business combination.⁹⁵³

A change in a reporting shell company’s status via a business combination with an operating company results in the reporting shell company investors effectively exchanging their security representing an interest in the reporting shell company, an entity that has no or nominal operations and either (i) no or nominal assets; (ii) assets consisting solely of cash and cash equivalents; or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets, for a new security representing an interest in a combined operating company.⁹⁵⁴ This is a change in the

nature of the investment, which does not occur in traditional M&A transactions.⁹⁵⁵ Although shell company shareholders may not actually be receiving shares from the combined public operating company, they have surrendered “value” for purposes of section 2(a)(3) because, unlike a business combination not involving a reporting shell company and an operating company, they have effectively surrendered their shares in a public shell company for shares in a fundamentally different company, a combined operating company. In addition, unlike a business combination that does not involve a reporting shell company and an operating company, such a transaction involves the use of a public shell to create a public market for the combined operating company.⁹⁵⁶

Moreover, courts⁹⁵⁷ and the Commission⁹⁵⁸ have determined that it

⁹⁵⁵ As discussed above, Rule 145a is limited to business combinations that involve reporting shell companies. See *supra* section IV.A.3.

⁹⁵⁶ See *SEC v. Datronics Engineers, Inc.*, 490 F.2d 250 (4th Cir. 1973) cert. denied, 416 U.S. 937 (1974) (“*Datronics*”) (finding a sale under the Securities Act requiring registration or an exemption from registration when a parent company, Datronics, created shell subsidiaries for the purpose of merging them with private companies. Datronics reserved approximately one-third of the shares of the post-merger subsidiary for itself and distributed the remainder to its shareholders without registration. Secondary market trading of the shares began promptly. Datronics’ only business purpose was to create a trading market for the shares). See also *SEC v. Harwyn Industries Corp.*, 326 F. Supp. 943 (S.D.N.Y. 1971) (“*Harwyn*”). In *Harwyn*, the court found a sale under the Securities Act requiring registration or an exemption from registration when each of several subsidiaries of the public parent acquired assets from a corporation in exchange for a controlling interest in the subsidiary. The parent then spun off shares of the subsidiaries to its stockholders in an unregistered transaction, creating over-the-counter trading markets in the shares. The court stated that “value” was received by Harwyn and other insiders “in the form of a contribution of substantially new assets to each subsidiary and the creation of a public market in the shares.”

⁹⁵⁷ See *Datronics*, *supra* note 956, at 253–254 (“Value accrued to Datronics in several ways. First, a market for the stock was created by its transfer to so many new assignees—at least 1000, some of whom were stockbroker-dealers, residing in various States. Sales by them followed at once—the District Judge noting that ‘in each instance dealing promptly began in the spun-off shares’.” [sic] This result redounded to the benefit not only of Datronics but, as well, to its officers and agents who had received some of the spun-off stock as compensation for legal or other services to the spin-off corporations. Likewise, the stock retained by Datronics was thereby given an added increment of value.”); *Harwyn*, *supra* note 956, at 954 (“We see no reason to construe §§ 2(a)(3) and 5 as requiring that the ‘value’ requiring registration must flow from the immediate parties who received the stock, in this case Harwyn’s shareholders.”).

⁹⁵⁸ See *Capital General*, *supra* note 950, at *11 (The Commission found that “the analysis of whether a sale occurred focuses not only on whether the recipient of the securities gives something of value in exchange for the securities,

does not matter what party in the course of a transaction receives value—as long as any party receives value, the “for value” requirement in section 2(a)(3) is satisfied. In particular, transactions involving the use of public shells to provide access to the public markets have been found to constitute a sale under section 2(a)(3) of the Securities Act.⁹⁵⁹ We view a reporting shell company (that is not a business combination related shell company) merging with a private operating company as similarly providing access to the public markets, and thus creating value. Therefore, the business combination transaction is a sale which entitles the reporting shell company’s existing shareholders, who are the investors acquiring securities in this sale, to all applicable protections provided by the Securities Act.

Finally, one commenter asked that we clarify within the rule text that the sale contemplated by Rule 145a would be “a disposition of a security or an interest in a security . . . for value.”⁹⁶⁰ Although, as we explain above, we agree with the commenter that such a transaction would be “for value,” we do not believe it is necessary to add that detail within the text of Rule 145a because the Securities Act, itself, already contains the “for value” requirement in section 2(a)(3).⁹⁶¹

ii. No Additional Registration Statement Required Where a Shell Company Business Combination Is Already Registered

If, in the course of a business combination with a reporting shell company, the exchange of the shell company shares for securities of the surviving combined operating business is already being registered, then there is no need to register any additional transaction under the Securities Act to comply with Rule 145a because the transaction that is recognized as a sale by Rule 145a is already being registered. For example, in many de-SPAC transactions, an actual exchange of securities between the SPAC’s existing shareholders and the target company or a new holding company is already being registered at the time of the business

but also on whether value is received from any other source. *Harwyn Industries* and *Datronics* also make clear that the analysis must include the entire transaction—the distribution of the issuer’s shares, and subsequent change in control of the issuer—to determine whether value was received from the distribution.”).

⁹⁵⁹ *Id.*

⁹⁶⁰ Letter from ICGN.

⁹⁶¹ See 15 U.S.C. 77b(a)(3).

⁹⁵¹ Letters from ABA, Kirkland & Ellis.

⁹⁵² Letter from ABA.

⁹⁵³ Letter from Kirkland & Ellis.

⁹⁵⁴ We note that this rule does not change the conclusion that a merger with a reporting shell company may constitute the offer and sale of securities to other parties for which registration under the Securities Act or an exemption would be required. For example, where a SPAC survives the de-SPAC transaction, the SPAC will frequently issue its securities to shareholders of the private company in exchange for their interests in the private company. Such a transaction would still require registration or an exemption from registration.

combination transaction.⁹⁶² In these circumstances, the transaction that Rule 145a construes as a sale is typically already being registered because the SPAC's existing shareholders are receiving securities of the combined company in exchange for their shares of the SPAC. Where Securities Act registration of this transaction is already occurring, Rule 145a would not require the filing of an additional registration statement. However, Rule 145a only applies with respect to a shell company's existing security holders. The surviving company in a de-SPAC transaction must give separate consideration as to whether a registration statement or exemption would be required for any offer and sale of securities to the target company's security holders.

iii. Where Rule 145a Requires Registration in the Absence of an Exemption

However, in transaction structures where reporting shell company shareholders are not actually exchanging their shell company shares for securities of a combined operating company, the parties will need to consider Rule 145a in structuring the transaction. For example, in a de-SPAC transaction structured such that the shareholders of the SPAC keep their existing shares in the SPAC throughout the business combination transaction, and those interests change into interests in the combined company, the parties would need to consider the impact of Rule 145a on the transaction and either register the transaction or find an exemption for the constructive exchange between the shell company's pre-transaction shareholders and the surviving combined company.⁹⁶³ Such transactions would be situations implicating a Rule 145a constructive sale.

⁹⁶² Share exchanges in which the target company survives the business combination as the public entity are commonly referred to as "Target-on-Top" structures. Alternatively, the combining entities may also form a new holding company such that both holders of the SPAC and the target company receive securities in the holding company in exchange for their existing interests in the target company.

⁹⁶³ This would typically be any transaction where the SPAC survives the business combination as the public company. Such transactions are commonly referred to as "SPAC-on-Top." Where registration is required for a Rule 145a constructive sale, the registration statement should register the exchange of the number of outstanding shares that represent the interests of all shareholders of the shell company immediately preceding the business combination.

iv. Investor Protection and Liability

While we acknowledge, as several commenters have argued,⁹⁶⁴ that certain transactions, such as de-SPAC transactions, may already be accompanied by a set of disclosures provided to the reporting shell company's shareholders, the timing and nature of such disclosures may not be equivalent,⁹⁶⁵ and such disclosures do not have equivalent levels of investor protection as there currently would be in a transaction involving Securities Act registration. To the extent that Rule 145a transactions are registered, registration would result in enhanced liabilities for the registrant and other parties who have liability under the Federal securities laws with respect to the registration statement, including potential underwriter liability (as described elsewhere in this release) and liability under Securities Act section 11(a)(4) for experts. Given the change in the nature of an investor's security when a reporting shell company engages in a business combination transaction with an operating company, Rule 145a is designed to ensure that shareholders more consistently receive the full protections of Securities Act disclosure and liability provisions, as applicable, and that such investor protections will apply regardless of transaction structure.

v. Market for Shell Company Mergers

A commenter asserted that the Commission had not previously found it necessary to adopt a provision like Rule 145a to regulate shell company mergers "and was amenable at that time to allow such transactions to proceed so long as public investors were given current and complete information about the new business they owned."⁹⁶⁶ The commenter further asserted that proposed Rule 145a no longer reflects this Commission position on shell

⁹⁶⁴ Letters from Freshfields, Kirkland & Ellis, NYC Bar, Vinson & Elkins.

⁹⁶⁵ For example, investors in a reporting shell company undergoing a business combination in which there is no shareholder vote and no redemption feature currently may receive no disclosure about the pending business combination until four business days after closing at which time the shell company would be required to file a Form 8-K to provide the disclosure required by Items 5.06 and 9.01. Even though pursuant to these items shareholders will receive the equivalent of Form 10 information about the combined company, investors will still not receive certain transaction-specific information that would be required in a Securities Act registration statement. For example, a Securities Act registration statement would require disclosure of a summary of the terms of the acquisition agreement and the reasons of the registrant and of the company being acquired for engaging in the transaction. See Items 4(a)(1) and (2) of Form S-4.

⁹⁶⁶ See letter from Loeb & Loeb.

company mergers and can be expected "to shut down [the shell company] market."⁹⁶⁷ We disagree. Although the Commission adopted rules and rule amendments addressing the use of Form S-8, Form 8-K, and Form 20-F by shell companies,⁹⁶⁸ the Commission is not precluded from revisiting shell company transactions and considering the investor protections applicable to these transactions. In this regard, we believe Rule 145a complements the disclosure protections that the Commission adopted in 2005.⁹⁶⁹ In addition, we do not believe that a requirement to register a transaction or find an applicable exemption when a reporting shell company becomes an operating company, would "shut down the market." Indeed, depending on the structure, many business combinations involving reporting shell companies are already registered under the Securities Act.

vi. Perceived Conflicts Between Non-SPAC Reporting Shell Companies and SPACs

A commenter stated that an investment in a SPAC transaction is not comparable to other reporting shell company business combinations.⁹⁷⁰ In particular, the commenter indicated that an investor in a non-SPAC reporting shell company does not necessarily invest in a company seeking a business combination opportunity. While we acknowledge that non-SPAC shell companies typically have some investors that predated the company's shell company status, this distinction is not relevant for this purpose because the effect of a business combination transaction in both cases is the same. Both involve a situation where a public shell company is no longer going to be a shell company and the nature of the investor's shares has changed to an investment in an entirely new operating business. Moreover, the purpose of the transaction is to provide the formerly private company with access to the public markets. As such, the concerns that we are addressing in adopting Rule 145a are present in both non-SPAC reporting shell company business combinations and de-SPAC transactions.

vii. Perceived Analogies to Traditional Reverse Mergers

A commenter argued that de-SPAC transactions should not be distinguished

⁹⁶⁷ See *id.*

⁹⁶⁸ See Shell Company Adopting Release, *supra* note 943.

⁹⁶⁹ See *id.*

⁹⁷⁰ See letter from Kirkland & Ellis.

from other reverse mergers because the accounting predecessor in a reverse merger is not currently deemed to be engaged in a distribution of its securities to stockholders of the non-predecessor entity.⁹⁷¹ We do not agree with the commenter's analogy because in traditional mergers, regardless of the accounting treatment of the respective parties, the issuer of securities whose offer and sale is registered is the entity whose securities are being sold to investors (e.g., in a share exchange, the entity whose securities are being offered in exchange for outstanding securities of another entity).⁹⁷² The commenter further asserted that if the SPAC is not actually issuing securities, the SPAC should not be a "registrant" and that, to the extent Rule 145a is adopted, only the target should be considered a registrant. We disagree, in part, with this argument. While we agree that the target company must be a registrant in all registered de-SPAC transactions,⁹⁷³ we see no basis to disregard the SPAC's status as a registrant, where applicable, even in cases where the SPAC is issuing securities only within the meaning of Rule 145a. Rule 145a is designed to identify a sale between the combined company and pre-business combination shareholders of the reporting shell company. For the reasons discussed above, we view this to be a sale even if the reporting shell company is not actually issuing securities. Given that this constructive sale occurs even if shares do not actually change hands, we decline to narrow Rule 145a by concluding that a sale occurs in a de-SPAC transaction only by the target company. To the extent that the choice of transaction structure may impact who is a registrant that must sign a registration statement, that is a separate analysis.⁹⁷⁴

Additionally, some commenters asked for clarification regarding the intended trigger for the application of Rule 145a in a de-SPAC transaction⁹⁷⁵ and who would be the exchanging parties in a Rule 145a constructive sale.⁹⁷⁶ As

discussed above, Rule 145a specifies that a sale occurs from the post-transaction company to the existing shareholders of a reporting shell company in situations where a reporting shell company that is not a business combination related shell company enters into a business combination transaction involving another entity that is not a shell company. Pursuant to Rule 145a, all existing holders of the reporting shell company's shares, at the time of the business combination, are constructively exchanging their securities for securities in the combined company, whether or not these investors are actually exchanging any shares to complete the business combination.⁹⁷⁷ The surviving public company will be the entity that is constructively selling the securities of the combined company.

viii. Section 3(a)(9) Does Not Apply to Rule 145a Constructive Sales

Having considered the views of commenters regarding the application of the section 3(a)(9) exemption in Rule 145a constructive sales,⁹⁷⁸ we continue to believe section 3(a)(9) would not be available for a transaction that is a Rule 145a constructive sale. There are several features of these transactions which cast doubt on the availability of the exemption. In particular, section 3(a)(9) was designed to facilitate "certain voluntary readjustment[s] of [an issuer's] obligations."⁹⁷⁹ A reporting shell company business combination with an operating company is not merely a voluntary readjustment, but the combination of such an entity with an entirely new business.

In addition, the four requirements of an exchange qualifying for the section 3(a)(9) exemption are as follows:

- Same issuer—the issuer of the old securities being surrendered must be the same as the issuer of the new securities;
- No additional consideration from the security holder;
- Offer must be made exclusively with existing security holders; and
- No commission or compensation may be paid for soliciting the exchange.

The failure to meet any single one of these requirements would be enough to preclude use of the section 3(a)(9) exemption.

First, section 3(a)(9) is limited to securities exchanged by the issuer with its existing shareholders. In the case where shareholders of a reporting shell company constructively exchange their

shares with securities of the combined entity, we view the combined entity to be a different issuer than the shell that originally issued the securities even if the reporting shell company is the entity that survives the merger. Although the combined company may retain the legal identity of the shell for the purposes of State or local law, it is substantively a new entity. To hold otherwise would place form over substance, given that the use of the section 3(a)(9) exemption is premised upon an investor's familiarity with the company in which they have already invested.⁹⁸⁰

Second, the section 3(a)(9) exemption would not be available where the Rule 145a constructive sale occurs in connection with the offer and sale of securities to target company security holders. Such a sale would not occur exclusively to the reporting shell company's existing security holders. Thus, where interests in the existing reporting shell are also being exchanged with the target company's shareholders, the exchange would not be exclusively with the reporting shell company's existing security holders and section 3(a)(9) would not be available to exempt the deemed sale to the reporting shell company shareholders.

Finally, section 3(a)(9) is not available where a commission or other remuneration is paid or given directly or indirectly for soliciting participation in the deemed exchange. This would occur, for example, if a proxy solicitor is compensated to solicit the reporting shell company's shareholders for proxy votes in connection with the business combination. Certain commenters asserted that section 3(a)(9) of the Securities Act should not be rendered unavailable simply because a proxy solicitor is paid to solicit proxies from SPAC shareholders in connection with the shareholder vote on a de-SPAC transaction.⁹⁸¹ As discussed above, Rule 145a deems there to be a share exchange in situations, such as de-SPAC

⁹⁸⁰ The Commission has stated that the rationale for the section 3(a)(9) exemption, in part, is that the market already has adequate familiarity with the issuer, and thus, the protections under the registration provisions of the Securities Act are not necessary. See, e.g., *Form for Registration of Securities When Issuers Qualify Under Certain Proposed Rule*, Release No. 33-5011 (Oct. 7, 1969) [34 FR 17033, 17033 (Oct. 18, 1969)] ("[T]he exemption in section 3(a)(9) of the Act applies only where the issuer of the convertible security and the security issuable on conversion is the same. In such a situation the information available to the trading markets through periodic reports filed by the issuer under the Securities Exchange Act should provide an adequate substitute for the disclosure which would be provided by the registration and prospectus delivery provisions of the Securities Act.")

⁹⁸¹ Letters from Kirkland & Ellis, Vinson & Elkins.

⁹⁷¹ Letter from Winston & Strawn.

⁹⁷² Although the commenter seeks to analogize de-SPAC transactions to reverse mergers in traditional M&A, such transactions are readily distinguishable. With respect to other reverse mergers not involving shell companies, although the entity surviving the transaction may acquire new assets or new lines of business as a result of the transaction, it is not changing the actual nature of the investment—from a company with no operations to an operating company—and it is not a means to provide a company access to the public markets for the first time.

⁹⁷³ See *supra* section III.C.

⁹⁷⁴ *Id.*

⁹⁷⁵ Letter from ABA.

⁹⁷⁶ Letter from Winston & Strawn.

⁹⁷⁷ See *supra* section IV.A.3.iii regarding when a shell company must consider registering the sale identified by Rule 145a.

⁹⁷⁸ Letters from Kirkland & Ellis, Vinson & Elkins.

⁹⁷⁹ H.R. Rep. No. 152, 73rd Cong. 1st Sess. 25 (1933).

transactions, where a reporting shell company that is not a business combination related shell company enters into a business combination transaction involving another entity that is not a shell company. In our view, if shareholder approval is being solicited on a matter that is required to accomplish a reporting shell company business combination,⁹⁸² and compensation is being paid for such solicitation, then that is, in substance, a solicitation for approval of the Rule 145a transaction. This is consistent with views the Commission previously has expressed in analogous contexts. For example, the Commission has previously taken the position that where a solicitation of security holders is for the purpose of approving the authorization of additional securities which are to be used to acquire another specified company, and the security holders will not have a separate opportunity to vote upon the transaction, the solicitation to authorize the securities is also a solicitation with respect to the acquisition.⁹⁸³ Accordingly, if a proxy solicitor is compensated to solicit the reporting shell company's shareholders for proxy votes in connection with the shareholder vote on a de-SPAC transaction, such solicitation would mean the transaction would not qualify for the section 3(a)(9) exemption for the Rule 145a constructive sale.

B. Financial Statement Requirements in Business Combination Transactions Involving Shell Companies

After a business combination involving a shell company, the financial statements of a business⁹⁸⁴ that will be

⁹⁸² For example, approval of the business combination, the authorization of additional shares, revisions to the articles of incorporation, or a reincorporation to a different jurisdiction.

⁹⁸³ See, e.g., Note A to Schedule 14A ("Where any item calls for information with respect to any matter to be acted upon and such matter involves other matters with respect to which information is called for by other items of this schedule, the information called for by such other items also shall be given. For example, where a solicitation of security holders is for the purpose of approving the authorization of additional securities which are to be used to acquire another specified company, and the registrants' security holders will not have a separate opportunity to vote upon the transaction, the solicitation to authorize the securities is also a solicitation with respect to the acquisition.")

⁹⁸⁴ We use the term "business" throughout, rather than "private operating company" (or "target company") as it encompasses both terms. In the Proposing Release, the Commission stated, in a business combination transaction involving a shell company, the private operating company would meet the definition of a "business" in Rule 15-01(d) of Regulation S-X. Proposing Release, *supra* note 7, at 29491, n.253. In connection with the adoption of final Rule 15-01(b) in this release, we reiterate that, in a business combination transaction involving a

a predecessor⁹⁸⁵ to the shell company registrant become those of the registrant for financial reporting purposes.

How a business chooses to become a public company could affect its financial statement disclosures due to differences in the requirements of registration statements on Form S-1 or F-1 (for IPOs) and the requirements of registration statements on Form S-4 or F-4 (regarding business combination transactions). In our view, a company's choice of the manner in which it goes public should not generally result in substantially different financial statement disclosures being provided to investors.

In the Proposing Release, the Commission proposed amendments to its forms and rules to more closely align the financial statement reporting requirements in business combinations involving a shell company registrant and a business with those in traditional IPOs.⁹⁸⁶ The financial statement requirements that are being adopted under the final amendments are based, in part, on current Commission staff guidance for transactions involving shell companies.⁹⁸⁷ In proposing to codify this guidance, the Commission sought to reduce any asymmetries between financial statement disclosures in business combination transactions involving shell companies and traditional IPOs.

1. Proposed Rule 15-01(a), Rule 1-02(d), and Form Instructions: Audit Requirements

In the Proposing Release, the Commission proposed Rule 15-01(a), amendments to Rule 1-02(d), and related new instructions to Forms S-4 and F-4.⁹⁸⁸ The Commission noted in the Proposing Release that these changes would align the level of audit

shell company, a "business" includes but is not limited to a private operating company or a target company that is not an asset acquisition.

⁹⁸⁵ The term "predecessor" when used in this section has the same meaning as applied in its use under Regulation S-X and determination of financial statement requirements.

⁹⁸⁶ See Proposing Release, *supra* note 7, at 29490-29494. See also proposed amendments to Forms S-4, F-4, and 8-K and to Regulation S-X.

⁹⁸⁷ Commission staff has provided informal guidance to address practical questions related to financial reporting issues for shell company mergers in the FRM.

⁹⁸⁸ See proposed Rule 15-01(a) of Regulation S-X, proposed Rule 1-02(d), proposed Instruction 1 to Item 17(b)(7) of Form S-4 (adding requirement, in a de-SPAC transaction to provide the financial statements required by § 240.15-01 (Rule 15-01 of Regulation S-X)), proposed Instruction 1 to Item 17(b)(5) of Form F-4 (adding requirement, in a de-SPAC transaction to provide the financial statements required by § 240.15-01 (Rule 15-01 of Regulation S-X) at Proposing Release, *supra* note 7, at 29491.

assurance required for the target business in business combination transactions involving a shell company with the audit requirements for an IPO.⁹⁸⁹ Specifically, proposed Rule 15-01(a) provided that the term "audit (or examination)," when used with respect to financial statements of a business that is or will be a predecessor to a shell company,⁹⁹⁰ means an examination of the financial statements by an independent accountant in accordance with the standards of the PCAOB for the purpose of expressing an opinion thereon. The Commission also proposed to amend Rule 1-02(d) to include the following new provision: "See § 210.15-01(a) for definition of an audit when used in regard to financial statements of a company that will be a predecessor to an issuer that is a shell company (other than a business combination related shell company)." The combined effect of the proposals would be that a predecessor to a shell company, including one that is a target private operating company, would be required to comply with the same definition of audit as in Rule 1-02(d) of Regulation S-X for its audited financial statements as if it were filing for an IPO.

2. Comments: Rule 15-01(a), Rule 1-02(d), and Form Instructions: Audit Requirements

We received comments from several commenters that were supportive of proposed Rule 15-01(a), because it would codify existing staff guidance.⁹⁹¹ No commenters opposed proposed Rule 15-01(a), the proposed amendments to Rule 1-02(d), or the proposed new instructions to Forms S-4 and F-4. One commenter recommended that we adopt an exception to the audit requirements applicable to SPACs to permit the audits of the financial statements of target companies that would otherwise be eligible for multijurisdictional disclosure system ("MJDS") reporting to be able to use Canadian Generally Accepted Auditing Standards ("Canadian GAAS").⁹⁹²

As noted in section III.C above, one commenter said that co-registration

⁹⁸⁹ See Proposing Release *supra* note 39, at 29491.

⁹⁹⁰ See definition of the term "business combination related shell company" in Securities Act Rule 405 and Exchange Act Rule 12b-2.

⁹⁹¹ Letters from PwC, RSM US LLP (May 25, 2022) ("RSM") ("We believe the proposed rule, if finalized, would appropriately codify current SEC staff guidance and align the level of audit assurance required for the target private operating company in business combination transactions involving a shell company with the current requirements for an audit of a private operating company in a traditional IPO to be performed in accordance with the standards of the Public Company Accounting Oversight Board."), Vinson & Elkins.

⁹⁹² Letter from ABA.

would result in disclosure requirements that are inconsistent with the proposed revisions to Regulation S-X, raising the issue of whether, if there were multiple target companies, each company would be required to provide financial statements audited in accordance with PCAOB standards in the de-SPAC registration statement, rather than solely the predecessor pursuant to proposed Rule 15-01(a) of Regulation S-X.⁹⁹³ This commenter indicated that co-registration would result in inconsistencies with IPOs where there are multiple target companies.

3. Final Rule 15-01(a), Rule 1-02(d), and Form Instructions: Audit Requirements

After considering the comments, we are adopting Rule 15-01(a), the amendments to Rule 1-02(d), and the instructions to Forms S-4 and F-4 largely as proposed, with a few modifications discussed below.

In the past, the Commission staff has advised shell companies that it expects the financial statements of the predecessor, including a private operating company, in a transaction involving a shell company, to be audited under the same standards as a registrant in an IPO, because, at consummation, the financial statements of the business become that of the shell company.⁹⁹⁴ As noted in section III.C above, the amendments to Form S-4 and Form F-4 will result in each business that is reported as a company being acquired on Form S-4 or F-4 being an issuer under section 2(a)(7) of the Sarbanes-Oxley Act. The final amendments to Rule 1-02(d) have been modified to refer any entity that is involved in a combination with a shell company to Rule 15-01(a), which in turn provides rules as to the level of audit assurance required depending on whether the entity in the combination is a predecessor or non-predecessor. Consistent with existing staff guidance and the proposal, an entity that is or will be a predecessor, whether it is part of a shell company transaction or an issuer under the amendments to Form S-4 and Form F-4 that is part of a shell company transaction, will be required to have its financial statements audited by an independent accountant in accordance with the standards of the

PCAOB. Consistent with the level of assurance in an IPO involving multiple businesses today, the financial statements of an entity that is not a predecessor that are included in a registration statement or proxy statement⁹⁹⁵ filed for a combination with an issuer that is a shell company may be audited in accordance with either the standards of the PCAOB or U.S. GAAS as specified or permitted in the regulations and forms applicable to those entities for the purpose of expressing an opinion thereon.⁹⁹⁶ The final rule has been revised from that proposed in order to codify existing staff practice that the predecessor in a shell company transaction that does not involve a SPAC and is not an issuer be audited by an independent accountant registered with the PCAOB.⁹⁹⁷ In addition, the final rule refers to “entity” instead of “issuer,” as proposed, in order for the rule to apply to shell company business combinations that are not de-SPAC transactions. All issuers in a de-SPAC transaction would still need a PCAOB-registered audit firm in accordance with section 102 of the Sarbanes-Oxley Act to perform the audit. Further, these amendments that permit U.S. GAAS audits for the financial statements of an issuer that is not the predecessor apply to a small subset of de-SPAC transactions involving multiple target companies where there may be an issuer that is a not a predecessor.⁹⁹⁸

We are not adopting amendments to permit the use of Canadian GAAS in connection with de-SPAC transactions involving a Canadian business. Under current rules, a registrant must meet the MJDS requirements and register on an

MJDS form in order to rely on such accommodations.⁹⁹⁹ Also, under current rules, a SPAC that satisfies the MJDS-eligibility requirements and is involved in a de-SPAC transaction involving a Canadian business that also meets the MJDS-eligibility requirements once combined is permitted to use Canadian GAAS post-combination if it files on an MJDS form. Moreover, virtually all MJDS issuers provide audit opinions under PCAOB standards, even though they are able to provide audit opinions under Canadian GAAS, so it is unclear whether any Canadian registrants would provide audit opinions under Canadian GAAS even if that were an option at the time of filing the registration statement.¹⁰⁰⁰ MJDS accommodations go beyond the use of Canadian GAAS.

In final Rule 1-02(d), we have deleted the proposed term “financial statements of a company” and replaced it with the term “financial statements of an issuer.” The use of “issuer” rather than “company” will ensure consistency with related provisions in Rule 15-01.

We have revised proposed Instruction 1 to Item 17(b)(7) of Form S-4 and Instruction 4 to Item 8 of Form 20-F by replacing “provide the financial statements required by § 240.15-01 (Rule 15-01 of Regulation S-X)” with “see § 240.15-01 (Rule 15-01 of Regulation S-X),” because the financial statement requirements extend beyond Rule 15-01. We further revised Instruction 4 to Item 8 of Form 20-F by clarifying that it is applicable for filings on Form 20-F filed pursuant to General Instruction A.(d) of this form and for registration statements, so that a shell company would not consider Rule 15-01 when it is filing its annual report in due course before acquiring a business. Also, for this Instruction 4, we revised “shell company that will acquire a business” to “shell company that is combining with a business,” in order for the reference to Rule 15-01 to apply in more structures. Lastly, we have revised each of these instructions to remove reference to the predecessor because the instruction would apply to a non-predecessor as well.

4. Proposed Rule 15-01(b): Number of Years of Financial Statements

Currently, a registration statement in connection with a de-SPAC transaction on Form S-4 or F-4 and a proxy or information statement must include financial statements of the target

⁹⁹³ Letter from Vinson & Elkins.

⁹⁹⁴ See FRM at Sections 1140.5 and 2200.7 that discusses “Audit Requirement for Non-Reporting Target” in relation to Form S-4 or F-4 when the registrant is a SPAC. In addition, Section 4110.5 includes a chart that outlines the staff’s views on the application of certain PCAOB requirements in various filings with the SEC, which includes transactions involving a shell company.

⁹⁹⁵ For ease of reference, when we refer to disclosures in a “proxy statement,” the same discussion applies to “information statement.” Information statements call for the same information as a proxy statement. See Item 1 of § 240.14c-101 (Schedule 14C).

⁹⁹⁶ See *supra* section III.C for additional discussion regarding the definition of audit for issuers that are not predecessors in business combination transactions with a shell company involving multiple targets.

⁹⁹⁷ See FRM at Section 12250.1, which stipulates in a reverse recapitalization by a non-public company with a public shell company, the financial statements of the non-public company filed in the Form 8-K or Form 20-F must be audited by a public accounting firm registered with the PCAOB. Further, the auditor would need to be independent under PCAOB and Commission independence rules for all years required to be in the Form 8-K. For Form 20-F, the auditor of the non-public company that is an FPI must comply with the PCAOB and Commission independence rules for at least the latest fiscal year as long as the auditor is independent in accordance with home-country standards for earlier periods.

⁹⁹⁸ See *infra* section VIII.A. There were approximately 17 out of 583 de-SPAC transactions between 1990–2022 that had two or more targets.

⁹⁹⁹ See *Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers*, Release No. 33-6902 (June 21, 1991) [56 FR 30036 (July 1, 1991)] (adopting the MJDS system).

¹⁰⁰⁰ See General Instruction B to Form 40-F.

company for the same number of years as would be required by the target company in an annual report and any subsequent interim periods, which could require three years of comprehensive income, changes in stockholders' equity, and cash flows even if the target company qualifies as an EGC.¹⁰⁰¹ In contrast, in a traditional IPO under the Securities Act, a registrant that qualifies to be an EGC may provide only two years of these financial statements.¹⁰⁰²

In the Proposing Release, the Commission proposed Rule 15–01(b) in order to align the number of fiscal years required to be included in the financial statements for a business¹⁰⁰³ that will be the predecessor(s) in a shell company business combination with the financial statements required to be included in a Securities Act registration statement for an IPO of equity securities.¹⁰⁰⁴ Proposed Rule 15–01(b) provided that when the registrant is a shell company, and the financial statements of a business that will be a predecessor(s) to the shell company registrant are required in a registration statement or proxy statement, the shell company registrant must file financial statements of that business(es) in accordance with §§ 210.3–01 through 210.3–12 and 210.10–01 (Articles 3 and 10 of Regulation S–X) or §§ 210.8–01 through 210.8–08 (Article 8), if applicable, as if the filing were a Securities Act registration statement for the IPO of that business's equity securities. The effect of proposed Rule 15–01(b) would be that, when the registrant filing is a shell company (which would include, but not be limited to, any SPAC), the Forms S–4 or F–4 or proxy statement may include only two years of statements of comprehensive income, changes in stockholders' equity, and cash flows for the business(es) that would be the predecessor when those business(es) would qualify as an EGC and/or SRC if

it were doing its own IPO for equity securities.

5. Comments: Rule 15–01(b): Number of Years of Financial Statements

Several commenters supported this proposed rule, noting generally that it would align the number of fiscal years required to be included in the financial statements for a private company that will be the predecessor in a shell company combination with those that would be required for a traditional IPO.¹⁰⁰⁵ No commenters opposed the proposed rule.

6. Final Rule 15–01(b): Number of Years of Financial Statements

Having considered the comments received, we are adopting Rule 15–01(b) largely as proposed, except for certain revisions, in order to align the number of fiscal years required to be included in the financial statements for a business that will combine with a shell company registrant with the financial statements required to be included in a Securities Act registration statement for an IPO of equity securities. We are clarifying that a business that is combining with a shell company registrant, beyond just the predecessor, must comply with the financial statement requirements of Regulation S–X as if the filing were a registration statement for its own IPO by removing the reference to predecessor in this rule. Absent this revision, three years of financial statements for a business that would be an EGC but is not a predecessor may be required, which would exceed the two years required for a predecessor that qualifies as an EGC.¹⁰⁰⁶ We believe that the predecessor and another business combining with the shell company registrant should both be subject to Rule 15–01(b). Further, we are replacing the proposed term “the registrant” with “such registrant” to recognize there may be multiple registrants and promote readability. Also, in the final sentence of the rule, we have revised the phrase “if it were filing a registration statement itself” to delete the word “itself” and replace it with the word “alone”; we believe the term “alone” will more clearly convey the intent of the rule.¹⁰⁰⁷

Last, we added to final Rule 15–01(b), as well as Rule 15–01(c) and (d), “for which audited financial statements are available” to “most recently completed fiscal year” in order to conform to its usage in Item 10(f)(2) of Regulation S–K.

7. Proposed Rule 15–01(c): Age of Financial Statements

In the Proposing Release, the Commission proposed Rule 15–01(c) regarding the age of predecessor financial statements. The proposed rule provided that the financial statements of a business that will be the predecessor to a shell company must comply with the requirements in 17 CFR 210.3–12 (“Rule 3–12” of Regulation S–X) (Rule 8–08 when that business would qualify to be an SRC based on its annual revenues as of the most recently completed fiscal year, if it were filing a registration statement alone) in determining the age of the financial statements of the predecessor business in the registration statement or proxy statement of the registrant.

8. Comments: Rule 15–01(c): Age of Financial Statements

Several commenters indicated support for proposed Rule 15–01(c).¹⁰⁰⁸ No commenters opposed the proposed rule.

9. Final Rule 15–01(c): Age of Financial Statements

We are adopting Rule 15–01(c) largely as proposed, with certain modifications discussed below.

Currently—with respect to companies being acquired that do not meet Form S–3 use requirements and are not subject to the reporting requirements of either section 13(a) or 15(d) of the Exchange Act, which is the case with most target companies in de-SPAC transactions—Form S–4 (under Item 17(b)(7)) requires inclusion of financial statements that would be required in an annual report sent to security holders under 17 CFR 240.14a–3(b)(1) and (2) (Rule 14a–3(b)(1) and (2)), if an annual report is required. In summary, Rule 14a–3(b)(1) and (2) require the inclusion of consolidated audited balance sheets as of the end of the two most recent fiscal years and consolidated audited statements of income and cash flows for each of the three most recent fiscal years prepared in accordance with Regulation S–X. Form F–4 is similar in this respect.¹⁰⁰⁹ The position of the

¹⁰⁰¹ See Items 17(b)(7) and 17(b)(8) of Form S–4; Items 17(b)(5) and 17(b)(6) of Form F–4; Item 14 of Schedule 14A; and Instruction 1 of Schedule 14C. Balance sheets as of the end of the two most recent fiscal years are always required.

¹⁰⁰² Only two years of these financial statements may be required in other scenarios, such as when the registrant is an SRC.

¹⁰⁰³ The Commission proposed to use the term “business” in this context, rather than “private operating company” (or “target company” which would have been a different, potentially narrower, set of persons than a “business” in the context of the proposed rule’s reference to “any shell company,” which thereby was not limited to SPACs) in order to be consistent with the provisions in Regulation S–X that define and use “business,” such as Rule 11–01(d) of Regulation S–X.

¹⁰⁰⁴ See Proposing Release, *supra* note 39, at 29491.

¹⁰⁰⁵ Letters from Ernst & Young, PwC, RSM.

¹⁰⁰⁶ Financial statements being provided under Rule 3–05 or 8–04 of Regulation S–X, 17 CFR 210.8–06 (“Rule 8–06” of Regulation S–X), or Rule 3–14 of Regulation S–X for a business being acquired by the predecessor are addressed in Rule 15–01(d) and the number of years of financial statements provided would be based on the significance test in those rules, which is two years or less.

¹⁰⁰⁷ See *supra* sections III.C and IV.A. (discussing co-registration of target companies and Rule 145a respectively).

¹⁰⁰⁸ Letters from ABA, PwC, RSM.

¹⁰⁰⁹ See Form F–4, Item 17(b)(5) (for company being acquired that may not use Form F–3 and is not a reporting company, include financial statements that would have been required to be

Commission's staff is that the requirement to update target company financial statements in a Form S-4 is based on the obligation of the registrant filing the Form S-4 to update under Rule 3-12 (or Rule 8-08 for a smaller reporting company). Rule 3-12 addresses the age of financial statements at the effective date of a registration statement or at the mailing date of a proxy statement.¹⁰¹⁰ A registration statement on Form S-1 for an IPO would also require application of Rule 3-12¹⁰¹¹ (or Rule 8-08¹⁰¹² for SRCs), regarding the age of financial statements at the effective date of a registration statement or at the mailing date of a proxy statement. However, Rule 3-12 requires application of Rule 3-01(c), which permits reporting companies 45 more days to update annual financial statements when certain conditions are met.

Absent this amendment, the required financial statements of each company being acquired in a Form S-4, because the shell company is a reporting company, would not have the same age requirements as those in the context of an initial registration statement.

Thus, in order to align the age requirements for financial statements for each business involved in a business

combination with a shell company filed on Form S-4 or F-4 with those for an issuer in an IPO on Form S-1 or F-1, we are adopting final Rule 15-01(c). Further, we revised the rule to clarify that Rule 3-12 or 8-08 must be applied to each business involved in a business combination with a shell company as if the financial statements were included in an initial registration statement. Based on the Commission staff's experience reviewing filings in de-SPAC transactions and other shell company business combination transactions, Rule 15-01(c) is consistent with existing market practice for the age of financial statements, where they are updated similar to an IPO. We further revised the rule to clarify that the rule applies to any business being acquired by a shell company, and not only a predecessor, that is included in registration statement under Item 17 of Form S-4, in order to ensure that the financial statements of non-predecessors are subject to the same age requirements. Also, in the parenthetical in the final sentence of the rule, we have revised the phrase "if it were filing a registration statement itself" to delete the word "itself" and replace it with the word "alone"; we believe the term "alone" will more clearly convey the intent of the rule.¹⁰¹³

10. Proposed Rules: 15-01(d), 1-02(w)(1), 3-05(b)(4)(ii), 3-14(b)(3)(ii): Acquisition of a Business or Real Estate Operation by a Predecessor

Currently, the financial statements of a business that is, or will be, the predecessor to a shell company registrant are required in registration statements or proxy statements related to the business combination.¹⁰¹⁴ Aside from the predecessor, the financial statements of any other businesses that have been, or are probable to be, acquired may also be required.¹⁰¹⁵ For example, "Shell Company A" and "Target Business B" are part of a business combination and a Form S-4 registration statement is filed. Target Business B, the predecessor, acquired "Company C" before the Form S-4 was filed, so Company C is not another company being acquired by Shell Company A (the registrant) as Company C will have been subsumed into Target Business B before the Form S-4 is filed. The proposed rules and amendments addressed the financial reporting

required for Company C in this non-exclusive example.

Commission staff has taken the position that existing Securities Act Rule 408(a) and Exchange Act Rule 12b-20, elicit financial statements of a business (e.g., "Company C" in the above example) acquired or probable of being acquired by the target business (e.g., "Target Business B" in the example) in a shell company business combination filed in a registration statement or proxy statement only when omission of those financial statements would render the target business's financial statements substantially incomplete or misleading.¹⁰¹⁶ The Commission proposed Rule 15-01(d) of Regulation S-X to reduce the judgment required in determining when to include financial statements of a business other than the shell company registrant or its predecessor and instead provide certainty by requiring application of Rule 3-05 or Rule 8-04 of Regulation S-X,¹⁰¹⁷ aligning with the reporting in an IPO when there is a similar acquisition. These provisions would dictate when the financial statements of a non-predecessor business¹⁰¹⁸ that has been acquired, or is probable to be acquired, by a shell company registrant or its predecessor should be included in the registration statements or proxy statements related to the business combination.

Since proposed Rule 15-01(d) would require the application of Rule 3-05 or 8-04, which in turn would require application of 17 CFR 210.1-02(w)(1) ("Rule 1-02(w)(1)" of Regulation S-X) in measuring significance, the Commission also proposed amendments to Rule 1-02(w)(1) and a new Rule 15-01(d)(1) to change how significance is measured in a shell company business combination transaction.

The existing significance tests in 17 CFR 210.1-02(w) ("Rule 1-02(w)" of Regulation S-X), as applied to acquisitions involving shell companies where significance would be measured

included in an annual report on Form 20-F; Form 20-F, Item 17(b) (The financial statements shall disclose an information content substantially similar to financial statements that comply with U.S. generally accepted accounting principles and Regulation S-X).

¹⁰¹⁰ See FRM 2200.8. As further described in Section 2045.5 of the FRM, while the age of financial statements is dependent on the registrant's requirements and eligibility for relief under Rule 3-01(c) of Regulation S-X, after a reverse acquisition accounted for as a business combination, the position of the Commission's staff is that the accounting acquirer's ability to meet those requirements should be considered in determining the need to update.

¹⁰¹¹ See Rule 3-12 of Regulation S-X, which stipulates for registrants that are not FPIs and are not large accelerated filers or accelerated filers that the balance sheet date in an initial registration statement must not be more than 134 days old, except that third quarter data is timely through the 45th day after the most recent fiscal year-end. For FPIs, Rule 3-12 requires compliance with the age requirements in Form 20-F. Form 20-F requires financial statements of an FPI must be as of a date within nine months of the effective date of a registration statement, and audited financial statements for the most recently completed fiscal year must be included in registration statements declared effective three months or more after fiscal year-end.

¹⁰¹² See Rule 8-08 of Regulation S-X, which states financial statements may be as current as of the end of the third fiscal quarter when the anticipated effective or mailing date falls within 45 days after the end of the fiscal year, or if the date falls within 90 days of the end of the fiscal year and (1) if a reporting company, all reports due were filed; (2) in good faith the company expects to report income in the fiscal year just completed; and (3) it reported income in at least one of the two previous fiscal years.

¹⁰¹³ See *supra* sections III.C and IV.A. (discussing co-registration of target companies and Rule 145a respectively).

¹⁰¹⁴ See Item 17 of Form S-4 and Form F-4; § 240.14A-3(b); Items 13 and 14 of Schedule 14A.

¹⁰¹⁵ See 17 CFR 230.408(a) ("Rule 408(a)" under the Securities Act); 17 CFR 240.12b-20 ("Rule 12b-20" under the Exchange Act).

¹⁰¹⁶ See FRM at Section 2005.5. If a company being acquired that is not the predecessor acquired a business, the registrant must evaluate Securities Act Rule 408 and disclose the financial statements for that acquired business when omission of those financial statements would render the financial statements for the company being acquired substantially incomplete or misleading.

¹⁰¹⁷ Rule 8-04 applies when the registrant or, depending on the context, its predecessor would qualify to be an SRC based on its annual revenues as of the most recently completed fiscal year if it were filing a registration statement alone.

¹⁰¹⁸ For ease of reference, in this section, when we refer to "business," we also mean "real estate operation." When we refer to "Rule 3-05," we also mean Rule 3-14 of Regulation S-X. When we refer to "Rule 8-04," we also mean 17 CFR 210.8-06 ("Rule 8-06" of Regulation S-X).

against the shell company registrant, appeared inconsistent with the reasons underlying the sliding scale approach adopted in Rule 3–05 (or Rule 8–04). The sliding scale approach recognizes that certain acquisitions have a greater impact on a company than others and those acquisitions should result in additional financial information about the acquired business. The significance tests in Rule 1–02(w)¹⁰¹⁹ do not address the scenario when there is both a shell company registrant and a business that is or will be its predecessor. Because a shell company has nominal activity and therefore the denominator for the tests would be minimal, the application of such tests generally result in an acquisition being significant at the maximum level, which suggests that the existing sliding scale for business acquisitions may not be effective in the context of a shell company business combination transaction.¹⁰²⁰ In order to address the ineffectiveness of the existing sliding scale in these specific transactions, the proposed amendments to Rule 1–02(w) would require the significance of the acquired business that is not the predecessor to be calculated using the predecessor's financial information as the denominator instead of that of the shell company registrant.

The Commission also proposed Rule 15–01(d)(2) to specify when the proposed Rule 15–01(d)-required financial statements, through application of Rule 3–05 (or Rule 8–04), for a business that is not the predecessor to a shell company, would be required to be filed if such financial statements are properly omitted from a registration, information, or proxy statement under Regulation S–X. Specifically, 17 CFR 210.3–05(b)(4)(i) (“Rule 3–05(b)(4)(i)” of Regulation S–X) provides that financial statements of a recently acquired or to be acquired business may be omitted from a registration or proxy statement when the significance of that acquisition, under the required significance tests in Rule 3–05, is measured at 50% or less. Rule 3–05 further provides that such omitted financial statements must be filed under cover of Form 8–K within 75 days after consummation of the acquisition.¹⁰²¹ A company that is not required to register

a class of securities under the Exchange Act is not required to file a current event report, such as Form 8–K, and we are not changing that in our final rules.¹⁰²² However, the Commission proposed in Rule 15–01(d)(2) that the financial statements of the business acquired by the shell company or the predecessor that were properly omitted under Rule 3–05 from the previously-filed registration or proxy statement would be required as part of the already-required Item 2.01(f) Form 8–K filed with Form 10 information within four business days of the de-SPAC transaction. The Commission also proposed amendments to Rules 3–05 and 3–14 to refer to Rule 15–01(d)(2) for completeness and to avoid confusion on when such financial statements are due when a shell company business combination transaction is involved.

11. Comments: Rules 15–01(d), 1–02(w)(1), 3–05(b)(4)(ii), 3–14(b)(3)(ii): Acquisition of a Business or Real Estate Operation by a Predecessor

Several commenters expressed general support for proposed Rule 15–01(d) or general support for proposed changes to Regulation S–X.¹⁰²³ However, each of the commenters who were generally supportive of Rule 15–01(d) and a few other commenters suggested changes to Rule 15–01(d)(2).¹⁰²⁴ Specifically, these commenters observed that the proposed rule could accelerate the filing of financial statements of an acquired business in a Form 8–K that have previously been omitted from a registration statement, compared to the timing that would be required after an IPO, and recommended that we conform the timing.¹⁰²⁵ After an IPO, a registrant must file the omitted financial

statements no later than 75 days after consummation of the acquisition.¹⁰²⁶ In contrast, commenters suggested the proposed rule could give the combined company insufficient time to prepare the financial statements of the acquired business because the proposed rule could require the omitted financial statements to be filed sooner than 75 days after the relevant acquisition in cases where the Form 8–K filed in connection with the consummation of the de-SPAC transaction is filed earlier than 71 days after such acquisition.¹⁰²⁷

One commenter recommended “that the Commission address the interaction between proposed Rule 15–01(d)(2) of Regulation S–X and the company's reporting requirements under section 15(d) as it relates to recently acquired businesses (or real estate operations) which are excluded from a registration or proxy or information statement prepared in connection with the de-SPAC transaction.”¹⁰²⁸

This same commenter also recommended that Rule 15–01(d) reference Rule 3–14 for real estate operations the same way the proposed rule referenced Rules 3–05 and 8–04 for businesses so that the acquisition of real estate operations is explicitly addressed.¹⁰²⁹

Several commenters supported,¹⁰³⁰ and no commenters opposed, the proposed amendments to Rule 1–02(w)(1) that required that the significance of acquired businesses be measured using the predecessor's financial information as the denominator, instead of the shell company's, because use of the predecessor's financial statements for the denominator should produce results more consistent with the sliding scale approach in Rule 3–05.

12. Final Rules 15–01(d), 1–02(w)(1), 3–05(b)(4)(ii), 3–14(b)(3)(ii): Acquisition of a Business or Real Estate Operation by a Predecessor

We are adopting new Rule 15–01(d) introductory text and (d)(1) and (2), as well as the amendments to Rules 1–02(w)(1), 3–05, and 3–14, substantially as proposed, except for certain modifications discussed below. New Rule 15–01(d) and corresponding amendments more closely align the financial reporting of an acquired business in a shell company business combination transaction reported on

¹⁰¹⁹ Rule 1–02(w) requires the financial information of the registrant, which may be a shell company, to be used as the denominator for the significant subsidiary tests.

¹⁰²⁰ See Proposing Release, *supra* note 7, at 29492.

¹⁰²¹ See Rule 3–05 (generally requiring the filing of financial statements of an acquired business when the conditions in Rule 1–02(w) related to significant subsidiary exceed 20%).

¹⁰²² As a co-registrant, target companies will have an Exchange Act reporting obligation. See *supra* sections III.C and IV.A (discussing co-registration of target companies and Rule 145a respectively).

¹⁰²³ Letters from ABA (expressing support for Rule 15–01(d) but suggesting changes to Rule 15–01(d)(2)), Freshfields (expressing support for Rule 15–01(d)(1) but suggested changes to proposed Rule 15–01(d)(2)), ICGN (supporting Article 15), PwC (expressing support for Regulation S–X changes to align with an IPO with respect to acquisitions by a predecessor but suggesting changes be made to proposed Rule 15–01(d)(2)), Vinson & Elkins (expressing support for Rule 15–01 but suggesting changes to proposed Rules 15–01(d)(2) and 15–01(e)), Winston & Strawn (expressing general support for Regulation S–X proposed amendments but suggesting changes to proposed Rule 15–01(d)(2)). See also letters from BDO, Deloitte & Touche LLP (June 7, 2022) (“Deloitte”), Ernst & Young, KPMG, Loeb & Loeb, RSM (expressing general support for proposed Regulation S–X amendments).

¹⁰²⁴ Letters from ABA, BDO, Freshfields, Goodwin, PwC, Vinson & Elkins, Winston & Strawn.

¹⁰²⁵ *Id.*

¹⁰²⁶ Rule 3–05(b)(4)(ii) of Regulation S–X.

¹⁰²⁷ Letters from ABA, Freshfields, Goodwin, Vinson & Elkins, Winston & Strawn.

¹⁰²⁸ Letter from PwC.

¹⁰²⁹ *Id.*

¹⁰³⁰ Letters from ABA, Freshfields, PwC, RSM, Vinson & Elkins.

Form S-4 or F-4 or proxy statement with that in an IPO by requiring application of Rule 3-05 or 8-04 of Regulation S-X to acquisitions of a business or real estate operation, respectively, by a predecessor to the shell company. They are also consistent with the Commission staff observations that current market practice applies Rule 3-05 (or Rule 8-04) to acquisitions by the business that will be the predecessor.

In the context of a registration statement on Form S-4 or F-4, the acquired business financial statements addressed in Rule 15-01(d) that are filed pursuant to Rule 3-05 do not represent financial statements of a company being acquired that would be a co-registrant in a shell company business combination.¹⁰³¹ For example, the financial statements of a business when its acquisition is cross-conditioned on the acquisition of a predecessor would ordinarily fall under Item 17 of Form S-4 or Form F-4, rather than under Rule 3-05. Judgment may be required in other examples when determining whether the financial statements of a business would be required under Item 17 of Form S-4 or Form F-4¹⁰³² as a “company being acquired” or under the provisions of Rule 3-05 for a significant acquisition.

New Rule 15-01(d)(1) directs registrants to Rule 1-02(w)(1) in order to determine how significance is measured in certain shell company business combination transactions. New Rule 15-01(d)(2) clarifies when and how financial statements for a recently acquired or to be acquired business should be filed.

We have made a few revisions to the final rule in response to comments received and some other revisions to improve the clarity of the final rules. First, consistent with commenters’ suggestions,¹⁰³³ we revised Rule 15-01(d)(2) from the proposal so that when the financial statements of a recently acquired business that is not or will not

be the predecessor to the shell company are omitted from a registration statement or proxy statement pursuant to Rule 3-05(b)(4)(i) of Regulation S-X, those financial statements must be filed in a Form 8-K by the later of the filing of the Form 8-K filed pursuant to Item 2.01(f) or 75 days after consummation of the acquisition. This revision does not accelerate the filing of such financial statements when compared to the application of Rule 3-05(b)(4)(i) outside of a shell company transaction.

In response to a comment about the interaction of this rule and section 15(d) of the Exchange Act,¹⁰³⁴ which includes requirements relating to periodic reporting on Forms 10-K and 10-Q and current reporting on Form 8-K, the revised rule specifies that a business whose financial statements are omitted from the registration statement in reliance on Rule 3-05(b)(4)(i) will be required to file those financial statements in a Form 8-K.

Next, we have revised Rule 15-01(d) to add references to Rule 3-14 and Rule 8-06 regarding real estate operations, which were inadvertently omitted from the proposal, as noted by a commenter.¹⁰³⁵ For similar reasons we have also revised Rule 15-01(d)(2) to change the reference from “recently acquired business” to “recently acquired business or real estate operation.” We reference “real estate operation” in the context of Rule 15-01(d) and not the other rules in Article 15 because a real estate operation can meet the definition of a business under 17 CFR 210.11-01(d) (“Rule 11-01(d)” of Regulation S-X), but the permitted financial statement presentation for an acquired real estate operation (Rule 3-14) is different than that for other acquired businesses (Rule 3-05). Where the rules in Article 15, other than Rule 15-01(d), refer to “business,” such references contemplate a real estate operation.

Unrelated to commenter feedback, we revised the parenthetical in Rule 15-01(d) related to when Rules 8-04 and 8-06 for SRCs will apply to clarify that these rules would apply when the predecessor qualifies as an SRC.

We also made several technical changes to improve the clarity of each of final Rule 15-01(d) introductory text and (d)(1) and (2). In final Rule 15-01(d), in place of the proposed term “when that business,” we have inserted instead the term “when the predecessor.” This change will help clarify which entity’s SRC status is being referred to. Also, we have changed

the term “itself” to “alone” for the same reasons the same change was made in Rule 15-01(b) and (c) as discussed above.¹⁰³⁶

We also removed from final Rule 15-01(d) references to acquisitions by a shell company, because we determined that the financial statements for acquisitions by a shell company would be required by Item 17 of Form S-4 or F-4 as a “company being acquired” and not required through application of Rule 3-05 or 3-14. Relatedly, we revised Rules 1-02(w), 3-05, and 3-14 so that they pertain to acquisitions by a predecessor rather than an acquisition by a shell company. Lastly, we reorganized some of the language in Rule 15-01(d)(2) to improve the readability of the requirement.

We are adopting the amendments to Rule 1-02(w) largely as proposed, except for two modifications discussed below. Final Rule 1-02(w) provides for the use of the predecessor’s financial statements as the denominator in the significance tests, which determine when financial statements are required for an acquired business, instead of those of the shell company registrant. We expect the rule will produce results more consistent with the objective of the sliding scale approach in Rule 3-05 and appropriately differentiate for investors those acquisitions that have a greater impact to the predecessor than others.

In the final rule, we made some technical changes and the modification already discussed above, in relation to final Rule 15-01(d), to remove the reference to acquisitions by a shell company. In the final rule, we also added the terms “consolidated” before “predecessor” and “those of” before “the shell company registrant” as well as eliminated “the subsidiaries consolidated” for clarity. We also added “shell company” before “registrant” in order to clarify which registrant should not be used as part of the significance test.

13. Proposed Rule 15-01(e): Financial Statements of a Shell Company Registrant After the Combination With Predecessor

In recent years, the Commission staff has received questions on whether the historical financial statements of a shell company registrant are required in filings made after a business combination. The Commission proposed new Rule 15-01(e) to allow a shell company, including a SPAC, to exclude

¹⁰³⁶ We also changed the plural term “businesses” to singular “business” and changed the related plural verb “are” to singular “is” in Rule 15-01(d), as well as in Rule 15-01(d)(1), in order to be consistent throughout Rule 15-01(d).

¹⁰³¹ See *infra* section III.C.

¹⁰³² We are adopting as proposed the amendment to Instructions to paragraph (b)(5) and (b)(6) of Item 17 of Form F-4. This amendment requires a reconciliation under Item 18 of Form 20-F when a shell company acquires a foreign business that will be a predecessor that prepares financial statements on the basis of a comprehensive body of accounting principles other than U.S. GAAP. Absent this amendment, the foreign business being acquired would present a reconciliation under Item 17 of Form 20-F, which does not include the disclosures required under U.S. GAAP. A predecessor that applies IFRS, as adopted by the IASB, in financial statements presented in Form F-4 would not have to present a reconciliation to U.S. GAAP, pursuant to Item 17(c) of Form 20-F.

¹⁰³³ Letters from ABA, Freshfields, Vinson & Elkins, Winston & Strawn. See *supra* note 1027.

¹⁰³⁴ Letter from PwC.

¹⁰³⁵ *Id.*

the financial statements of the shell company, for periods prior to a business combination that results in the combined entity no longer being a shell company, once the following conditions have been met: (1) the financial statements of the predecessor, as that term is used in financial reporting, have been filed for all required periods through the acquisition date, and (2) the financial statements of the combined entity registrant include the period in which the acquisition was consummated, which would also include the accounting for the business combination.

In the example of a de-SPAC transaction, assuming the first condition is met, the financial statements of the SPAC, as a shell company, would generally no longer be relevant or meaningful to an investor once the financial statements of the registrant include the period in which the de-SPAC transaction was consummated for any filing.¹⁰³⁷

14. Comments: Rule 15–01(e): Financial Statements of a Shell Company Registrant After the Combination With Predecessor

Several commenters were supportive of the proposed rule.¹⁰³⁸ One of these commenters expressed the view that shell company financial statements would no longer be relevant or meaningful once the financial statements of the registrant include the period in which the combination was consummated.¹⁰³⁹

Two commenters, however, asserted that the financial statements of the shell company should no longer be required in any filings made after consummation of a transaction because the shell company's financial statements would no longer be relevant or material.¹⁰⁴⁰ Two commenters highlighted an inconsistency between the proposed rule text and the discussion of the proposed rule in the Proposing Release as it relates to one of the conditions for when the shell company's financial statements may be omitted.¹⁰⁴¹

¹⁰³⁷ Once the financial statements of the registrant include the period in which the de-SPAC transaction was consummated, the financial statements required would be those of the predecessor for all historical periods presented.

¹⁰³⁸ Letters from Ernst & Young, PwC, RSM.

¹⁰³⁹ Letter from RSM.

¹⁰⁴⁰ Letters from Ernst & Young, Freshfields. See also letter from Vinson & Elkins, which stated: "We disagree that financial statements of the SPAC could ever be material to an investor in the combined company, as surmised by the SEC in the Proposing Release, but if they were material then Exchange Act Rule 12b–20 or Securities Act Rule 408(a) would require their disclosure."

¹⁰⁴¹ Letters from Freshfields, Vinson & Elkins (both highlighting that Rule 15–01(e), as proposed,

15. Final Rule 15–01(e): Financial Statements of a Shell Company Registrant After the Combination With Predecessor

We are adopting Rule 15–01(e) substantially as proposed, except for modifications discussed further below. The final rules reflect our belief that the financial statements of a shell company would be necessary and material to an investor until such time that the combined registrant's financial statements include the period in which the acquisition was consummated.

We disagree with commenters' assertions that the shell company's financial statements would provide no material information prior to the point in time when the financial statements of the combined entity registrant include the period in which the acquisition was consummated. Specifically, we note that the shell company's financial statements may include material information about its equity or outstanding derivative financial instruments. While we understand, as a commenter asserted,¹⁰⁴² that application of Securities Act Rule 408(a) may result in inclusion of the shell company's financial statements in a registration statement because of a determination that they are material, we believe that the new rule appropriately eliminates a determination that could result in the financial statements' exclusion and the related regulatory uncertainty involved in such judgment because we believe the shell company's financial statements would be material. The staff has not objected to the registrant excluding the historical financial statements of the shell company from periodic reports once the financial statements include the period in which the acquisition or recapitalization was consummated.¹⁰⁴³ Further, in the staff's experience with reviewing these filings, the registrant has continued to include the historical shell company's financial statements until that time period. Thus, the new rule codifies the existing staff view and current practice.

In response to the comments on the inconsistency between the proposed rule text and the discussion in the Proposing Release, we added "registrant" to "shell company" for

would permit the financial statements of the shell company for periods prior to the consummation of the acquisition to be omitted once the financial statements of the predecessor have been filed for all required periods through the acquisition date, whereas the Proposing Release refers to financial statements of the shell company (and not the predecessor)). See Proposing Release, *supra* note 7, at 29493.

¹⁰⁴² Letter from Vinson & Elkins.

¹⁰⁴³ Proposing Release, *supra* note 7, at 29493.

clarity that the shell company in this rule represented a registrant. As a registrant, the shell company is required to file financial statements for all required periods through the acquisition date under Exchange Act section 13(a) or 15(d) and rules thereunder.

In final Rule 15–01(e), we have made a change from the proposal to include a provision that has a similar effect as the proposed amendments to Rule 11–01(d) would have had if we had adopted them. This added provision states that if a registrant¹⁰⁴⁴ is to acquire or has acquired a shell company, the financial statements of the shell company are required to be included in any filing that requires the registrant's financial statements, as if the shell company were the registrant for the filing, unless the financial statements of the registrant include the period in which the acquisition of the shell company was consummated. As also discussed below, as a result of this change, it is unnecessary to adopt proposed Rule 11–01(d) which would have had a similar effect.

The final rule will provide clarity as to when the financial statements of a shell company are required after a shell company business combination transaction. The final rule applies regardless of whether the business combination is accounted for by the shell company as a forward acquisition of the business, which may be a private operating company, or as a reverse recapitalization of the business.¹⁰⁴⁵ Under the final rule, the historical financial statements of the shell company will be required in all filings that require financial statements (including registration statements and the Form 8–K with Form 10 information filed following the de-SPAC transaction) filed prior to the first periodic report, such as Form 10–Q, that includes those post-business combination financial statements.¹⁰⁴⁶ For example, under the final rule, registration statements filed before the first periodic report filed with the post-business combination financial statements, such as a registration statement to register the resale of shares issued in connection with a PIPE financing filed shortly after the de-SPAC

¹⁰⁴⁴ A registrant that would be required to include the financial statements of a shell company is a new holding company that is created where a SPAC and a target company merge into that new holding company.

¹⁰⁴⁵ A reverse recapitalization is considered to be an equivalent to the issuance of stock by a private company for the net monetary assets of a shell company accompanied by a recapitalization.

¹⁰⁴⁶ Proposing Release, *supra* note 7, at 29493.

transaction, will require the SPAC's financial statements.

16. Proposed Rule 11–01(d)

The Commission proposed to amend Rule 11–01(d) of Regulation S–X to state that a SPAC is a business for purposes of the rule. While Rule 11–01(d) states that an entity is presumed to be a business, consideration of the continuity of the SPAC's operations prior to and after the de-SPAC transaction may lead some parties to conclude that the SPAC is not a business.¹⁰⁴⁷ The Commission noted in the Proposing Release that, given the significant equity transactions generally undertaken by a SPAC, the Commission believes the financial statements of the SPAC could be material to an investor, particularly when they underpin adjustments to pro forma financial information in a transaction when an operating company is the legal acquirer of a SPAC.

As a result of the proposed rule, an issuer that is not a SPAC may be required to file financial statements of the SPAC in a resale registration statement on Form S–1.¹⁰⁴⁸

Further, the proposed amendment to Rule 11–01(d) would change the application of 17 CFR 210.11–01(b)(3)(i)(B) (“Rule 11–01(b)(3)(i)(B)” of Regulation S–X)¹⁰⁴⁹ by allowing the significance of a future acquired business to be compared to the pro forma amounts related to the shell company and target company business combination transaction in filings made after the consummation of the business combination transaction.¹⁰⁵⁰ The impact

of such application would be that the shell company's financial statements, including its cash, would be part of the pro forma financial information and would likely increase the denominator in the significance tests compared to measuring the significance of an acquisition against only the target private operating company's financial information. While the Commission did not propose amendments to Rule 11–01(b)(3)(i)(B), the Proposing Release sought feedback on the potential change in its application as a result of the proposed amendments to Rule 11–01(d).¹⁰⁵¹

17. Comments: Rule 11–01(d)

Several commenters opposed the proposed amendments to Rule 11–01(d) that would treat the SPAC as a business for purposes of 17 CFR 210.11–01.¹⁰⁵² One commenter, while not specifically referring to proposed Rule 11–01(d), expressed views consistent with support for the rule.¹⁰⁵³

One commenter that opposed the amendments said that the SPAC historical financial statements are not relevant to the ongoing business of the target operating company.¹⁰⁵⁴ The commenter said that the balance sheet of the combined public company will already reflect the impact of the combination of the SPAC with the target operating company.¹⁰⁵⁵ The commenter also said that the proposed amendment would result in significant additional compliance costs while resulting in no substantive additional public disclosure.¹⁰⁵⁶

One commenter expressed the view that the proposed amendment is contradictory to current Rule 11–01(d)'s requirement to evaluate whether there is sufficient continuity of the acquired entity's operations prior to and after the transaction so that disclosure of prior financial information is material to an understanding of future operations.¹⁰⁵⁷ Another commenter expressed similar views, asserting that, “[i]n a de-SPAC transaction there is no continuity of operations between the SPAC and the surviving company, and the SPAC's revenue producing activities (interest on short term U.S. government securities or money market funds investing in the

as the denominator in the significance tests may be met. Proposing Release, *supra* note 7, at 29493, n.273.

¹⁰⁵¹ Proposing Release, *supra* note 7, at 29494.

¹⁰⁵² Letters from Davis Polk, Vinson & Elkins, Ernst & Young.

¹⁰⁵³ Letter from Freshfields.

¹⁰⁵⁴ Letter from Davis Polk.

¹⁰⁵⁵ *Id.*

¹⁰⁵⁶ *Id.*

¹⁰⁵⁷ Letter from Ernst & Young.

same) do not continue post-closing and are not material to investors in the surviving company.”¹⁰⁵⁸

This commenter also said, “[w]hile there is a presumption that a separate entity, such as a SPAC, is a business, none of the attributes identified in S–X Rule 11–01(d)(2) for evaluation of whether a lesser component of a business constitutes a business (*i.e.* physical facilities, employee base, market distribution system, sales force, customer base, operating rights, production techniques or trade names) remain after the de-SPAC transaction.”

Current Rule 11–01(b)(3)(i)(B) permits pro forma information to be used in the denominator of significance tests under certain circumstances. This commenter also said that “[t]he use of pro forma financials should only be allowed to the extent they would be permitted for an acquisition in connection with a pending or completed IPO.”¹⁰⁵⁹

One commenter said that the proposed amendment to Rule 11–01(d) is contradictory to proposed Rule 15–01(e), about which the Proposing Release stated: “the financial statements of the SPAC, as a shell company, would generally no longer be relevant or meaningful to an investor after a de-SPAC transaction once the financial statements of the registrant include the period in which the de-SPAC transaction was consummated for any filing.”¹⁰⁶⁰ The commenter expressed a similar view with respect to pro forma information as the foregoing, stating that the historical financial statements of the SPAC are not necessary for the purposes of the pro forma financial information. The commenter said, “[f]or example, the trust account amounts in the pro forma information significantly differ from actual amounts due to transaction costs and redemptions. Any private investment in public equity (PIPE) transaction is also not reflected in the historical SPAC financials, and much of the SPAC's historical income statement activity is generally eliminated in the preparation of the pro forma financial statements.”

One commenter, while not specifically referring to proposed Rule 11–01(d), expressed views consistent with proposed Rule 11–01(d).¹⁰⁶¹ The commenter said, “we agree that the pro forma financial information that gives effect to the shell company transaction

¹⁰⁵⁸ Letter from Vinson & Elkins (also expressing the view that Exchange Act Rule 12b–20 or Securities Act Rule 408(a) would require disclosure of the SPAC's financial statements if they were material).

¹⁰⁵⁹ *Id.*

¹⁰⁶⁰ Letter from Ernst & Young.

¹⁰⁶¹ Letter from Freshfields.

¹⁰⁴⁷ Proposing Release, *supra* note 7, at 29494.

¹⁰⁴⁸ Proposing Release, *supra* note 7, at 29493. By contrast, application of Rule 3–05 to a significant business under Rule 11–01(d) requires its financial statements to continue to be filed in any subsequent registration statements until the acquired business is included in the registrant's results for at least nine months subsequent to acquisition. As proposed, the application of Rule 3–05 would require the SPAC financial statements for a longer duration subsequent to the de-SPAC transaction than the application of proposed Rule 15–01(e).

¹⁰⁴⁹ This rule permits in certain circumstances the use of pro forma amounts that depict significant business acquisitions and dispositions consummated after the latest fiscal year-end for which the registrant's financial statements are required to be filed for the registrant's financial information in the significance tests. Such pro forma use is permitted if the registrant has filed audited financial statements for any such acquired business for the periods required by Rule 3–05, 8–04, or 3–14 and the pro forma information required by 17 CFR 210.11–01 through 210.11–02.

¹⁰⁵⁰ Proposing Release, *supra* note 7, at 29493. The Commission also said in the Proposing Release that, pursuant to the proposed amendment to Rule 11–01(d) that would stipulate that the SPAC is a business, an acquisition of the SPAC would be considered an acquisition of a business, and the conditions under Rule 11–01(b)(3)(i)(B) to use pro forma financial statements depicting the acquisition

should be allowed to be used as the denominator in measuring the significance of other acquisitions not involving a predecessor.” The commenter also indicated that the use of pro forma financial information to measure significance should not be limited to acquisitions that occur subsequent to a de-SPAC transaction. The commenter said, “[i]n most de-SPAC transactions there are numerous other contemporaneous transactions occurring that affect the target’s capital structure and, as a result, using proforma financial statements for measuring significance can produce a more accurate analysis of an acquirer’s significance.”

18. Decline To Adopt Rule 11–01(d)

After considering the comments received, we are not adopting the proposed amendment of Rule 11–01(d), because we agree with a commenter’s feedback¹⁰⁶² that it would be contradictory to proposed Rule 15–01(e). In this regard, the proposed amendment to Rule 11–01(d) could require filing of the shell company’s financial statements in subsequent registration statements despite Rule 15–01(e) potentially permitting their omission.¹⁰⁶³ Instead we are making revisions to proposed Rule 15–01(e) to require that, if a registrant is to acquire or has acquired a shell company, the financial statements of the shell company must be filed, as if the shell company were the registrant for the filing, unless the financial statements of the registrant include the period in which the acquisition was consummated. Accordingly, in structures where another issuer is the legal acquirer of a shell company, that issuer will look to final Rule 15–01(e), rather than Rules 11–01(d) and 3–05, for determining whether financial statements of the shell company are required in filings made subsequent to the transaction. Final Rule 15–01(e) will require financial statements of the SPAC in registration statements filed subsequent to the de-SPAC transaction when the de-SPAC transaction has not yet been reflected in the financial statements filed by the registrant. In contrast to the proposed rule,¹⁰⁶⁴ the final rule would not require financial statements of the SPAC once the de-

SPAC transaction has been reported on in the financial statements filed by the registrant. The final rules reflect our view that the financial statements of the SPAC could be material to an investor.

As highlighted in the Proposing Release, application of the proposed amendment to Rule 11–01(d) that would treat a shell company as a business could have resulted in significance testing of a future acquired business (*i.e.*, numerator) being measured against pro forma amounts that combine the shell company and target private operating company (*i.e.*, denominator).¹⁰⁶⁵ Because the proposed amendment to Rule 11–01(d) is not being adopted, the shell company will not be included in the denominator, similar to how proceeds from an offering would not be included in the comparison.

19. Proposed Item 2.01(f) of Form 8–K

Item 2.01(f) of Form 8–K currently requires a shell company registrant to file, after an acquisition, the information that would be required if the registrant were filing a general form for the registration of securities on Form 10 under the Exchange Act. The Commission proposed to revise this item to refer to “acquired business,” rather than “registrant,” in an effort to clarify that the information provided relates to the acquired business for periods prior to consummation of the acquisition and not the shell company registrant.¹⁰⁶⁶

20. Comments: Item 2.01(f) of Form 8–K

One commenter supported the proposed amendment to refer to “acquired business” instead of “registrant.”¹⁰⁶⁷ Another commenter recommended that we use the term “predecessor,” instead of “acquired business,” in order to avoid potential confusion with acquired businesses that are not the predecessor.¹⁰⁶⁸

Currently, a Form 8–K filed pursuant to Item 2.01(f) may require three fiscal years of financial statements for an acquired business that is the predecessor to a shell company, while only two fiscal years may be required in the Form S–4 for the de-SPAC transaction for the same company under Rule 15–01(b).¹⁰⁶⁹ For example, an EGC that is not an SRC would need to present an additional year of financial

statements within four business days of consummation of the de-SPAC transaction. Several commenters responded to a request for comment that asked whether we should amend the Form 8–K requirement to provide an exception to the required Form 10 type-information so that the financial statements of the acquired business need not be presented for any period prior to the earliest audited period of that acquired business previously presented in connection with a registration, proxy, or information statement of the registrant.¹⁰⁷⁰ Each of the commenters that responded to the request for comment supported the exception,¹⁰⁷¹ with one commenter stating that it was not clear why an earlier annual period would be required in the Form 8–K filed after consummation of the merger when such information was not considered necessary for an investment decision by the SPAC’s shareholders.¹⁰⁷² No commenters opposed such an exception.

21. Final Item 2.01(f) of Form 8–K

We are adopting the proposed amendments to Item 2.01 of Form 8–K, with modifications made in response to comments received. We agree with the commenter’s recommendation that we use the term “predecessor,” instead of “acquired business,” in order to avoid potential confusion with acquired businesses that are not the predecessor.¹⁰⁷³

We agree with the comments suggesting that, when the predecessor meets the conditions of an EGC at the time of filing the Form 8–K, the registrant should not be required to present audited financial statements for any period prior to the earliest audited period presented in the predecessor’s financial statements in connection with a de-SPAC registration or proxy statement of the registrant.¹⁰⁷⁴ The final rule provides that, when, at the time of filing of the Item 2.01(f) Form 8–K, the predecessor meets the conditions of an “emerging growth company,” as defined in Securities Act Rule 405 or Exchange Act Rule 12b–2, the registrant need not present audited financial statements for the predecessor for any period prior to the earliest audited period presented in its financial statements included in a previously filed registration or proxy

¹⁰⁶² Letter from Ernst & Young.

¹⁰⁶³ See *supra* section IV.B.15.

¹⁰⁶⁴ If Rule 3–05 were applied to the SPAC because the SPAC was considered a business under Proposed Rule 11–01(d), then financial statements of the SPAC may be required in registration statements of the registrant until the SPAC has been included in the registrant’s financial statements for at least nine months.

¹⁰⁶⁵ Proposing Release, *supra* note 7, at 29493.

¹⁰⁶⁶ Proposing Release, *supra* note 7, at 29294.

¹⁰⁶⁷ Letter from PwC.

¹⁰⁶⁸ Letter from Ernst & Young.

¹⁰⁶⁹ As discussed above, we are adopting Rule 15–01(b) largely as proposed, with certain technical modifications in the final rule.

¹⁰⁷⁰ Proposing Release, *supra* note 7, at 29494 (request for comment number 109).

¹⁰⁷¹ Letters from BDO, PwC, Deloitte, RSM, Freshfields, Vinson & Elkins.

¹⁰⁷² Letter from BDO.

¹⁰⁷³ Letter from Ernst & Young. See *supra* note 1068.

¹⁰⁷⁴ Letters from BDO, PwC, Deloitte, RSM, Freshfields, Vinson & Elkins. See *supra* note 1071.

statement for the transaction resulting in the loss of shell company status.

22. Proposed Rules 3–01, 8–02, 10–01(a)(1): Balance Sheets of Predecessors

Currently, 17 CFR 210.3–02 (“Rule 3–02” of Regulation S–X) requires that statements of comprehensive income be filed for the registrant and its predecessors. Rules 3–01 and 8–02 and 17 CFR 210.10–01(a)(1) (“Rule 10–01(a)(1)” of Regulation S–X), however, specify that balance sheets be filed for the registrant but do not specifically refer to balance sheets of predecessors. In the Proposing Release, the Commission proposed amendments to Rules 3–01, 8–02, and 10–01(a)(1) of Regulation S–X to refer specifically to financial statements of predecessors (consistent with the provision in current Rule 3–02 regarding statements of comprehensive income).¹⁰⁷⁵

23. Comments: Rules 3–01, 8–02, 10–01(a)(1): Balance Sheets of Predecessors

One commenter expressed support for the proposed amendments.¹⁰⁷⁶ No commenters opposed the proposed amendments.

24. Final Rules 3–01, 8–02, 10–01(a)(1): Balance Sheets of Predecessors

We are adopting the amendments largely as proposed, with a technical modification discussed below. We do not believe the intent of current Rules 3–02, 8–01, and 10–01(a)(1) is to require a predecessor’s statements of comprehensive income without the balance sheets as that would not be considered a complete set of financial statements, which would be inconsistent with Article 3 of Regulation S–X.

These final amendments are consistent with existing financial reporting practices of registrants. We do not expect the final amendments to result in any changes in disclosures.

Finally, we made a technical revision to Rule 8–02 to add “and its subsidiaries consolidated” to “registrant” in order to conform to Rule 3–01.

25. Other Shell Company Matters

In order to deter potential abuses involving shell company transactions,¹⁰⁷⁷ the Commission has adopted various rules and limitations over the years, some of which apply to

former shell companies.¹⁰⁷⁸ For example:

- For a person to resell securities initially issued by a shell company in reliance on 17 CFR 230.144, a former shell company must satisfy the requirements of 17 CFR 230.144(i)(2);¹⁰⁷⁹
- A former shell company may not use Form S–8 until at least 60 calendar days after the company is no longer a shell company and has filed current Form 10 information;¹⁰⁸⁰
- For three years following the change in shell company status, a former shell company is an “ineligible issuer” under Rule 405 that may not, among other things, use free writing prospectuses for communications during a registered offering or rely on the safe harbor of Rule 163A from section 5(c) of the Securities Act for pre-filing communications;¹⁰⁸¹ and
- For three years following the change in shell company status, a broker-dealer may not rely on the safe harbors of Securities Act Rules 137, 138, and 139 for research reports regarding a former shell company.¹⁰⁸²

Several commenters asked the Commission to carve out a post-de-SPAC transaction combined company from these and other former shell company limitations and to make certain safe harbors available to the combined company that are not available to former shell companies.¹⁰⁸³ Generally, these commenters expressed the view that doing so would more closely align the rules that apply to target companies that enter the public markets through a de-SPAC transaction with the rules that apply to companies that conduct a traditional IPO.

We are not adopting changes to these limitations or to other rules and limitations related to former shell companies that may apply to the combined company at this time. In light of the comments we received and taking into account the rules being adopted

herein and market practices that may develop as a result, we believe that further consideration of potential application of these rules and limitations to the combined company is warranted.

V. Enhanced Projections Disclosure

A. Proposed Items 10(b) and 1609 of Regulation S–K

1. Proposed Rules

Current Item 10(b) of Regulation S–K provides Commission guidance with respect to factors to be considered in formulating and disclosing management’s projections of future economic performance that applies to all filings made with the Commission. The Commission proposed to amend Item 10(b) of Regulation S–K to expand and update the Commission’s views on the use of such projections. The proposed amendments to Item 10(b) continued to state the Commission’s view that projected financial information included in filings must have a reasonable basis. To address specific concerns with respect to the format of projections, namely that some companies may present projections more prominently than actual historical results (or the lack of historical results where they have no operations at all) or use non-GAAP financial measures in the projections without a clear explanation or definition of such measures, the Commission proposed amending Item 10(b) to state that:

- Any projected measures that are not based on historical financial results or operational history should be clearly distinguished from projected measures that are based on historical financial results or operational history;

- It generally would be misleading to present projections that are based on historical financial results or operational history without presenting such historical measure or operational history with equal or greater prominence; and

- The presentation of projections that include a non-GAAP financial measure should include a clear definition or explanation of the measure, a description of the GAAP financial measure to which it is most closely related,¹⁰⁸⁴ and an explanation why the

¹⁰⁷⁸ These rules and limitations generally do not apply to shell companies that qualify as “business combination related shell companies” as defined in Rule 405.

¹⁰⁷⁹ See 17 CFR 230.144(i), 17 CFR 230.145(c) and (d); *Revisions to Rules 144 and 145*, Release No. 33–8869 (Dec. 6, 2007) [72 FR 71546 (Dec. 17, 2007)].

¹⁰⁸⁰ See General Instruction A.1, Form S–8 (17 CFR 239.16b); Shell Company Adopting Release, *supra* note 943.

¹⁰⁸¹ See 17 CFR 230.165(e)(2)(ii); 17 CFR 230.163A(b)(3)(ii); *Securities Offering Reform*, Release No. 33–8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)].

¹⁰⁸² See 17 CFR 230.137(d)(2); 17 CFR 230.138(a)(4); 17 CFR 230.139(a)(1)(ii).

¹⁰⁸³ See letters from ABA, American Securities Association, Cowen, Ernst & Young, Fenwick, Freshfields, Goodwin, Vinson & Elkins, White & Case, Winston & Strawn.

¹⁰⁸⁴ The reference to the most closely related GAAP measure called for by the proposed amendments to Item 10(b) would not require a reconciliation to that GAAP measure. The need to provide a GAAP reconciliation would continue to be governed by Regulation G and Item 10(e) of Regulation S–K.

¹⁰⁷⁵ Proposing Release, *supra* note 7, at 29494.

¹⁰⁷⁶ Letter from PwC.

¹⁰⁷⁷ See, e.g., Shell Company Adopting Release, *supra* note 943. Also affiliates of any non-issuer party to a transaction identified in 17 CFR 230.145(a) must consider 17 CFR 230.145(c) and (d).

non-GAAP financial measure was used instead of a GAAP measure.¹⁰⁸⁵

Finally, the Commission proposed amending Item 10(b) to clarify that it would apply to a target company's projections when they are presented to investors through the registrant's Commission filings. Pursuant to the proposed amendments, the guidance in amended Item 10(b) would apply to any projections of future economic performance of both the registrant and persons other than the registrant (which would include a target company in a de-SPAC transaction), that are included in the registrant's Commission filings.

The Commission proposed Item 1609 of Regulation S-K, which would apply only to de-SPAC transactions, to require a registrant to provide the following disclosures:

- With respect to any projections disclosed in the filing, the purpose for which the projections were prepared and the party that prepared the projections;
- All material bases of the disclosed projections, all material assumptions underlying the projections, and any factors that may impact such assumptions (including a discussion of any material growth rates or discount multiples used in preparing the projections, and the reasons for selecting such growth rates or discount multiples); and
- Whether the disclosed projections reflect the view of the board or management of the SPAC or target company, as applicable, as of the date of the filing; if not, then a statement regarding the purpose of disclosing the projections and the reasons for any continued reliance by management or the board on the projections.

2. Comments

A number of commenters generally supported the proposed items.¹⁰⁸⁶ In addition, some of these commenters, in response to issues raised in a request for comment in the Proposing Release,¹⁰⁸⁷

indicated that the updated guidance in proposed Item 10(b) should apply to all filings.¹⁰⁸⁸

In a comment letter that addressed issues raised in a request for comment in the Proposing Release, one group of commenters expressed support for the proposals but stated that “[w]e are opposed to mandating the disclosure of certain financial statement line items (e.g., revenue, EBITDA [earnings before interest, taxes, depreciation, and amortization], etc.)” and said, “Some of the proposals regarding Item 10(b) of Regulation S-K and Item 1609 . . . should also extend to the investor presentations disclosed as an attachment to the Form 8-K.”¹⁰⁸⁹ These commenters said their analysis and that of others “suggests that the market response to a de-SPAC transaction and financial projections occur at the time of the merger announcement.”¹⁰⁹⁰

Several commenters addressed the reasonableness of projections made concerning companies with no operating history. One of the commenters who supported the proposed amendments recommended that we adopt an additional provision providing that “if a registrant does not have a history of operations for the basis of the projections, then it is possible to acquire an outside review of the projections as support for the ‘reasonable’ projections.”¹⁰⁹¹ Another commenter said, “As for the proposed amendments to Regulation S-K on the use of projections, we believe not only that non-GAAP metrics need to be conspicuously highlighted and marked for investor review, but also that

disclosures should state succinctly that issuers with no historical operations or completed negotiations for company/asset acquisitions do not have a reasonable basis for projections.”¹⁰⁹²

Another commenter recommended that Item 1609(b) include a requirement to disclose sensitivity testing of the key assumptions underlying the projections.¹⁰⁹³

A few commenters also sought clarification that the staff guidance provided in Questions 101.01, 101.02 and 101.03 of the Compliance and Disclosure Interpretations relating to Non-GAAP Financial Measures (last updated December 13, 2022)¹⁰⁹⁴ will continue to apply, notwithstanding adoption of proposed Item 10(b)(2)(iv).¹⁰⁹⁵

In response to a request for comment,¹⁰⁹⁶ one commenter stated that we should not require projections to be presented in a separately captioned section of a Commission filing because doing so would “change the purpose” for which the projections were prepared.¹⁰⁹⁷ On the other hand, a few commenters stated that such a requirement would be consistent with current practice and unlikely to lead to significant changes in the information disclosed or create undue burdens on registrants.¹⁰⁹⁸

In comment letters that addressed issues raised in a request for comment in the Proposing Release,¹⁰⁹⁹ some commenters suggested that Item 1609 should apply to all filings,¹¹⁰⁰ while one commenter expressed support for limiting the applicability of Item 1609 to de-SPAC transaction filings only.¹¹⁰¹ Some commenters who supported Item 1609 applying to all filings emphasized that Item 1609 should apply to all companies that disclose financial projections in Commission filings (and

¹⁰⁸⁸ Letters from ABA; Chris Barnard; Goodwin; Michael Dambra, Omri Even-Tov, and Kimberlyn George.

¹⁰⁸⁹ Letter from Michael Dambra, Omri Even-Tov, and Kimberlyn George (“We note that the announcement of a prospective de-SPAC transaction often results in an immediate and substantial increase in the trading volume of the securities of the SPAC, based on the terms of the transaction that have been disclosed and the limited information publicly available on the private operating company at the time of the announcement, which is far less extensive than that of a newly public company after a traditional initial public offering.”); Proposing Release, *supra* note 7, at 29504 (request for comment number 150) (“Should we consider requiring additional disclosures, such as more disclosure on the private operating company or risk factor disclosure, in a Form 8-K filed pursuant to Item 1.01 of the form disclosing that the parties have entered into a business combination agreement? If so, what additional disclosure should we require? Should we amend Item 1.01 of Form 8-K to require the filing of the business combination agreement as an exhibit to the Form 8-K filing (as opposed to allowing the agreement to be filed as an exhibit to a subsequent periodic report)? What other amendments should we consider in this regard?”).

¹⁰⁹⁰ Letter from Michael Dambra, Omri Even-Tov, and Kimberlyn George.

¹⁰⁹¹ Letter from ICGN.

¹⁰⁹² Letter from NASAA.

¹⁰⁹³ Letter from Chris Barnard.

¹⁰⁹⁴ The interpretations relate to whether certain forecasts are considered non-GAAP financial measures, as that term is used in Item 10(e) of Regulation S-K and Regulation G.

¹⁰⁹⁵ Letters from ABA, Goodwin.

¹⁰⁹⁶ Proposing Release, *supra* note 7, at 29496 (request for comment number 113) (“Are there different ways of presenting financial projections that would be beneficial to investors? For example, should we require registrants to present some or all financial projections in a separately captioned section of a Commission filing?”).

¹⁰⁹⁷ Letter from Kirkland & Ellis.

¹⁰⁹⁸ Letters from ABA, Goodwin.

¹⁰⁹⁹ Proposing Release, *supra* note 7, at 29496 (request for comment number 115) (“As proposed, Item 1609 of Regulation S-K would apply only to de-SPAC transactions. Should we expand the scope of the item to apply to all companies that publicly disclose financial projections in Commission filings?”).

¹¹⁰⁰ Letters from ABA, Goodwin, Vinson & Elkins.

¹¹⁰¹ Letter from Chris Barnard.

¹⁰⁸⁵ The Commission stated a similar view in 2003. See *Conditions for Use of Non-GAAP Financial Measures*, Release No. 33-8176 (Jan. 22, 2003), section II.B.2 [68 FR 4820 (Jan. 30, 2003)].

¹⁰⁸⁶ Letters from ABA (except for proposed Items 1609(b) and (c)); Americans for Financial Reform Education Fund; Chris Barnard (May 27, 2022) (“Chris Barnard”); Goodwin (except for proposed Items 1609(b) and (c)); ICGN; Julianna Marandola (Apr. 30, 2002); Michael Dambra, Omri Even-Tov, and Kimberlyn George.

¹⁰⁸⁷ Proposing Release, *supra* note 7, at 29493 (request for comment number 111) (“Instead of applying to all filings covered by Item 10(b), as proposed, should the proposed updated guidance apply solely to filings relating to business combination transactions (including de-SPAC transactions), while retaining the existing Item 10(b) guidance for other filings?”).

not just to de-SPAC transactions as proposed) in connection with business combinations in which the target is at an early stage and has a limited financial track record and the transaction may involve more significant dilution.¹¹⁰²

A few commenters indicated that proposed Item 1609(b) is likely to reduce the disclosure of projections in Commission filings but acknowledged that the rules are unlikely to “significantly impact the willingness of parties to De-SPAC Transactions to continue preparing and disclosing projections” because the disclosure of projections is compelled by certain other Federal and State requirements.¹¹⁰³

A few commenters stated that the requirement in proposed Item 1609(b) to discuss the material bases and assumptions underlying projections, despite the inclusion of a materiality qualifier, is unduly prescriptive, may result in the inclusion of “inputs and assumptions that are not material to an investor’s understanding of the projections” and may lead registrants towards a conservative approach of disclosing growth rates or discount multiples in order to protect against future claims that such inputs were material.¹¹⁰⁴ Another commenter, however, said that “asking for more clarity in assumptions and identifying where they came from strike us as very sensible.”¹¹⁰⁵

With respect to Item 1609(c), some commenters indicated that registrants should not have to affirm the validity of projections as of the date of the filing because it would be unduly burdensome and inconsistent with the purpose of the preparation of the projections.¹¹⁰⁶ The commenters also suggested that the disclosure requirement may result in the need to prepare an updated set of projections, which would be expensive and time-consuming.¹¹⁰⁷ Two commenters suggested an alternative approach to Item 1609(c) involving several elements.¹¹⁰⁸ First, they suggested requiring disclosure of “(i) the date as of which the projections were prepared and (ii) the views of the preparer of the projections as of such date of preparation and, if different, the date upon which the SPAC board approved the transaction.”¹¹⁰⁹ Second,

they suggested that registrants should be permitted to “disclaim any duty to update the projections as of a later date except to the extent there is a material lapse in time and change in circumstances.”¹¹¹⁰ Third, they suggested “the Commission may seek disclosure confirming whether the projections still reflect management’s views on future performance and/or describing what consideration the board gave to obtaining updated projections or a lack of reliance upon the projections.”¹¹¹¹

Also regarding Item 1609(c), one commenter expressed the view that projections are included in a de-SPAC transaction disclosure document to describe the basis upon which the directors of the SPAC approved the transaction, not to serve as a basis for investors to make an investment decision.¹¹¹² The commenter also indicated that “projections are routinely disclosed in proxy statements and registration statements as the basis for fairness opinions issued at the time of the execution of the merger agreement of the public merger, but the SEC has not historically required the parties to the merger to confirm the projections in connection with each filing.”¹¹¹³

Some commenters expressed the view that the proposed rule was not sufficiently specific in its use of the phrase “as of the date of the filing” and that the requirement could be interpreted to require compliance with this item in the original filing and all subsequent amendments.¹¹¹⁴

One commenter made a number of suggestions with respect to the disclosure of projections in IPOs of all types, including in de-SPAC transactions.¹¹¹⁵ First, the commenter recommended requiring disclosure of management’s assessment of the probability of achieving any forecasts provided and the major assumptions underlying all forecasts provided.¹¹¹⁶ Second, the commenter suggested that when financial projections are disclosed, to qualify for the PSLRA safe harbor, the directors, management and other affiliates must agree to a lock-up on sales of shares until the combined company has released audited financial statements for its first full fiscal year following the transaction.¹¹¹⁷ Third, the commenter suggested requiring

disclosure of the track record of the company, the sponsor, or the chief executive officer or chief financial officer for meeting past projections disclosed.¹¹¹⁸

3. Final Rules

We are adopting the amendment of Item 10(b) as proposed and new Item 1609 substantially as proposed, except for clarifying revisions that we discuss below.

With respect to the final amendment to Item 10(b), we note that the rule is Commission guidance that already applies to all filings made with the Commission and this aspect of Item 10(b) precedes the revisions to the rule adopted in this release.¹¹¹⁹ We also note that Item 1609 applies only to de-SPAC transactions.

In response to one commenter’s opposition to an obligation to present certain specific line items in all projections,¹¹²⁰ we note that the Commission guidance in Item 10(b) does not mandate the inclusion of any specific line item. Instead, the final amendment to Item 10(b) acknowledges that projections have traditionally included certain line items, but registrants are free to determine which line items are appropriate to include in projections.

With respect to the recommendation to revise the rule to allow a company with no history of operations to obtain an outside review of projections,¹¹²¹ we note that neither Item 10(b) nor Item 1609 prevents companies from obtaining any such outside review.

With respect to the suggestion from a commenter that non-GAAP financial metrics should be highlighted for investor review,¹¹²² we believe the provisions of Item 10(e) already address this concern. With respect to the same commenter’s suggestion that we require a statement from the registrant when a target company has no history of operations or a negotiated acquisition that the projections disclosed do not have a reasonable basis, we believe the provisions of Items 10(b) and 1609 and other rules adopted in this release will

¹¹¹⁸ *Id.*

¹¹¹⁹ Some commenters indicated that the updated guidance in Item 10(b) should apply to all filings. See *supra* note 1088 and accompanying text.

¹¹²⁰ Letter from Michael Dambra, Omri Even-Tov, and Kimberly George. See *supra* notes 1089–1090 and accompanying text.

¹¹²¹ Letter from ICGN. See *supra* note 1091 and accompanying text.

¹¹²² Letter from NASAA. See *supra* note 1092 and accompanying text.

¹¹⁰² Letters from ABA, Goodwin.

¹¹⁰³ Letters from ABA, Goodwin.

¹¹⁰⁴ Letters from ABA, Goodwin.

¹¹⁰⁵ Letter from Loeb & Loeb.

¹¹⁰⁶ Letters from ABA, Freshfields, Goodwin, Kirkland & Ellis.

¹¹⁰⁷ Letters from ABA, Goodwin, Kirkland & Ellis.

¹¹⁰⁸ Letters from ABA, Goodwin.

¹¹⁰⁹ *Id.*

¹¹¹⁰ *Id.*

¹¹¹¹ *Id.*

¹¹¹² Letter from Freshfields.

¹¹¹³ *Id.*

¹¹¹⁴ Letters from Freshfields, Kirkland & Ellis.

¹¹¹⁵ Letter from Bullet Point Network.

¹¹¹⁶ *Id.*

¹¹¹⁷ *Id.*

provide sufficient information about the basis for any disclosed projections.¹¹²³

With respect to commenters' request for clarification that certain staff guidance will continue to apply notwithstanding adoption of proposed Item 10(b)(2)(iv),¹¹²⁴ we confirm that the final rules do not impact the staff's guidance in Questions 101.01, 101.02 and 101.03 of the Compliance and Disclosure Interpretations related to Non-GAAP Financial Measures.

With respect to commenters' responses to our request for comment that we should not require projections to be presented in a separately captioned section of a filing,¹¹²⁵ we note that we have not added such a requirement to the presentation of projections.

In the final rules, we made three technical revisions to Item 10(b). First, in final Item 10(b)(2)(i), we replaced the term "foregoing measures of income" with the term "foregoing measures of income (loss)." Second, in final Item 10(b)(2)(iii), we replaced the term "historical financial measure" with the term "historical financial results." We believe these changes will enhance clarity and avoid potential ambiguity. Third, we made revisions in final Item 10(b)(2)(iv) to require a description of the GAAP financial measure "most directly comparable" to the non-GAAP measure, rather than "most closely related" (as proposed). We made this change in final Item 10(b)(2)(iv) to create consistency with the terms used in existing Item 10(e)(1)(i)(A) of Regulation S-K, which requires the inclusion of the directly comparable financial measure or measures calculated and presented in accordance with GAAP whenever one or more non-GAAP financial measures are included in a filing with the Commission.

With respect to commenters' views that Item 1609 should apply to all companies that publicly disclose financial projections in Commission filings,¹¹²⁶ we decline to expand the coverage of Item 1609 beyond SPACs since the specialized disclosure requirements in new subpart 1600 of Regulation S-K are intended to only apply to SPAC IPOs and de-SPAC transactions. Item 10(b), as updated in this release, will continue to provide helpful guidance for all companies that

publicly disclose projections in Commission filings.

With respect to commenters who expressed concern there could be an uncertain impact on the use of projections under Item 1609,¹¹²⁷ we note that final Item 1609 does not restrict the registrant's ability to disclose projections and is not intended to alter the registrant's determination as to whether or not projections should be disclosed under other Federal or State law requirements. Rather, if a registrant determines to include projections in a filing in connection with a de-SPAC transaction, Item 1609 creates a level of consistency for the presentation of projections that would make the information more useful to investors.

With respect to the recommendation that Item 1609(b) include a requirement to disclose sensitivity testing of the key assumptions underlying the projections,¹¹²⁸ we believe that such a requirement would be inconsistent with the general approach of Item 1609, which does not prescribe a specific format for the projections and does not require specific line items to be included in the projections.

With respect to the comment that the requirement in Item 1609(b) to discuss material growth rates or discount multiples used in preparing the projections is unduly prescriptive and may result in the over-inclusion of certain immaterial information,¹¹²⁹ we note that this requirement includes a materiality qualifier, which makes clear that Item 1609(b) is not intended to capture immaterial information and does not require disclosure of growth rates or discount rates that are not material.

In final Item 1609(b), we have added a materiality qualifier to the requirement to disclose any factors that may impact the material assumptions underlying the projections to clarify that only material factors are required to be disclosed. In final Item 1609(b), we have also made two technical revisions to the proposal in order to improve the clarity of this item and avoid potential ambiguity.¹¹³⁰ First, we have replaced the proposed terms "material growth rates" with the terms "material growth or reduction rates" throughout final Item 1609(b), because projections may involve some line items in financial

statements that are projected to increase and others that are projected to decrease. Second, we have replaced the proposed term "discount multiples" with the term "discount rates" throughout final Item 1609(b) to reflect more closely the terminology for the relevant concept that is frequently used by valuation professionals.¹¹³¹

With respect to the proposed requirement in Item 1609(c)—to include a statement regarding whether or not projections disclosed in a filing reflect the current views of the SPAC or target company management or board of directors as of the date of filing—commenters expressed concerns that the requirement would be unduly burdensome, may involve an expensive and time-consuming effort to update the projections,¹¹³² and would be inconsistent with the purpose of the preparation of the projections and current market practice.¹¹³³ We acknowledge that if the SPAC or the target company determines to affirm that the projections disclosed in a filing reflect the current views of the SPAC or target company management or board of directors, the SPAC or the target company, as applicable, would likely undertake additional analysis with respect to the projections, whether to provide updated projections or otherwise. If the SPAC or the target company determines to state that the disclosed projections do not reflect the current views of the SPAC or target company management or board of directors, we believe the additional burden created by final Item 1609(c) is likely to be considerably less because the level of analysis undertaken, if any, will be minimal as compared to the analysis undertaken to affirm that the disclosed projections reflect the current views of the SPAC or target company management or board of directors. For example, if the target company chooses not to affirm that its projections reflect the current view of management due to a significant lapse of time, we do not believe target company management will update the projections or rerun its analysis in order to make that choice. We believe the required disclosure reflects an appropriate balance between the benefits to investors of this

¹¹²³ See, e.g., Item 1605, Item 1606(b), and Item 1607.

¹¹²⁴ Letters from ABA, Goodwin. See *supra* note 1095 and accompanying text.

¹¹²⁵ Letter from Kirkland & Ellis. See *supra* note 1097 and accompanying text.

¹¹²⁶ Letters from ABA, Goodwin, Vinson & Elkins. See *supra* note 1100 and accompanying text.

¹¹²⁷ Letters from ABA, Goodwin. See *supra* notes 1103–1104 and accompanying text.

¹¹²⁸ Letter from Chris Barnard. See *supra* note 1101 and accompanying text.

¹¹²⁹ Letters from ABA, Goodwin. See *supra* note 1104 and accompanying text.

¹¹³⁰ In addition, in final Item 1609(b) we replaced the proposed term "impact" with the term "affect" for clarity.

¹¹³¹ Two examples of "discount rates" are: (1) the weighted average cost of capital used to discount to present value the future cash flows over the period of years projected in a discounted cash flow analysis and (2) the rate applied to the terminal value in a discounted cash flow analysis to calculate its present value.

¹¹³² Letters from ABA, Goodwin, Kirkland & Ellis. See *supra* note 1107 and accompanying text.

¹¹³³ Letters from ABA, Goodwin, Freshfields, Kirkland & Ellis. See *supra* notes 1106–1107 and 1112–1113 and accompanying text.

disclosure and the costs of compliance with the rule requirements. The required disclosure should help investors better assess the continued reliability of the projections through the current views of the SPAC or target company management or board of directors. We also note that Item 1609(c) does not impose a duty to update the disclosed projections. Item 1609(c) only requires a statement as to whether or not the disclosed projections reflect the view of the SPAC or target company management or board of directors about its future performance as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to shareholders. We revised Item 1609(c) to replace the proposed terms “state whether the projections” and “disclose whether the target company” with the terms “state whether or not the projections” and “disclose whether or not the target company”, respectively, for purposes of clarity.

In response to commenters who said that the proposed terms “as of the date of the filing” were unclear and could be interpreted to require compliance with this item in the original filing and all subsequent amendments,¹¹³⁴ we are making one change to final Item 1609(c) to improve the clarity of this item and avoid potential ambiguity. We replaced the proposed term “as of the date of the filing” with the term “as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to security holders” throughout final Item 1609(c). This change is intended to clarify that the statement required by Item 1609(c) on whether or not the projections reflect the view of management or the board of directors (or similar governing body) about future performance must be made as of a recent date prior to, and as close as is feasible to, the date of the disclosure document disseminated to security holders.¹¹³⁵ Thus, the Item 1609(c) statement is not required to be

made as of the filing date of the initial or preliminary filing and as of each amendment thereto.

For several reasons we discuss below, we are not adopting the alternative approach suggested by two commenters that involved several elements, including: (1) that disclosure should be required that provides the date the projections were prepared and the views of the preparer of the projections as of the date of preparation, (2) that, with certain exceptions, registrants should be permitted to disclaim any duty to update the projections, and (3) that the Commission may seek disclosure confirming whether the projections still reflect management’s views on future performance.¹¹³⁶ First, there is nothing in final Item 1609 that prevents the disclosure of the date of the projections or the projection preparer’s views. Depending on the facts and circumstances, this information could be material to investors. In addition, we note that, where an outside party is the preparer of a report, opinion, or appraisal that materially relates to any of certain criteria set out in final Item 1607(a), final Item 1607(b)(6) requires a summary of such report, opinion, or appraisal that includes, among other things, a summary of findings and recommendations. Second, as we discuss immediately above, Item 1609(c) does not impose a duty to update the projections disclosed in a filing. Also, as we discuss above in section III.E.3, to the extent a SPAC is concerned that security holders may rely on the projections disclosed in a filing in instances where the SPAC believes security holders should not rely on them, a SPAC could provide supplemental disclosure advising and alerting security holders of this fact, including by noting factors such as the date of the projections (and discussing any staleness issues) and the independence from the SPAC of the third-party that conducted the analysis.¹¹³⁷ Third, we do not agree with the suggestion that having the Commission seek disclosure confirming the ongoing reliability of the projections included in the filing would better ensure that investors have information about the ongoing reliability of those projections than a disclosure rule. On the contrary, registrants will be in a better position to know about the ongoing reliability of projections

concerning the SPAC or the target company and to make the related disclosures under final Item 1609 than the Commission, which would need to determine when it may be necessary to request the confirmatory disclosure depending on the particular facts and circumstances of the SPAC or the target company.

For several reasons we discuss below, we are also not adopting the following suggestions of one commenter with respect to the disclosure of projections in IPOs of all types, including in de-SPAC transactions: (1) requiring disclosure of management’s assessment of the probability of achieving any forecasts provided, (2) requiring as a condition to qualify for the PSLRA safe harbor when projections are disclosed that directors, management and other affiliates must agree to a lock-up on sales of shares until the company has released audited financial statements for its first full fiscal year following the transaction, and (3) requiring disclosure of the track record of the company, the sponsor, or the chief executive officer or chief financial officer for meeting past projections disclosed.¹¹³⁸ First, we believe that management’s assessment of the probability of achieving any forecasts provided would require a high degree of subjectivity and such disclosure would likely not be useful to investors without significant additional disclosure regarding the assessment, including the bases and assumptions that underlie the assessment, which disclosure could be distracting or confusing to investors. We also believe that such disclosure may cause investors to place undue reliance on the probability or projections disclosed. Second, we believe requiring a long-term lock-up as a condition to qualify for the PSLRA safe harbor has potential far-reaching implications for the parties involved and the market that are uncertain. Third, we believe the track records for meeting projections disclosed in prior transactions would not necessarily be relevant to an investor’s evaluation of the projections disclosed with respect to the de-SPAC transaction that is the subject of the filing and may not be useful without significant additional disclosure regarding the facts and circumstances of the prior transactions. Such additional disclosure, if added, could become distracting or confusing for investors trying to evaluate the projections disclosed with respect to the subject de-SPAC transaction.

We are amending General Instruction B to Form 8-K to require the

¹¹³⁴ Letters from Freshfields, Kirkland & Ellis. See *supra* note 1114 and accompanying text.

¹¹³⁵ For example, a statement made in response to Item 1609(c) as of the date of the final Form S-4 amendment prior to the registrant’s request for acceleration of effectiveness could be considered to be made as of the “most recent practicable date prior to the date of the disclosure document required to be disseminated to security holders” if the date of the final prospectus disseminated to shareholders is within five days following effectiveness of the subject registration statement on Form S-4. If additional disclosure is included in the Form S-4 amendment to support the statement required by Item 1609(c), the Commission staff will need adequate time to review the new disclosure before the registrant’s request for acceleration of effectiveness of the Form S-4 is submitted as is the case currently when new disclosure is included in a Form S-4 amendment.

¹¹³⁶ Letters from ABA, Goodwin. See *supra* notes 1108–1111 and accompanying text.

¹¹³⁷ Section III.E.3 discusses final definitions of “blank check company” and related availability of PSLRA safe harbors in connection with comments received providing comparative analysis of de-SPAC transactions to other types of transactions.

¹¹³⁸ Letter from Bullet Point Network.

information set forth in paragraphs (a) and (b) of Item 1609 in any Form 8-K report or exhibit to such report that relates to a de-SPAC transaction and includes projections that relate to the performance of the SPAC or the target company. One commenter indicated that the market response to a de-SPAC transaction and the disclosed financial projections occurs at the time of the merger announcement, and “[s]ome of the proposals regarding Item 10(b) of Regulation S-K and Item 1609 as discussed above should also extend to the investor presentations disclosed as an attachment to the Form 8-K.”¹¹³⁹ The issue noted by this comment raises significant investor protection concerns, and we are amending the General Instructions to Form 8-K and revising proposed Item 1609(a) in response. Based on the Commission staff’s experience, Form 8-K filings in connection with the announcement of a de-SPAC transaction may contain projections in the exhibits to the Form 8-K filings, including in investor presentation materials featuring projections that also have been provided by the SPAC to PIPE investors. These projections may begin to shape investors’ decisions concerning the de-SPAC transaction even before a registration or proxy statement in connection with the de-SPAC transaction is filed. We believe investors would benefit from the background and context provided by the application of new Item 1609 to those projections.

Finally, we revised Item 1609(c) to replace the proposed term “board” with the terms “board of directors (or similar governing body)” for purposes of clarity and consistency with other final rules.

VI. The Status of Spacs Under the Investment Company Act

A. Background

The Commission proposed Rule 3a-10 under the Investment Company Act, which would have provided a safe harbor from the definition of investment company under section 3(a)(1)(A) of the Investment Company Act¹¹⁴⁰ for certain SPACs.¹¹⁴¹ As discussed in the Proposing Release, in recent years, the

number of SPACs has grown dramatically,¹¹⁴² and some SPACs and their sponsors have sought to operate SPACs in ways that suggest that SPACs and their sponsors should increase their focus on evaluating when a SPAC could be an investment company. Such developments sparked debate about the status of SPACs as investment companies under the Investment Company Act.¹¹⁴³ For the reasons discussed below, we are not adopting the proposed safe harbor.

Instead, we are setting forth below our views on facts and circumstances that are relevant to whether a SPAC meets the definition of investment company under the Investment Company Act.¹¹⁴⁴ Like any other issuer, depending on the facts and circumstances, a SPAC may meet the definition of investment company under section 3(a)(1)(A) or 3(a)(1)(C)¹¹⁴⁵ or both. The views below are intended to assist SPACs in analyzing their status under these sections, particularly with regard to how SPACs may apply the five-factor test that is traditionally used to determine whether an issuer is an investment company under section 3(a)(1)(A) (known as the *Tonopah* factors).¹¹⁴⁶

¹¹⁴² See, e.g., *supra* note 25 and accompanying text; see also Proposing Release, *supra* note 7, at nn.7–8 and accompanying text.

¹¹⁴³ See Kristi Marvin, 49 Law Firms Unite and Push Back on Recent SPAC Litigation, SPAC Insider (Aug. 27, 2021), available at <https://www.spacinsider.com/news/spacinsider/49-law-firms-unite-push-back-on-spac-litigation>; Alison Frankel, Law Profs Defend Theory that SPAC is Illegal under the Investment Company Act, Reuters (Nov. 1, 2021).

¹¹⁴⁴ This guidance is intended to address the status of a SPAC from the time of the SPAC’s initial offering until it completes its de-SPAC transaction. The remaining company (or companies) after the de-SPAC transaction may also raise separate questions of Investment Company Act status.

¹¹⁴⁵ Section 3(a)(1)(C) defines an investment company as any issuer that is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and that owns or proposes to acquire investment securities having a value exceeding 40% of the value of the company’s total assets (exclusive of Government securities and cash items) on an unconsolidated basis. Section 3(a)(2) of the Investment Company Act generally defines “investment securities” to include all securities except Government securities, securities issued by employees’ securities companies, and securities issued by majority-owned subsidiaries of the owner which are not investment companies or certain private investment companies. If a SPAC owns or proposes to acquire 40% or more of its total assets in investment securities, it would likely need to register under the Investment Company Act unless an exclusion from the definition applies.

¹¹⁴⁶ To assess an issuer’s primary engagement under section 3(a)(1)(A), and in other contexts under the Investment Company Act, we historically have looked at (1) the company’s historical development; (2) its public representations of policy; (3) the activities of its officers and directors; (4) the nature of its present assets; and (5) the sources of its present income (known as the

The Commission received comments that represented a range of views and positions on proposed Rule 3a-10. While some commenters expressed the view that SPACs are not investment companies,¹¹⁴⁷ others stated that SPACs are unregistered investment companies.¹¹⁴⁸ Similarly, while some commenters disagreed with the Commission’s concern that investors might view SPACs as fund-like investments,¹¹⁴⁹ other commenters asserted that SPAC shareholders often treat SPACs like investment companies¹¹⁵⁰ and should be regulated under the Investment Company Act accordingly.¹¹⁵¹

Commenters also held varying views about the need for a Commission safe harbor. Some commenters believed that a safe harbor would provide clarity.¹¹⁵²

“*Tonopah* factors”). See *In the Matter of Tonopah Mining Co.*, 26 SEC. 426 (July 21, 1947). The Commission has also considered the activities of the company’s employees, in addition to company’s officers and directors, in determining a company’s primary business. See, e.g., 17 CFR 270.3a–8 (Rule 3a–8 under the Investment Company Act); *Snowflake Inc.*, Release No. IC-34049 (Oct. 9, 2020) [85 FR 65449 (Oct. 15, 2020)] (notice), Release No. IC-34085 (Nov. 4, 2020) (order); *Lyft Inc.*, Release No. IC-33399 (Mar. 14, 2019) [84 FR 10156 (Mar. 19, 2019)] (notice), Release No. IC-33442 (Apr. 8, 2019) (order).

¹¹⁴⁷ See, e.g., letters from ABA, Davis Polk, Goodwin.

¹¹⁴⁸ See, e.g., letters from Consumer Federation; Robert J. Jackson, Jr. and Professor John Morley (June 13, 2022) (“Robert Jackson and John Morley”).

¹¹⁴⁹ See, e.g., letters from Goodwin, Skadden, Vinson & Elkins, White & Case.

¹¹⁵⁰ Letters from Consumer Federation (“From the time that a SPAC goes public until the time a business combination with a private company is completed, a SPAC functions like a mutual fund, investing in Treasuries, money market funds, or other cash-like securities, while providing initial investors a fixed income–equivalent return. . . . ‘Nearly all’ SPAC IPO investors treat SPACs like mutual funds.”), Robert Jackson and John Morley (“SPAC investors clearly understand SPACs to be substitutes for mutual funds and other types of investment companies” and noting that “[i]n the median SPAC, nearly three quarters of investors choose to redeem rather than hold their shares through the completion of the SPAC’s acquisition. When they redeem, they avoid any exposure to the SPAC’s future operations, taking only the return on the SPAC’s securities portfolio.”) (Emphasis in original). See also Alex Wittenberg and Jack Pitcher, *Saba Capital’s Boaz Weinstein Recommends SPACs, CDS as Fed Tightens*, Bloomberg (January 28, 2022), available at <https://www.bloomberg.com/news/articles/2022-01-28/saba-s-weinstein-recommends-spacs-cds-as-fed-tightens#xj4y7vzkg> (SPACs are misunderstood because they’re “fixed-income products” quoting Weinstein).

¹¹⁵¹ Letters from Consumer Federation; Robert Jackson and John Morley.

¹¹⁵² Letters from Skadden (stating that a safe harbor would facilitate the ability to raise capital “without the specter of strike lawsuits” but that some conditions included in the proposed safe harbor were “unnecessarily restrictive”), Robert Jackson and John Morley (arguing that a safe harbor is “necessary to eliminate any doubt that the [Investment Company Act] applies to SPACs” and, among other things, that we should shorten the

¹¹³⁹ Letter from Michael Dambra, Omri Even-Tov, and Kimberlyn George. See *supra* notes 1089–1090 and accompanying text.

¹¹⁴⁰ 15 U.S.C. 80a–3(a)(1)(A). Section 3(a)(1)(A) defines an “investment company” as any issuer that is or holds itself out as being engaged primarily, or proposes to be engaged primarily, in the business of investing, reinvesting, or trading in securities. See *infra* note 1146.

¹¹⁴¹ For purposes of this section, the terms “SPAC,” “De-SPAC transaction,” and “target company” have the same meaning as set forth in Item 1601 of Regulation S-K. See *supra* section II.A (Definitions).

Other commenters, including some that believed SPACs are not investment companies, believed the proposed safe harbor was unnecessary.¹¹⁵³ In contrast, some commenters suggested that the proposed safe harbor was unnecessary because SPACs are investment companies that should be subject to the Investment Company Act.¹¹⁵⁴ Finally, one commenter stated that it welcomed the Commission's efforts to provide clarity but suggested that instead of adopting a safe harbor, the Commission should issue interpretive guidance on the activities that SPACs could undertake that would cause a SPAC to become an investment company.¹¹⁵⁵

Commenters also expressed differing opinions about the proposed safe harbor's duration limits. Some commenters stated that the duration limits were unnecessary and potentially harmful to SPACs and their investors.¹¹⁵⁶ Some of these commenters suggested that if duration limits are to be included in the safe harbor, the duration limits should be lengthened to require SPACs to complete the de-SPAC transaction within 36 months (with no interim target agreement duration limit) to match national securities exchanges' current listing standards.¹¹⁵⁷ In contrast, other commenters argued that the proposed duration limits were too long, and suggested that the Commission should require a SPAC to announce a de-SPAC transaction within 12 months and complete the transaction within 18 months.¹¹⁵⁸ In their view, any additional leeway would provide SPACs with special treatment not afforded to "transient investment companies" as permitted under 17 CFR 270.3a-2 ("Rule 3a-2" under the Investment

permitted acquisition periods under the safe harbor). See also letter from Vinson & Elkins ("We are supportive of a safe harbor, but believe proposed Rule 3a-10 should be revised substantially.").

¹¹⁵³ See, e.g., letters from ABA ("there is no apparent need or basis for this safe harbor"), Loeb & Loeb ("we are not inclined to consider the 'safe harbor' . . . as either safe or necessary"). See also letter from Ropes & Gray.

¹¹⁵⁴ Letter from Consumer Federation ("The proposed safe harbor allows SPACs to function as investment companies without having to comply with the investor protections afforded by the Investment Company Act"). See also letter from Lucas Schwartz ("no safe harbor should be carved out to create yet another privileged investment instrument").

¹¹⁵⁵ Letter from Davis Polk.

¹¹⁵⁶ See, e.g., letters from NYC Bar, Ropes & Gray. See also recommendation of the Small Business Capital Formation Advisory Committee, *supra* note 40.

¹¹⁵⁷ See, e.g., letters from ABA, Kirkland & Ellis, Managed Funds Association.

¹¹⁵⁸ See, e.g., letters from Consumer Federation; Robert Jackson and John Morley.

Company Act), and thus would not be consistent with the Commission's approach in that rule.¹¹⁵⁹ One of these commenters also argued that shorter duration limits would benefit investors by reducing the number of "low quality de-SPAC transactions to which investors are exposed."¹¹⁶⁰

As discussed above, depending upon the facts and circumstances, a SPAC may meet the definition of "investment company" in section 3(a)(1) of the Investment Company Act.¹¹⁶¹ Given the fact-based, individualized nature of this determination and because, depending on the facts and circumstances, a SPAC could be an investment company at any stage of its operation such that a specific duration limitation may not be appropriate, we have decided not to adopt proposed Rule 3a-10. Rather, whether a SPAC is an investment company under section 3(a)(1) is based on the particular facts and circumstances, which a SPAC should evaluate both at its inception and throughout its existence. No one specific duration period is the sole determinant of a SPAC's status under the Investment Company Act. The duration of a SPAC, however, should be considered in its analysis of the long-standing factors that are considered in the determination of an issuer's status as an investment company under section 3(a)(1)(A) of the Act, including, for example, a SPAC's historical development and the activities of its officers, directors and employees.¹¹⁶²

B. SPAC Activities

Typically, a SPAC is organized for the purpose of merging with or acquiring one or more operating companies.¹¹⁶³ The SPAC thereby provides its shareholders with the opportunity to own interests in a public entity that, in contrast to an investment company, will, as a result of the de-SPAC transaction, either be an operating company, or will, through a primarily controlled company, operate such operating company. Nevertheless, a

¹¹⁵⁹ See, e.g., letters from Better Markets; Consumer Federation; Robert Jackson and John Morley.

¹¹⁶⁰ Letter from Robert Jackson and John Morley.

¹¹⁶¹ In addition, SPACs may also need to be mindful that section 48(a) of the Investment Company Act generally makes it unlawful for any person to do indirectly through another person or entity what would be unlawful for the person to do directly.

¹¹⁶² See *supra* note 1146 (discussion of factors considered in determining an issuer's status as an investment company under section 3(a)(1)(A)). As discussed below, a SPAC's activities may become more difficult to distinguish from an investment company the longer the SPAC takes to achieve its business purpose.

¹¹⁶³ See *supra* note 5 and accompanying text.

SPAC might engage in certain activities that would raise serious questions about whether it is an investment company under the Investment Company Act, including activities that would affect a SPAC's analysis under the *Tonopah* factors. By way of illustration, some activities of a SPAC that would raise concerns about its status as an investment company under the Investment Company Act include:

1. The Nature of SPAC Assets and Income

A SPAC may hold, or propose to hold, assets¹¹⁶⁴ that would weigh heavily in favor of it being an investment company.¹¹⁶⁵ For example, if a SPAC were to invest in corporate bonds, or not engage in a de-SPAC transaction but instead acquire a minority interest in a company with the intention of being a passive investor, such activities would affect the analysis of the SPAC's status under section 3(a)(1)(C). In this regard, a SPAC that owns or proposes to acquire 40% or more of its total assets in investment securities would likely need to register under the Investment Company Act unless an exclusion from the definition applies. Such activities would also weigh in favor of a SPAC being considered to be primarily engaged in the business of investing, reinvesting, and trading in securities under section 3(a)(1)(A).¹¹⁶⁶ In addition, a SPAC whose income is substantially derived from such assets would further suggest that the SPAC is an investment company under section 3(a)(1)(A).¹¹⁶⁷

A SPAC that holds only the sort of securities typically held by SPACs today, such as U.S. Government securities, money market funds¹¹⁶⁸ and cash items prior to the completion of the de-SPAC transaction, and that does not

¹¹⁶⁴ Any references to the SPAC's assets refer to both the assets held in a trust or escrow account and any assets held by the SPAC directly.

¹¹⁶⁵ A SPAC that does not hold any securities would generally not implicate the Investment Company Act, unless it proposes to engage in the business of being an investment company as defined in section 3(a)(1) of the Investment Company Act. See Proposing Release, *supra* note 7, at n. 550.

¹¹⁶⁶ As stated in the Proposing Release, a SPAC that purchases multiple companies as part of a single transaction would not be engaging in the types of activities that raise investor protection concerns addressed by the Investment Company Act as it would still be seeking to be primarily engaged in the business of an operating company or companies after the de-SPAC transaction and not be engaged in investment management activities. Proposing Release, *supra* note 7, at 29500.

¹¹⁶⁷ See *supra* note 1146.

¹¹⁶⁸ The term "money market fund" refers to those money market funds registered under the Investment Company Act and regulated pursuant to 17 CFR 270.2a-7 (Rule 2a-7 under the Investment Company Act).

propose to acquire investment securities, would be more likely not to be considered an investment company under section 3(a)(1)(C). While U.S. Government securities and money market funds are securities for purposes of section 3(a)(1)(A), asset composition is only one of the factors that should be considered in analyzing a SPAC's status under the Investment Company Act. For example, an issuer that holds these assets, but whose primary business is to achieve investment returns on such assets would still be an investment company under section 3(a)(1)(A).

2. Management Activities

Another significant factor in the analysis of whether a SPAC is an investment company under section 3(a)(1)(A) is the actions of its officers, directors, and employees.¹¹⁶⁹ For example, we would have serious concerns if a SPAC held its investors' money in securities, but the SPAC's officers, directors, and employees did not actively seek a de-SPAC transaction or spent a considerable amount of their time¹¹⁷⁰ actively managing the SPAC's portfolio for the primary purpose of achieving investment returns. Such activities would affect the analysis as to whether the SPAC was primarily engaged in seeking to complete a de-SPAC transaction and weigh more in favor of the SPAC being primarily engaged in the business of investing, reinvesting, or trading in securities such that it would be an investment company under the Investment Company Act.

Depending on the facts and circumstances, the management of a SPAC also could cause SPAC sponsors to come within the definition of "investment adviser" in section 202(a)(11) of the Investment Advisers Act of 1940.¹¹⁷¹ That section generally defines an investment adviser as any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or any person who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. The definition generally includes three elements for

determining whether a person is an investment adviser: (i) the person provides advice, or issues analyses or reports, concerning securities; (ii) the person is in the business of providing such services; and (iii) the person provides such services for compensation. Each element must be met in order for a person to be deemed an investment adviser.¹¹⁷²

3. Duration

When evaluating whether it is an investment company under section 3(a)(1)(A), a SPAC whose assets and income are substantially composed of, and derived from, securities should be mindful of the length of time that it has been operating prior to entering into an agreement with a target company and then completing the de-SPAC transaction with that company.¹¹⁷³ While the duration of a SPAC is not the sole determinant of its status under the Investment Company Act, a SPAC's activities may become more difficult to distinguish from those of an investment company the longer the SPAC takes to achieve its stated business purpose.¹¹⁷⁴ For example, when a SPAC operates without completing a de-SPAC transaction with a target company, particularly where its assets are substantially composed of and its income derived from securities, its duration may indicate that its historical development is that of an investment company even if its representations say otherwise. Similarly, the longer that a SPAC takes to achieve its stated business purpose, the more questions arise as to whether its officers, directors, and employees are more engaged in achieving investment returns from the securities the SPAC holds rather than in achieving the SPAC's stated business purpose. Accordingly, after a certain period of time, a SPAC's historical development and director, officer, and employee activities, together with its asset composition and sources of income may suggest that the SPAC is primarily engaged in the business of investing, reinvesting, and trading in securities.

In evaluating whether a SPAC has reached such a point in time, a SPAC should consider how its duration falls within the framework of the Investment Company Act, the rules thereunder, and past Commission positions, including Rule 3a-2 under the Investment Company Act and the Commission's position regarding Rule 419 under the Securities Act.¹¹⁷⁵ Rule 3a-2 provides a one-year safe harbor to so-called "transient investment companies" which are issuers that, as a result of an unusual business occurrence may be considered an investment company under the statutory definitions but intend to be engaged in a non-investment company business. In addition, the Commission took the position that accounts of certain blank check companies relying on Rule 419 need not be required to be regulated under the Investment Company Act in part because, among other things, the rule limits the duration of such accounts to 18 months and restricts the nature of investments.¹¹⁷⁶ A SPAC that operates beyond these timelines raises concerns that the SPAC may be an investment company, and these concerns increase as the departure from these timelines lengthens. Thus, a SPAC needs to be cognizant that, depending on the facts and circumstances, it could be viewed as a fund-like investment if it operates beyond the duration limits contemplated in other similar contexts. Accordingly, we believe that a SPAC should reassess its status and analyze whether it has become an investment company if it has, for example, failed to enter into an agreement with a target company beyond such timelines.¹¹⁷⁷

¹¹⁷⁵ See Investment Company Act Rule 3a-2 and Securities Act Rule 419. We note that while exchange listing rules contemplate potentially longer SPAC lifespans, those rules were adopted for a different regulatory purpose and do not address investment company status concerns.

¹¹⁷⁶ Specifically in adopting Rule 419, the Commission stated that "although [an escrow or trust account established by blank check companies that comply with Rule 419 under the Securities Act] may be an investment company under the Investment Company Act of 1940, in light of the purposes served by the regulatory requirement to establish such an account, the limited nature of the investments, and the limited duration of the account [i.e., 18 months], such an account will neither be required to register as an investment company nor regulated as an investment company as long as it meets the requirements of Rule 419." *Blank Check Offerings*, *supra* note 3, at text accompanying n.32; see also 17 CFR 230.419(e)(2)(iv) ("If a consummated acquisition(s) meeting the requirements [of Rule 419] has not occurred by a date 18 months after the effective date of the initial registration statement, funds held in the escrow or trust account shall be returned [to investors.]"). As noted in the Proposing Release, SPACs are not subject to the requirements of Rule 419. See Proposing Release, *supra* note 7, at nn.12-13 and accompanying text.

¹¹⁷⁷ See Rules 3a-2 and 419.

¹¹⁶⁹ See *supra* note 1146.

¹¹⁷⁰ See *In the Matter of Tonopah Mining Co.*, *supra* note 1146; *Daxor Corp.*, Initial Dec. Rel. 428 (Aug. 31, 2011) ("The Commission next considers how and where the issuer's employees spend their time and effort. Where employees spend considerable time managing the investment securities, there is greater likelihood that the issuer is primarily engaged in the investment business." (Citation omitted)).

¹¹⁷¹ 15 U.S.C. 80b-2(a)(11).

¹¹⁷² See *Request for Comment on Certain Information Providers Acting as Investment Advisers*, Release No. IA-6050 (June 15, 2022) [87 FR 37254 (June 22, 2022)].

¹¹⁷³ See *supra* note 1146 (discussion of *Tonopah* factors). As discussed previously, given the other factors in the analysis, however, we note that a SPAC could be an investment company at any stage of its operation.

¹¹⁷⁴ See Proposing Release, *supra* note 7, at 29501; cf. Goodwin ("We acknowledge that after some period of time without [c]losing [a de-SPAC transaction], a SPAC will appear not to be focused on consummating a De-SPAC transaction.").

When considering its status under the Investment Company Act, a SPAC should consider all relevant facts and circumstances, including, among other things the length of time that it has been operating prior to entering into an agreement with a target company and then completing the de-SPAC transaction with that company.

4. Holding Out

A SPAC that holds itself out in a manner that suggests that investors should invest in its securities primarily to gain exposure to its portfolio of securities prior to the de-SPAC transaction would likely be an investment company under the definition in section 3(a)(1)(A). For example, if a SPAC were to market itself primarily as a fixed-income investment, as an alternative to an investment in a mutual fund, or as an opportunity to invest in Treasury securities or money market funds, it would likely be holding itself out as being primarily engaged in the business of investing, reinvesting, or trading in securities. Accordingly, such a SPAC would likely be an investment company under section 3(a)(1)(A).

5. Merging With an Investment Company

If a SPAC were to engage or propose to engage in a de-SPAC transaction with a target company that meets the definition of investment company, such as a closed-end fund or a business development company, the SPAC is likely to be an investment company under section 3(a)(1)(A) of the Investment Company Act because it would be proposing to be engaged in the business of investing, reinvesting and trading in securities as set out in section 3(a) of that Act. A SPAC that seeks to engage in a de-SPAC transaction with an investment company would, at some point prior to the de-SPAC transaction, be proposing to engage in the business of being an investment company.

C. Conclusion

Depending upon the facts and circumstances, a SPAC may meet the definition of investment company in section 3(a)(1)(A) or 3(a)(1)(C) (or both) of the Investment Company Act. To the extent that a SPAC's activities—including any of those discussed above—may cause it to fall within one or more of these definitions, a SPAC should consider options that would bring it into compliance such as changing its operations, winding down its operations, or registering as an investment company under the Investment Company Act. The Investment Company Act imposes

registration, reporting, governance and minimum capital requirements on investment companies. Issuers that meet the definition of investment company but fail to comply with the Investment Company Act's provisions, or otherwise qualify for an exclusion or exemption from the provisions of the Act, could, among other things, be subject to enforcement action by the Commission or to private litigation.

VII. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated this rule as a "major rule," as defined by 5 U.S.C. 804(2).

VIII. Economic Analysis

We are mindful of the costs and benefits of these new rules and amendments. The discussion below addresses the potential economic effects of the new rules and amendments, including the likely benefits and costs, as well as the potential effects on efficiency, competition, and capital formation.¹¹⁷⁸ We have analyzed the expected economic effects of the new rules and amendments relative to the current baseline, which consists of the existing regulatory framework of disclosure requirements and liability provisions, current market practices, and the distribution of participants and their characteristics.

A SPAC is a shell company organized for the purpose of combining with one or more target companies.¹¹⁷⁹ Like

¹¹⁷⁸ Section 2(b) of the Securities Act (15 U.S.C. 77b(b)) and section 3(f) of the Exchange Act (17 U.S.C. 78c(f)) require the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest and to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, section 23(a)(2) of the Exchange Act (17 U.S.C. 78w(a)(2)) requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

¹¹⁷⁹ See discussion in section I. Like above, our discussion of de-SPAC transactions and target companies generally focuses on target companies that are private operating companies, but we also address situations where the target company of a de-SPAC transaction may comprise an operating

traditional IPOs, SPACs provide target companies with a way to raise capital through public markets. To that end, as noted above, the SPAC process is unique in that the de-SPAC transaction is a hybrid transaction that contains elements of both an IPO and an M&A transaction.¹¹⁸⁰ Under the current regulatory framework, the SPAC process allows the target company to raise capital through public markets without requiring the same level of disclosure or incurring the same liability as with a traditional IPO.¹¹⁸¹ As such, some commenters and academics have expressed the view that, compared to traditional IPOs, de-SPAC transactions raise additional "adverse selection" ¹¹⁸² concerns stemming from information asymmetry and conflicts of interest between SPAC investors and managers that are not fully resolved by market forces.¹¹⁸³

The final rules include a number of additional disclosure requirements that help address information asymmetries between investors ¹¹⁸⁴ and the SPAC,¹¹⁸⁵ which will enable investors

company that is a public company, a business, or assets, or combinations of multiple thereof. See Item 1601(d) of Regulation S-K.

¹¹⁸⁰ The SPAC process begins when a SPAC conducts an IPO and ends when the SPAC combines with a target company in a de-SPAC transaction.

¹¹⁸¹ See, e.g., Sris Chatterjee, N.K. Chidambaram & Gautam Goswami, *Security Design for a Non-Standard IPO: The Case of SPACs*, 69 J. Int'l Money & Fin. 151 (2016).

¹¹⁸² A well-known example of adverse selection is the "market for lemons," in which sellers of used cars know the quality of the car, but buyers do not. Because buyers have less information than sellers (information asymmetry) and cannot differentiate the "good" cars from the "lemons," their bids will be lower to reflect this uncertainty. In response, the sellers of high-quality products may exit the market, causing further decline in buyers' willingness to pay, which could cause the market to fall apart or "unravel" entirely, and no used cars to be purchased. See, e.g., George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Qtr. J. Econ. 488 (1970). For examples of existing market solutions to this adverse selection, see Proposing Release, *supra* note 7, at 29506.

¹¹⁸³ See, e.g., letters from Americans for Financial Reform Education Fund; Better Markets; Robert Jackson and John Morley. See also Lora Dimitrova, *Perverse Incentives of Special Purpose Acquisition Companies*, the "Poor Man's Private Equity Funds," 63 J. Acct. & Econ. 99 (2017); Klausner, Ohlrogge & Ruan, *supra* note 18.

¹¹⁸⁴ Throughout this section, "investor" can refer to any current or a potential security holder of a company, though it is generally understood that costs and benefits may accrue to such investors heterogeneously based on size, sophistication, and affiliation.

¹¹⁸⁵ We refer to SPACs throughout this analysis as shorthand but acknowledge that the various controlling parties of a SPAC that are involved in the decision making of the SPAC (including the SPAC sponsor, management, board, or other governing group) may have disparate incentives, each adding their own complexity to the principal-

Continued

to make more informed investment and voting decisions. For example, at the SPAC IPO stage, as discussed in detail in the sections below, the rules require disclosures about dilution, compensation, and conflicts of interest, among other things. As another example, at the de-SPAC transaction stage, the rules require disclosures related to the information considered by the SPAC in its assessment of the transaction, such as projections or assessments by third parties, among other things.

The final rules also include several provisions to help ensure that shareholders more consistently receive the full protections of Securities Act disclosure and liability provisions in connection with the de-SPAC transaction. For example, because the target company is effectively an “issuer” of the securities in any registered de-SPAC transaction, the rules require that the target company sign the registration statement filed in connection with the de-SPAC transaction.¹¹⁸⁶ Because signatories are subject to section 11 liability for material omissions and misstatements, we expect this requirement to increase incentives for targets to ensure the accuracy of the disclosures in de-SPAC transaction registration statements. We are also adopting definitions of “blank check company” for PSLRA safe harbor purposes that would not contain a qualification that the company issues penny stock. As a result, the safe harbor for forward-looking statements under the PSLRA will be unavailable to SPACs and other blank check companies, regardless of whether they would have qualified as an issuer of penny stock. This approach will help incentivize such blank check companies taken to take greater care when making forward-looking statements.¹¹⁸⁷

Certain rules we are adopting are intended to align disclosures in de-SPAC transactions more closely to those of traditional IPOs. For example, certain non-financial disclosures regarding a target company that are currently not filed by the company until a Form 8-K, within four business days after the completion of a de-SPAC transaction, will be required to be included in the disclosures that are filed in connection with a de-SPAC transaction (on Form S-

4 or F-4, a proxy or information statement, or a Schedule TO).¹¹⁸⁸ Also, the combined company following a de-SPAC transaction will be required to re-determine its eligibility for SRC status and reflect any change in status in its filings, beginning 45 days after consummation of the de-SPAC transaction.¹¹⁸⁹

We are also adopting final rules that apply to shell companies more broadly. Rule 145a deems any business combination involving a reporting shell company and another entity that is not a shell company to involve a sale of securities to the reporting shell company’s shareholders. Currently, investors in reporting shell companies may not always receive the disclosures and other protections afforded by the Securities Act at the time when there is a fundamental change in the nature of their investment due to the business combination involving another entity that is not a shell company. In addition, the amendments to Regulation S-X more closely align the financial statement requirements in business combinations between a shell company and a non-shell company with those required in connection with traditional IPOs.

As discussed in section I, market participants have raised concerns that disclosures that currently accompany SPAC IPOs and de-SPAC transactions do not provide investors with adequate information to assess the potential risks of investing in SPACs and the ways in which the SPAC sponsor and other affiliates stand to gain from these transactions. We expect the final rules to elicit information regarding SPAC transactions that is more consistent, useful, and readily comparable.¹¹⁹⁰ As a result, investors will be able to make more informed voting and investment decisions, resulting in more efficient pricing of securities.¹¹⁹¹ Moreover, by reducing information asymmetry and agency costs, we expect the final rules

to result in less adverse selection than might otherwise occur at the de-SPAC transaction stage, which should encourage greater investor participation. We further anticipate that, by addressing the liability of various parties in de-SPAC transactions and other shell company business combinations, the final rules will incentivize parties to exercise greater care in disclosing information in connection with relevant business combinations, increasing the protections afforded to investors. Overall, we expect the final rules will enhance the protection of investors and promote market efficiency.

SPACs and their target companies may incur costs related to the public disclosure of the newly required information. The costs will be lower for parties that already provide such disclosures voluntarily in response to market demands.¹¹⁹² We are also mindful that some aspects of this rulemaking may deter some forms of communications or some transactions that might otherwise be economically beneficial to issuers or investors (or both). We discuss these considerations in more detail below.

We received several comments specifically addressing the economic analysis of the Proposing Release.¹¹⁹³ A number of commenters shared the results of quantitative analyses that addressed SPAC-related issues considered by the proposed rules.¹¹⁹⁴

¹¹⁹² See *SPAC to the Future III*, IPO Edge (Nov. 10, 2021) (remarks of panelist Chris Weekes, Managing Director and Co-Head of SPACs, Cowen), available at <https://ipo-edge.com/join-spac-to-the-future-iii-with-nasdaq-cowen-gallagher-ve-icr-morrow-sodali-morganfranklin-featuring-gigacapital-hennessy-and-switchback/>.

¹¹⁹³ See letters from Virtu Financial Inc. (June 13, 2022) (“Virtu”), Skadden, Kirkland & Ellis, Committee on Capital Markets Regulation.

¹¹⁹⁴ See letters from Daniel Hemmings, Institute of European Finance, Bangor University and Aziz Jaafar, University of Sharjah (June 29, 2023); Tom Nohel, Department of Finance, Imperial College and Quinlan School of Business, Loyola University—Chicago, Felix Feng, Michael G. Foster School of Business, University of Washington, Xuan Tian, PBC School of Finance, Tsinghua University, Wenyu Wang, Kelley School of Business, Indiana University, and Yufeng Wu, Gies College of Business, University of Illinois Urbana-Champaign (Feb. 7, 2023); Michael Goffman, Hebrew University of Jerusalem and Yuchi Yao, University of Rochester (July 19, 2022 and Dec. 31, 2022); Alexander Groh, Professor of Finance, EMLYON Business School, France (Sept. 2, 2022 and Dec. 5, 2022); Michael Klausner, Michael Ohlrogge, Amanda Rose and Emily Ruan (July 11, 2022); Michael Klausner, Michael Ohlrogge, and Harald Halbhueber; Holger Spamann; Debarshi Nandy, Barbara and Richard M. Rosenberg Professor of Global Finance, Brandeis International Business School, Yaxuan Wen, Ph.D. Candidate in International Economics and Finance, Brandeis International Business School, and Mengnan Zhu, Assistant Professor of Finance, Dickinson College (June 7, 2022), citing Yaxuan Wen & Mengnan

¹¹⁸⁸ See *supra* section III.A.

¹¹⁸⁹ See *supra* section III.D.

¹¹⁹⁰ See, e.g., *infra* sections VIII.B.1.iii.c., VIII.B.3.

¹¹⁹¹ See, e.g., Orie E. Barron & Hong Qu, *Information Asymmetry and the Ex Ante Impact of Public Disclosure Quality on Price Efficiency and the Cost of Capital: Evidence from a Laboratory Market*, 89 *Acct. Rev.* 1269 (2014), available at <https://ssrn.com/abstract=2312812> (retrieved from SSRN Elsevier database) (high-quality public disclosure leads to increased price efficiency and decreased cost of capital); Ulf Brüggemann, Aditya Kaul, Christian Leuz & Ingrid Werner, *The Twilight Zone: OTC Regulatory Regimes and Market Quality* (Research Paper No. 3126379, Mar. 1, 2018, last revised June 12, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126379 (retrieved from SSRN Elsevier database) (increased disclosure regimes lead to increased liquidity and lower crash risk).

agent dynamic. However, the existence and general nature of the relationship between investors and the SPAC “agent” is not significantly different based on which specific agent is considered, thus the reference to the SPAC broadly. When this generalization does not hold, we provide more precise explanations.

¹¹⁸⁶ See *supra* section III.C.

¹¹⁸⁷ See *supra* section III.E.

We discuss these comments below in our analysis of the costs and benefits of the final rules. We also discuss the anticipated impacts on efficiency, competition, and capital formation and assess several reasonable policy alternatives. Where possible, we have attempted to quantify the economic effects of the final rules.¹¹⁹⁵ In many cases, however, we are unable to do so because we lack access to data that would allow us to quantify the effects with a reasonable degree of accuracy. 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. Where we are unable to quantify the economic effects of the final rules, we provide a qualitative assessment of the potential effects.

A. Baseline and Affected Parties

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the final rules and amendments are measured consists of the current state of the SPAC market, current practice as it relates to SPAC IPOs and subsequent business combination transactions between SPACs and private operating companies, and the current regulatory framework.

We begin by discussing current market practices related to SPAC IPOs in section VIII.A.1. We then discuss de-SPAC transactions in section VIII.A.2.

1. SPAC Initial Public Offerings

The parties most likely to be directly affected by the final rules regarding specialized disclosure requirements for SPACs in IPOs and other registered offerings are: SPAC sponsors and their affiliates or potential SPAC sponsors intending to organize a new SPAC; current SPAC officers, SPAC directors,

or promoters; SPAC investors; and any other market participants whose service or activities involve analysis of the information, data, and disclosures related to SPACs in these offerings.

In addition, if the adoption of the final rules alters the incentives for other parties (e.g., SPAC sponsors or underwriters) to participate in or be involved with SPAC transactions, we would expect secondary impacts on the prospects or opportunities of private companies that would be potential target companies of such newly-organized SPACs. The final rules also may affect parties who provide advisory or other services to SPACs or SPAC sponsors in connection with SPAC transactions through additional disclosures about the parties and provided services or potential liability.

Table 2 shows the estimated number of SPAC IPOs since 1990. They peaked in 2021, following a similar trend in traditional IPOs.¹¹⁹⁶ In 2023, there were an additional 31 SPAC IPOs.¹¹⁹⁷

Table 2. Number of SPAC IPOs^a

	1990– 2000	2001– 2005	2006– 2010	2011– 2015	2016– 2020	2021	2022	2023
Total	18	41	128	67	400	613	86	31
Nasdaq	18	0	3	56	248	433	74	27
NYSE	0	0	1	0	147	178	10	4
AMEX/NYSE American	0	6	78	0	5	2	2	0
OTC	0	35	46	11	0	0	0	0

^a Estimates for 1990 to 2023 are based on all SPACs that conducted an IPO with a confirmed pricing date through the end of 2023, identified by Dealogic, SPACInsider, Audit Analytics, and staff manual review. Values reflect the total over the period in the column headers rather than annual averages.

The vast majority of SPACs claim either SRC or EGC status, with the majority claiming both.¹¹⁹⁸ For example, all of the 86 SPAC IPOs in 2022 claimed EGC status and 84 claimed SRC status.¹¹⁹⁹

“Cliff” Zhu, *Is Going Public via SPAC Regulatory Arbitrage? A Textual Analysis Approach* (2022), <https://ssrn.com/abstract=4066641> or <https://dx.doi.org/10.2139/ssrn.4066641>; Usha Rodrigues and Mike Stegemoller; Snehal Banerjee, Associate Professor of Finance and Accounting, UC San Diego, and Martin Szydlowski, Assistant Professor of Finance, University of Minnesota (Apr. 1, 2022).

¹¹⁹⁵ For our estimates of the paperwork burdens associated with the rules and amendments for purposes of the Paperwork Reduction Act of 1995 (“PRA”), see *infra* section X. These PRA burden estimates pertain to “collections of information,” as that term is defined in the PRA, and therefore reflect only the hours and costs to prepare required

i. SPAC Exchange Listings

SPAC listings have migrated from the over-the-counter (OTC) market to three national securities exchanges: first, NYSE American (formerly, the American Stock Exchange (“AMEX”));

disclosures, as required by that Act. As a result, these PRA estimates do not reflect the full economic effects or full scope of economic costs of the rules and amendments that are discussed in this analysis.

¹¹⁹⁶ See, e.g., letter from Committee on Capital Markets, noting significant increases in the number of traditional IPOs in 2020 and especially 2021. See also data collected, cleaned, and made available by Jay Ritter on SPAC IPOs and overall IPO activity available at <https://site.warrington.ufl.edu/ritter/ipo-data/> (last accessed 10/24/2023).

¹¹⁹⁷ Data from Dealogic, based on IPO listing date for offerings with a confirmed pricing date.

¹¹⁹⁸ See also *supra* note 665.

then, the Nasdaq Stock Market (“Nasdaq”) and the New York Stock Exchange (“NYSE”) (see Table 2).¹²⁰⁰

¹¹⁹⁹ Based on status disclosed by SPACs in the financials filed after the IPO, if available, otherwise from Form S-1 or Form F-1.

¹²⁰⁰ SPACs first were listed on the AMEX in 2005. The Commission approved the NYSE’s proposed rule change to adopt listing standards to permit the listing of SPACs on May 6, 2008, and approved Nasdaq’s proposed rule change to adopt listing standards to permit the listing of SPACs on July 25, 2008. See Release No. 34–57785 (May 6, 2008) [73 FR 27597 (May 13, 2008)] (SR–NYSE–2008–17); Release No. 34–58228 (July 25, 2008) [73 FR 44794 (July 31, 2008)] (SR–NASDAQ–2008–013). See also Release No. 34–63366 (Nov. 23, 2010) [75 FR 74119 (Nov. 30, 2010)] (SR–NYSEAmex–2010–103) (notice

Continued

NYSE, Nasdaq, and NYSE American have rules setting forth listing requirements for a company whose business plan is to complete an IPO and engage in a business combination.¹²⁰¹ Among other things, the rules of all three exchanges permit the initial listing of SPACs only if at least 90% of the gross proceeds from the IPO and any concurrent sale by the SPAC of equity securities will be deposited in a trust account.¹²⁰² The rules of these exchanges further require that, within three years of the effectiveness of its IPO registration statement (or such shorter period specified in the registration statement under Nasdaq and NYSE American rules or its constitutive documents or by contract under NYSE rules), the SPAC complete a business combination(s) having an aggregate fair market value of at least 80% of the value of the net assets in the trust account excluding certain costs.¹²⁰³ The rules of NYSE, Nasdaq, and NYSE American require that a business combination meeting this 80% requirement be approved by a majority of the SPAC's independent directors.¹²⁰⁴ The rules of all three exchanges also require, if a shareholder vote is held, that a majority of the shares voted at the shareholder meeting approve a de-SPAC transaction meeting this 80% requirement.¹²⁰⁵ In addition, the rules of all three exchanges provide that, if a business combination transaction meeting this 80% requirement is approved and consummated, public shareholders voting against the transaction must have the right to convert their shares of common stock into a pro rata share of the aggregate amount then in the trust account net of taxes and working capital disbursements.¹²⁰⁶ Under the rules of all three exchanges, if a shareholder vote on a business combination transaction is not held, the SPAC must provide all shareholders with the

of filing and immediate effectiveness of proposed rule change to adopt additional criteria for the listing of SPACs).

¹²⁰¹ NYSE Listed Company Manual Section 102.06; Nasdaq Listing Rule IM-5101-2; NYSE American Company Guide Section 119. The Rules of the CBOE BZX Exchange, Inc. provide another example of listing requirements that are substantially similar to those described in this section. See CBOE BZX Rule 14.2(b).

¹²⁰² NYSE Listed Company Manual Section 102.06; Nasdaq Listing Rule IM-5101-2(a); NYSE American Company Guide Section 119(a).

¹²⁰³ NYSE Listed Company Manual Section 102.06(e); Nasdaq Listing Rule IM-5101-2(b); NYSE American Company Guide Section 119(b).

¹²⁰⁴ NYSE Listed Company Manual Section 102.06(d); Nasdaq Listing Rule IM-5101-2(c); NYSE American Company Guide Section 119(c).

¹²⁰⁵ NYSE Listed Company Manual Section 102.06(a); Nasdaq Listing Rule IM-5101-2(d); NYSE American Company Guide Section 119(d).

¹²⁰⁶ *Id.*

opportunity to redeem all their shares for cash equal to their pro rata share of the aggregate amount then in the trust account net of taxes and working capital disbursements, pursuant to Rule 13e-4 and Regulation 14E under the Exchange Act, which regulate issuer tender offers.¹²⁰⁷

ii. SPAC Sponsors

SPACs are managed by SPAC sponsors, who spend time and effort managing the SPAC process and searching for a suitable target to complete a de-SPAC transaction. Sponsors also invest in the SPAC and are compensated with a portion of ownership in the combined company that results from the de-SPAC transaction, which means that such compensation will generally only be realized if a de-SPAC transaction occurs. Commentators have suggested that one reason a SPAC might provide a more attractive route to the public markets than a traditional IPO is because the target company may benefit from the leadership and professional advice from one or more individuals composing the SPAC sponsor, including in some cases beyond the consummation of the de-SPAC transaction and into the life of the resulting combined public company.¹²⁰⁸ Although the majority of sponsors from 2019 through the first half of 2021 were financial institutions, a sizable fraction (47%) of companies classified as SPACs were self-reported as sponsored by individuals.¹²⁰⁹ This percentage has been increasing, as 66% of SPACs with IPOs in the second half of 2021 and 83% in 2022 were sponsored by individuals.¹²¹⁰

iii. SPAC IPO Underwriters

Underwriters of SPAC IPOs may be affected by the final rules, to the extent they are liable for IPO disclosures or any involvement in de-SPAC transactions. During the period 1990–2022, the average number of named underwriters

¹²⁰⁷ NYSE Listed Company Manual Section 102.06(c); Nasdaq Listing Rule IM-5101-2(e); NYSE American Company Guide Section 119(e).

¹²⁰⁸ See Robert Berger, *SPACs: An Alternative Way to Access the Public Markets*, 20 J. Applied Corp. Fin. 68 (2008) (“Though privately negotiated, tailored transactions, SPACs can provide companies with access to the public markets in ways that a traditional IPO cannot. SPAC mergers typically exhibit . . . specialized SPAC management teams that add experience that is difficult to replicate.”).

¹²⁰⁹ See SPACInsider, 1H–2021 Report, available at https://mcusercontent.com/764dc55fe6da1e37d427265ad/files/b90cf236-0845-f778-e35c-db7417200d35/1H_2021_SPAC_Report.pdf.

¹²¹⁰ Based on staff analysis of data from SPACInsider. SPACs with sponsor type “Sponsor” were counted as individually sponsored.

participating in a SPAC IPO was 2.4.¹²¹¹ In 2022, the average was 2.1. Although we are not aware of any database listing investment banks that are willing to provide underwriting services for SPACs, there were six investment banks that participated in at least ten SPAC IPOs in 2021 that did not participate in any SPAC IPOs in 2022 or in the first two quarters of 2023.¹²¹² All of these SPAC IPOs were done via a firm commitment underwriting.¹²¹³ The average fee charged by SPAC IPO underwriters from 1990–2022 was approximately 5.4% of IPO proceeds.¹²¹⁴ The average underwriting fee has declined from approximately 6.9% in the 1990s and 2000s to approximately 5.2% in the 2010s and 2020s.¹²¹⁵ The average underwriting fee for SPACs in 2022 was 5.1%.¹²¹⁶ SPAC IPO underwriters may provide services to a SPAC or its eventual target company both before and after the completion of an IPO. For example, a SPAC IPO underwriter may help a SPAC identify potential target companies, provide financial advisory services to the SPAC or the target company, or act as a PIPE placement agent. As discussed in the Proposing Release, current SPAC IPO underwriter practice is to defer a portion of the underwriting fee until, and conditioned upon, the completion of the de-SPAC transaction.¹²¹⁷ Prior to 2004, SPAC IPO

¹²¹¹ This estimate is based on staff analysis of Dealogic of SPAC IPOs registered with the SEC with a confirmed pricing date.

¹²¹² *Id.* Some commenters asserted that underwriters may have become more reluctant to participate in SPAC IPOs as a result of proposed Rule 140a, which would have deemed a SPAC IPO underwriter that takes steps to facilitate a de-SPAC transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction to be engaged in the distribution of the securities of the surviving public entity in a de-SPAC transaction within the meaning of section 2(a)(11) of the Securities Act. See Proposing Release, *supra* note 7, at 29486. See, e.g., letter from White and Case. A decrease in the supply of underwriters providing services to SPACs may have resulted in fewer SPAC IPOs because SPAC IPOs are typically structured as underwritten offerings. Conversely, it could also be the case that the decline in SPACs activity during this period, which may be due to other reasons, could naturally result in fewer underwriters.

¹²¹³ SPACs that conduct a firm commitment IPO and raise more than \$5 million in the offering are not subject to the requirements of Securities Act Rule 419. See *supra* note 3.

¹²¹⁴ This estimate is based on staff analysis of data as described in *supra* note 1211. See also letter from Sagiv Shiv, Managing Director, Head of MA and Advisory, ACP Capital Markets LLC (March 24, 2023), noting that the SPAC underwriting fee percentage is based on IPO proceeds, not the non-redeemed share of these proceeds at the de-SPAC stage.

¹²¹⁵ See *supra* note 1214.

¹²¹⁶ *Id.*

¹²¹⁷ See Proposing Release, *supra* note 7, at 29486. This practice has not changed since the

underwriters typically did not defer their fee until completion of the de-SPAC transaction.¹²¹⁸ During the period 2005–2022, we estimate that the average size of the deferred SPAC IPO underwriting fee was 3.1% of IPO proceeds (3.4% if excluding the cases where there was no deferred fee), or approximately 56% of total SPAC IPO underwriting fees. We have not observed significant differences in the

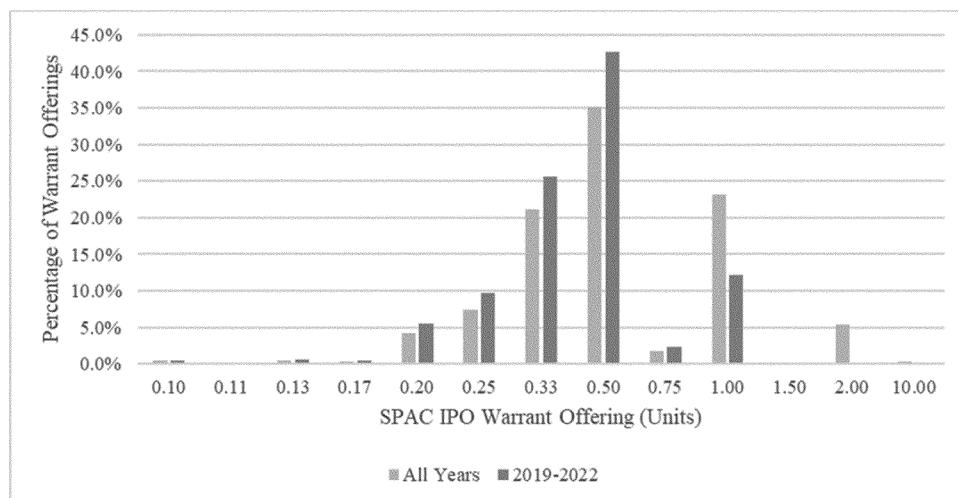
structure or level of SPAC IPO underwriting fees and deferred fees, as disclosed at the IPO stage, when comparing SPACs that have completed a de-SPAC transaction versus SPACs that did not do so.

iv. Public Warrants

Most SPAC IPOs register the offering of a unit composed of a common share, warrants, or fractions thereof, and—in

some cases—rights.¹²¹⁹ Currently, SPAC units usually include one common share and one or more fractional out-of-the-money warrants.¹²²⁰ Public warrants, *i.e.*, those issued to non-affiliated shareholders, give the holder the right to purchase common stock, typically at an exercise price of \$11.50, for up to five years after the completion of the de-SPAC transaction.¹²²¹

Figure 1. Warrants offered in SPAC IPO Units, 1990–2022^a



^a The estimated distribution is based on the warrant offering information presented in either the IPO prospectus or the Form S-1 or Form F-1 registration statement filed in connection with all SPACs identified in Table 1.

As SPAC offerings have evolved, however, the dilutive potential of the warrant component of a SPAC offering unit appears to have somewhat diminished. As indicated in Figure 1, across all the years included in Table 1, many SPACs offer units with fractional warrant components. In more recent years (2019–2022, inclusive), the majority of SPACs that have conducted an IPO offered units with fractional warrants representing half a share or

proposal. The average deferred fee in 2022 through the first two quarters of 2023 was 3.3% of IPO proceeds.

¹²¹⁸ This conclusion is based on staff analysis. See *supra* note 1211. See also Yochanan Shachmurove & Milos Vulanovic, *Specified Purpose Acquisition Company IPOs*, in *The Oxford Handbook of IPOs* 301 (Douglas Cumming & Sofia Johan eds., 2018).

¹²¹⁹ See, e.g., Gül Okutan Nilsson, *Incentive Structure of Special Purpose Acquisition Companies*, 19 Eur. Bus. Org. L. Rev. 253 (2018) (“[R]ecent SPACs seem to be experimenting with issuing certain ‘rights’ . . . defined as the ‘right to receive one-tenth of a SPAC share upon consummation of the business combination’ . . . Unlike in the case of warrants, shareholders are not required to pay for receiving these shares. ‘Rights’ can also trade separately and even the shareholders

less. The result of this trend is that warrant features have in some respects become less dilutive in more recent years.¹²²² SPAC sponsors also often acquire warrants, with some studies estimating the amount of those acquisitions representing 3–5% of the IPO proceeds.¹²²³

2. De-SPAC Transactions

At the de-SPAC transaction stage, the primary parties affected by the new

who convert their shares can keep them. If the business combination cannot be completed, rights expire worthless.”).

¹²²⁰ Early practice for SPACs often involved the offered unit containing multiple in-the-money warrants. See, e.g., Lola Miranda Hale, *SPAC: A Financing Tool with Something for Everyone*, J. of Corp. Acct. & Fin. Jan./Feb. 2007, at 67 (“The typical structure involves the offering of a unit consisting of common stock and one or two separate warrants for common stock. In a two-warrant unit, the unit price is \$6, including one share of common stock and two warrants . . . Typically, each warrant entitles the holder to purchase one share of common stock at a price of \$5 each.”); Carol Boyer & Glenn Baigent, *SPACs as Alternative Investments: An Examination of Performance and Factors that Drive Prices*, 11 J. Private Equity, Summer 2008, at 8 (“SPACs typically sell in units

disclosure requirements include SPACs, SPAC sponsors, investors (including PIPE investors if any), and target companies. Additionally, the final rules to amend or otherwise clarify the existing liability framework would affect those same parties (and certain individuals at those parties).

As illustrated in Table 3, based on staff analysis of SPAC IPOs that registered a sale of securities between 1990 and 2023, approximately two-

that are priced at \$6, and each unit is composed of one common share and two warrants that give investors the right to buy two more shares for \$5 each.”). Staff analysis of Dealogic data suggests unit offerings of 1 common stock and two warrants was typical between 2000 and 2005. Such structures reappear after 2020 but as a much smaller proportion of all unit structures.

¹²²¹ See Gahng, Ritter & Zhang, *supra* note 30.

¹²²² Early SPACs typically offered one or two in-the-money warrants. See *supra* note 1220. More recent SPAC structures offer out-of-the-money fractional warrants. See *supra* note 1221.

¹²²³ See, e.g., Gül Okutan Nilsson, *Incentive Structure of Special Purpose Acquisition Companies*, 19 Eur. Bus. Org. L. Rev. (2018), *supra* note 1219.

thirds (65%) of all SPACs following their IPOs announced a de-SPAC transaction, and about one-half (49%) completed such transactions.¹²²⁴ It is possible that SPACs currently searching

for target companies may still identify target companies, complete de-SPAC transactions, and thereby increase the fractions of SPACs with announcements and completed transactions. This de-

SPAC transaction completion rate of approximately one-half is generally consistent with previous research findings (which may have used different ranges or filters for their samples).¹²²⁵

Table 3. SPAC Outcomes, Grouped by IPO Year, 1990–2023^a

SPAC IPO Year	1990– 2000	2001– 2005	2006– 2010	2011– 2015	2016– 2020	2021	2022	2023
Number of IPOs in Year	18	41	128	67	400	613	86	31
De-SPAC Transaction Announced	17	41	108	59	334	282	47	8
De-SPAC Transaction Completed	17	35	64	52	319	175	11	0
Liquidated	1	6	64	15	71	258	12	0

^a Estimates reported here are based on the respective samples of SPAC IPOs (see Table 2 note a) that reflect all confirmed, completed activity as of Dec. 31, 2023. Transactions announced, transactions completed, and SPAC liquidations for each time period are based on realized future outcomes of the SPAC IPOs during that time period rather than the year of the announcement, completion, or liquidation.

Currently, the typical SPAC discloses in its IPO prospectus that it is formed for the purpose of effecting a business combination with one or more businesses. Most SPACs pursue only one target company for a de-SPAC transaction. Of the 583 business combination transactions with operating companies that occurred over the 1990–2022 period involving SPAC IPOs approximately 3% of transactions (17 of 583) involved two or more target companies (15 transactions involved two target companies and two transactions involved three target companies).¹²²⁶

i. PIPEs in Connection With De-SPAC Transactions

PIPEs have supported de-SPAC transactions since approximately 2005.¹²²⁷ However, in some recent de-SPAC transactions, PIPEs have played a larger role than they have historically played, and this has given rise to concern about the potential dilutive effects of PIPEs on SPAC shareholders

and how well these dilutive effects might be understood by other investors.

According to a recent study analyzing the 47 registered de-SPAC transactions that occurred between January 2019 and June 2020, the median cash raised through third-party PIPE investors was approximately 25% of the cash raised in the de-SPAC transactions.¹²²⁸ The same study found that, following these transactions, the median portion of the post de-SPAC company owned by SPAC shareholders including the sponsor was 35% and the median portion owned by the sponsor alone was 12%.¹²²⁹ Because PIPE investors may receive confidential information with which to make an investment decision (including one-on-one conversations with the target company's management, which may convey soft information that enables PIPE investors to assess management abilities or determine their level of confidence in the management team) and may also engage in extended and detailed due diligence on the SPAC and target company,¹²³⁰ their participation

has at times been considered a benefit to SPAC IPO investors, providing a positive signal of the expected future financial performance of the post-de-SPAC transaction combined company.

As the SPAC market has evolved, so too has the role of PIPEs that support, and in some cases enable, de-SPAC transactions. In 2021, according to one study, approximately 95% of de-SPAC transactions included PIPE financings and the average (\$316 million) and median (\$210 million) amounts raised in PIPE financings were similar to the average size of the SPAC trust account at the time of the IPO.¹²³¹ This may reflect that in more recent SPACs, in addition to enabling larger deals, some PIPEs may provide capital to ensure that a deal that otherwise may fail due to a high redemption rate can proceed to completion, although many PIPE offerings in connection with a de-SPAC transaction still appear to facilitate larger acquisitions rather than replace SPAC share redemptions.¹²³² In these cases, the ownership stake of the PIPE

¹²²⁴ Staff analysis based on the sample of SPAC IPOs described in Table 2 note a that reflect all confirmed, completed activity as of Dec. 31, 2023.

¹²²⁵ Studies performed in 2016 or later reviewing the 2003–2013 cohort of SPACs found that approximately 51.5% of SPACs that had an IPO during the decade successfully completed a de-SPAC transaction and 21.6% were still publicly traded three years later in 2016. See, e.g., Milos Vukanovic, *SPACs: Post-Merger Survival*, 43 *Managerial Fin.* 679, 679–699 (2017); Kamal Ghosh Ray & Sangita Ghosh Ray, *Can SPACs Ensure M&A Success?*, 16 *Advances in Mergers & Acquisitions* 83, 83–97 (2017).

¹²²⁶ Target counts are from Dealogic's SPAC M&A data.

¹²²⁷ See Meghan Leerskov, *Shell Mergers and SPACs: A Statistical Overview of Alternative Public Offering Methods*, in *The Issuer's Guide to PIPEs*:

New Markets, Deal Structures, and Global Opportunities 281 (Steven Dresner ed., 2015).

¹²²⁸ See Klausner, Ohlrogge & Ruan, *supra* note 18. The authors analyzed data for the 47 public company SPACs that entered into a business combination with a target company, and thereby brought the operating company public, between Jan. 2019 and June 2020.

¹²²⁹ *Id.*

¹²³⁰ *Id.*

¹²³¹ See Michael Levitt, Valerie Jacob, Sebastian Fain, Pamela Marcogliese, Paul Tiger, & Andrea Basham, *2021 De-SPAC Debrief*, Freshfields.us (Jan. 24, 2022), available at <https://blog.freshfields.us/post/102hgzy/2021-de-spac-debrief>. The difference between average and median PIPEs in this sample reflects that the data is positively skewed, implying that, while some deals may involve little or no

additional financing via PIPEs, other deals feature large investments outside the SPAC IPO process.

¹²³² See *supra* note 1203 which discusses de-SPAC transaction 80% minimum cash conditions. We note that while there may be more instances in which PIPE financing functions to ensure that the cash requirements of a de-SPAC transaction are met in recent years, the difference between the average and median amount of PIPE financing raised (respectively approximately \$300 million and \$200 million) and the average and median consideration paid to target shareholders (respectively approximately \$2 billion and \$1.25 billion) point to PIPE offerings facilitating larger acquisitions. See Michael Levitt, Valerie Jacob, Sebastian Fain, Pamela Marcogliese, Paul Tiger, & Andrea Basham, *2021 De-SPAC Debrief*, Freshfields.us (Jan. 24, 2022), available at <https://blog.freshfields.us/post/102hgzy/2021-de-spac-debrief>.

investors in the combined company may exceed that of the non-redeeming SPAC investors.¹²³³ PIPE investors may, therefore, come to have a larger stake in the combined company than SPAC IPO investors anticipated when making an initial investment. In 2022, this trend may have lessened slightly, with only 71% of de-SPAC transactions including PIPE financing, and the average (\$128 million) and median (\$92 million) amounts raised in PIPE financings were smaller than the average and median (both \$269 million) sizes of the SPAC trust account at the time of the IPO.¹²³⁴

PIPEs are typically priced at a discount relative to the market value of the publicly traded securities. For example, one study of PIPE transactions (including but not limited to de-SPAC transactions) indicates that the average discount for PIPE investors is 11.2% (compared to the market value of those securities), and for the subsample of PIPEs that do not include warrants, the average discount is 5.7%.¹²³⁵ Another study that focused on PIPEs in de-SPAC transactions of SPACs that conducted an IPO in or after 2015 and that completed a de-SPAC by March 2021 estimates that the mean discount for PIPE investors was approximately 20%.¹²³⁶

¹²³³ Assuming the price of shares sold to PIPE investors is the same as or less than the IPO price, this outcome would also occur if the PIPE investments simply exceeded the size of the SPAC IPO proceeds without redemptions, but such cases have not been commonly observed. In a review of PIPE finance raised in connection with de-SPAC transactions that occurred between Jan. 2018 and June 2021, the Commission staff found that while PIPE proceeds ranged on average from 60% to 88% of SPAC IPO proceeds, net of redemptions, these proceeds represented up to 137% on average (in calendar year 2019) of SPAC IPO proceeds (raised from SPAC shareholders whose shares were not redeemed) at the consummation of the de-SPAC transaction. De-SPAC transactions were less reliant on funding through PIPEs in 2022 than in 2021, according to one study, finding PIPEs were less common in de-SPAC transactions (70% compared to 95% in 2021) and were smaller in both absolute size (averaging approximately \$128 million in 2022, compared to \$316 million for the 2021) and size relative to the SPAC trust account (less than 50% in the 2022 deals, compared to nearly 100% in the 2021 deals). See Freshfields, *2022 De-SPAC Debrief: A Comprehensive Review of All 102 De-SPAC Transactions that Closed in 2022*, Freshfields.us (Jan. 2023), available at <https://www.freshfields.us/490963/globalassets/noindex/documents/2022-de-spac-debrief.pdf>.

¹²³⁴ See Freshfields, *2022 De-SPAC Debrief: A Comprehensive Review of All 102 De-SPAC Transactions that Closed in 2022*, Freshfields.us (Jan. 2023), available at <https://www.freshfields.us/490963/globalassets/noindex/documents/2022-de-spac-debrief.pdf>.

¹²³⁵ See Jongha Lim, Michael Schwert & Michael Weisbach, *The Economics of PIPEs*, 45 J. Fin. Intermediation 100832 (2021). These results are based on a sample of 3,001 PIPE transactions by U.S. firms listed on NYSE or Nasdaq between 2001 and 2015.

¹²³⁶ See Gahng, Ritter & Zhang, *supra* note 30. We note that discount calculations involve several

ii. Use of Projections in Connection With De-SPAC Transactions

Item 1609 of Regulation S-K will require certain enhanced disclosures about any projections disclosed in de-SPAC transactions.¹²³⁷ Hence, Item 1609 will potentially affect preparers and users of financial projections related to de-SPAC transactions, including SPACs, SPAC boards of directors, SPAC sponsors, target companies, both sets of controlling shareholders and management, and current and prospective investors.

Three recent papers discuss the use of projections by SPACs and target private operating companies in de-SPAC transactions. Chapman, Frankel, and Martin (2021) collected data on SPACs with IPO dates from 2015 to 2020.¹²³⁸ The authors found that 87% (249 out of 285) of de-SPAC transactions were accompanied by at least one forecast. Dambra, Even-Tov, and George (2022) focus on de-SPAC transactions between January 1, 2010, and December 31, 2020. The authors restricted their sample to transactions with a single target and excluded SPACs that delisted before the merger effective date, traded on the OTC market, or focused on the biotechnology industry, yielding a sample of 142 observations.¹²³⁹ They identified 128 target private companies (90.1%) that provided at least one form of forecast (e.g., revenue or net income) in investor presentations. Blankespoor, Hendricks, Miller, and Stockbridge (2022) reviewed a sample of 963 SPAC IPOs completed between January 1, 2000, and July 1, 2021.¹²⁴⁰ The authors removed companies “that are still seeking a merger target, have liquidated, are foreign, or have not publicly filed their roadshow” and arrived at a sample of 389 SPACs. Of this sample, 312 (80.21%) SPACs provided a revenue forecast. These three studies suggest that

methodological assumptions regarding the valuation of warrants and the treatment of transfers. For example, another study finds that between 2019 and June 2020, the median discount received by PIPE investors was 5.5% relative to the market value of the publicly traded SPAC shares and that, in 37% of SPACs with PIPE deals, PIPE investors received a 10% discount or more. See Klausner, Ohlrogge, & Ruan, *supra* note 18.

¹²³⁷ 17 CFR 229.1609.

¹²³⁸ See Kimball Chapman, Richard M. Frankel & Xiumin Martin, *SPACs and Forward-Looking Disclosure: Hype or Information?* (Working Paper, Oct. 20, 2021), available at <https://ssrn.com/abstract=3920714> (retrieved from SSRN Elsevier database).

¹²³⁹ See, e.g., Dambra, Even-Tov & George, *supra* note 36.

¹²⁴⁰ See Elizabeth Blankespoor, Bradley E. Hendricks, Gregory S. Miller & DJ Stockbridge, *A Hard Look at SPAC Projections*, 68 Mgmt. Sci. 4742 (2022), available at <https://doi.org/10.1287/mnsc.2022.4385>.

the use of projections is common in de-SPAC transactions.

iii. Use of Fairness Opinions

Item 1607 of Regulation S-K will require disclosures related to any report, opinion (other than an opinion of counsel) or appraisal received by the SPAC or the SPAC sponsor from an outside party or unaffiliated representative materially relating to, among other things, the fairness of the de-SPAC transaction to the SPAC, its security holders or SPAC sponsor if the SPAC or SPAC sponsor receives such a report, opinion, or appraisal.¹²⁴¹ Third-party providers of fairness opinions may factor the requirement for these disclosures into how they price their services as well as the types of information included in their reports and opinions. As such, this disclosure requirement may affect SPACs' determination of whether to obtain fairness opinions.

In 2021, only 15% of de-SPAC transactions disclosed that they were supported by fairness opinions, according to one study.¹²⁴² In 2022, that proportion increased to 32%.¹²⁴³ In contrast, a broader study of M&A transactions (not limited to SPACs) found that 85% of bidders obtained fairness opinions.¹²⁴⁴

iv. Changes in Jurisdiction of the Combined Company

In considering the potential economic effects of the final rules, we have taken into consideration elements of both the

¹²⁴¹ 17 CFR 229.1607(a)(4).

¹²⁴² Michael Levitt, Valerie Jacob, Sebastian Fain, Pamela Marcogliese, Paul Tiger, & Andrea Basham, *supra* note 1231.

¹²⁴³ See *supra* note 1234.

¹²⁴⁴ See Tingting Liu, *The Wealth Effects of Fairness Opinions in Takeovers*, 53 Fin. Rev. 533 (2018) (finding that fairness opinions are positively related to bidders' shareholder value and post-merger operating performance after the adoption of FINRA Rule 2290 in Dec. 2007 which regulates the identification and disclosure of conflicts of interest of FINRA members—e.g., broker-dealers with investment banking or valuation businesses—rendering fairness opinions.) The study's sample is of deals that occurred between 1995 and 2015, involving a publicly traded bidder that the study identified as seeking to acquire a majority of the target's shares. As discussed by the authors, it is difficult to estimate the fraction of deals that involve a fairness opinion since, according to the authors, the use of fairness opinions is required to be disclosed only if bidders are required to file proxy statements in connection with the solicitation of shareholder votes. They note that listing rules of the NYSE, NYSE American (named Amex in the study), and Nasdaq require a bidder shareholder vote only when the bidder plans to issue 20% or more new equity to finance a deal. In other words, according to the authors, if the bidder issues less than 20% of its outstanding shares or uses cash as consideration to pay for the acquisition, the bidder would not be required to disclose the fairness opinion even if the firm had obtained one.

economic and the regulatory baseline, including consideration of variations between the applicable legal frameworks in the jurisdictions in which SPACs are organized. Table 4 presents information on the jurisdiction of organization for each SPAC that conducted its IPO after 1990 and completed a de-SPAC transaction before 2022. The first two columns state the percentage of SPACs that later had de-SPAC transactions that were originally organized in each of six listed jurisdictions at the time of their IPO.

The second two columns state—for each originating jurisdiction—the percentage of combined companies that have their jurisdiction of organization in the listed jurisdictions following a de-SPAC transaction.

While the majority of SPACs that subsequently consummated a de-SPAC transaction remain organized in the same location, Table 4 indicates that, for some SPACs, the jurisdiction of organization of the combined company may change (compared to the SPAC's jurisdiction) in connection with the de-SPAC transaction. As a result, SPACs

may face changes in prevailing legal standards that arise from a change in jurisdiction of organization. To the extent that different jurisdictions have different disclosure requirements and provide differing levels of investor protections, the baseline regulatory framework will vary across SPACs and may change upon the de-SPAC transaction. For example, the incremental impact of the minimum dissemination period requirement may vary by jurisdiction.¹²⁴⁵

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¹²⁴⁵ See *infra* note 1364.

Table 4. Distribution of Combined Company Jurisdiction of Organization by SPAC Jurisdiction of Organization, 1990–2022^a

Organization at IPO	% of IPOs that Later de-SPAC	Organization Post de-SPAC	% of Total Number of Organization at IPO
Delaware	67.0%	Delaware	82.3%
		Cayman Islands	4.2%
		British Virgin Islands	1.9%
		Bermuda	1.9%
		Israel	1.3%
		Marshall Islands	1.0%
		Luxembourg	1.0%
		United Kingdom	0.7%
		Channel Islands	0.7%
		British Columbia	0.7%
		Island of Guernsey	0.7%
		Netherlands	0.7%
		Utah	0.3%
		Switzerland	0.3%
		India	0.3%
		Virginia	0.3%
		Bahamas	0.3%
		Gibraltar	0.3%
		Australia	0.3%
		New York	0.3%
Cayman Islands	28.3%	Quebec	0.3%
		Nevada	0.3%
		Delaware	60.3%
		Cayman Islands	26.0%
		Netherlands	3.8%
		Israel	3.8%
		Luxembourg	2.3%
		Republic of Ireland	0.8%
		Ireland	0.8%
		United Kingdom	0.8%
British Virgin Islands	3.7%	Jersey (Bailiwick of Jersey)	0.8%
		Ontario	0.8%
		British Virgin Islands	47.1%
		Delaware	17.7%
		Cayman Islands	11.8%
		Singapore	5.9%
		United Kingdom	5.9%
Marshall Islands	0.4%	Ireland	5.9%
		Mexico	5.9%
Florida	0.2%	Marshall Islands	100.0%
Massachusetts	0.2%	Delaware	100.0%
Nevada	0.2%	Massachusetts	100.0%
		Cayman Islands	100.0%

^a Estimates are based on the subsample of SPAC IPOs that subsequently completed a de-SPAC transaction. Data on state of organization is obtained from a combination of sources, including Dealogic, Audit Analytics, and SEC filings available on EDGAR. These estimates reflect all confirmed, completed activity as of Dec. 31, 2022.

BILLING CODE 8011-01-C**3. Blank Check Companies**

We are adopting final rules that define “blank check company” for purposes of

the PSLRA safe harbor provisions regarding forward-looking statements.¹²⁴⁶ The final rules will

¹²⁴⁶ See *supra* section III.E.

affect SPACs and any other companies that would otherwise meet the Rule 419 definition of “blank check company” except that they are not issuers of penny

stock, which currently seek to rely on the PSLRA safe harbor. The final rules also may affect investors and other market participants' access to the informational content of forward-looking statements or potential remedies in the case of material omissions from, or material misstatements in, a prospectus or registration statement or in connection with the purchase or sale of a security.

We estimate that, in addition to potentially affected SPACs, as previously discussed,¹²⁴⁷ the final rules also may affect approximately 32 non-SPAC entities that self-identified as blank check companies but would not meet the current definition of "blank check company" under Rule 419 given

that they did not self-identify as penny stock issuers.¹²⁴⁸

4. Shell Company Business Combinations

Securities Act Rule 145a and Article 15 of Regulation S–X may affect SPACs and other shell companies (other than business combination related shell companies) involved in business combination transactions. To the extent that Rule 145a transactions are registered, investors would receive disclosures in a registration statement, and registration would result in enhanced liabilities for the registrant and other parties who have liability under Securities Act section 11 with respect to the registration statement.

Article 15 of Regulation S–X will affect the financial statements associated with business combinations involving shell companies and thereby affect parties that are typically associated with the preparation, review, and dissemination of financial statements.¹²⁴⁹

Table 5 below illustrates that the proportion of de-SPAC transactions to non-SPAC reporting shell company business combinations has increased due to the recent increase in the number of SPACs entering the market and subsequently merging with target companies.¹²⁵⁰ In 2016, only 8% of all targets acquired by a reporting shell company merged with a SPAC. The proportion increased to 76% in 2021 and 65% in 2022.

Table 5. Distribution by Year of Shell-Mergers Reported on Form 8-K^a

	2016	2017	2018	2019	2020	2021	2022
SPAC	8.3%	9.5%	22.9%	37.0%	51.4%	76.1%	64.9%
Non-SPAC	91.7%	90.5%	77.1%	63.0%	48.6%	23.9%	35.1%

^a Based on Form 8-Ks by calendar year of filing that contain Item 5.06 (Change in Shell Company Status) disclosures, based on data from Intelligize, omitting duplicate reports from the same issuer filed on the same day.

We estimate that, in addition to existing SPACs that have yet to complete a de-SPAC transaction (as of the end 2022, there were 324 such SPACs according to the figures reported in Table 3), approximately 156 additional existing non-SPAC reporting shell companies may be affected by the final rules.¹²⁵¹ Almost all of these non-SPAC reporting shell companies trade in the OTC market and are smaller than SPACs in terms of market capitalization and total assets.¹²⁵² We further estimate that approximately 7.7% (12) of these

shells may also be affected by the definition of the term "blank check company" for purposes of the PSLRA in the final rules.¹²⁵³

B. Benefits and Costs of the Adopted Rules

1. Disclosure-Related Rules

i. Definitions (Item 1601)

New Item 1601 defines certain parties and transactions to which the requirements of subpart 1600 of Regulation S–K apply. Defining the

terms "special purpose acquisition company," "de-SPAC transaction," "SPAC sponsor," and "target company" establishes the scope of the parties and transactions subject to the requirements of subpart 1600 and any other rules, including other final rules, that rely on these definitions and thereby provides both registrants and investors notice of the associated obligations and expectations.¹²⁵⁴

As discussed above, in response to commenters, the Commission is adopting Item 1601 with

¹²⁴⁷ See *supra* sections VIII.A.3.

¹²⁴⁸ This estimate is based on staff review of all registrants, by unique CIK, that filed at least one registration statement, or quarterly or annual report in 2022 and for which the term "penny stock" did not appear in any of these filings according to a text search from Intelligize. This approach to identifying penny stock issuers may be subject to errors as studies have found that self-reported SIC codes may contain errors that could cause a higher number of issuers to be counted as affected parties than should be counted. See, e.g., Murat Aydogdu, Chander Shekhar & Violet Torbey, *Shell Companies as IPO Alternatives: An Analysis of Trading Activity Around Reverse Mergers*, 17 Applied Fin. Econ. 1335 (2007) ("Not all firms that use SIC code 6770 are actually blank checks. For instance, companies are required to file Form 12 after an acquisition to notify the SEC of their new SIC code. Many fail to file as they acquire operations in a business with a more descriptive SIC code, yet they continue to use 6770."). Our estimate does not seek to reclassify potential errors in this case because we are not able to distinguish when the classification error would represent a mistake made by a registrant that knows it is not a blank check company for SIC code

purposes versus when the registrant is mistaken in its belief that it is a blank check company for SIC code purposes. In the latter case, even if mistaken about its blank check company status for SIC code purposes, the party may still be affected by the final rules because they may currently make, or believe they are able to make, forward-looking statements that would fall under the PSLRA safe harbors.

¹²⁴⁹ If a previously non-public shell company files a registration statement, the financial statements included in the registration statement would be required to comply with Regulation S–X, including final Rule 15–01. We currently lack the data necessary to estimate the number of shell companies that are private that could be impacted by Article 15 if they file such a registration statement. As a result, this data is not included in the estimates discussed in our analysis.

¹²⁵⁰ The portion of non-SPAC shell company mergers may be overstated if some of the filings reflect changes in shell company status that are not a result of a business combination, such as a change in business model.

¹²⁵¹ This estimate is based on staff review of all registrants' self-reported status as a shell company

on the cover page of the most recent annual report (Form 10–K, 20–F, or 40–F) or an amendment thereto filed in calendar year 2022 by unique CIKs of entities that are not already identified as SPACs.

¹²⁵² As of year-end 2021, the average market capitalization of a non-SPAC shell company was \$154,731,262 while the average market capitalization of a SPAC was \$306,204,218. Based on the most recent periodic disclosure filed per registrant before Dec. 31, 2021, the average total assets of a non-SPAC shell was \$33,666,553 while the average of total assets of a SPAC was \$309,570,778.

¹²⁵³ This estimate is based on a cross-tabulation, by unique CIK, of potentially affected parties identified as blank check companies (*supra* note 1248) and as shell companies (*supra* note 1251).

¹²⁵⁴ See, e.g., General Instruction I.2 of Form S–4 (If the target company, as defined in Item 1601(d) of Regulation S–K (17 CFR 229.1601(d)), in a de-SPAC transaction is not subject to the reporting requirements of either section 13(a) or 15(d) of the Exchange Act, certain additional information with respect to the target company must be provided).

modifications.¹²⁵⁵ We have designed the rules with particular types of parties and transactions in mind and we have endeavored to define these parties and transactions in a way that is consistent with our understanding of current market usage. Overly narrow definitions will generally result in reduced costs and benefits. Conversely, overly broad definitions may introduce unintended costs to market participants without necessarily providing commensurate benefits, as they may be less applicable to settings we are not explicitly contemplating today.

ii. SPAC IPOs and Other Registered Offerings

At the SPAC IPO stage, there are information asymmetries between potential SPAC investors and the SPAC, making it challenging for investors to differentiate between SPACs and other investment options and to differentiate among SPACs. A SPAC sponsor looking to secure IPO investments may have incentives to obscure information that would be relevant to potential investors.¹²⁵⁶ Information regarding the specifics of the SPAC that informs investors about the probability of completion of a de-SPAC transaction and the potential payoffs to the investor of such a transaction is important for investment decisions. For example, information about the SPAC sponsor or potential conflicts of interest of the SPAC sponsor may factor into investors' decisions.¹²⁵⁷ This information should also benefit investors attempting to differentiate between investments in alternative SPACs.

a. Prospectus Cover Page, Summary, and Other Disclosures (Item 1602)

Item 1602 requires a prospectus filed in connection with a SPAC's IPO to disclose information in plain English on certain features unique to SPAC offerings and the potential associated risks, in addition to the information currently required by Item 501 of Regulation S-K and 17 CFR 229.503(a) (Item 503 of Regulation S-K), on the prospectus cover page and in the prospectus summary, as discussed above.¹²⁵⁸ On the cover page, SPACs will be required to disclose, among other information: the proposed timeline of the SPAC to consummate a de-SPAC transaction; redemption terms;

compensation (including securities issued to certain SPAC insiders); any actual or potential conflict of interest of the SPAC sponsor, its affiliates, or promoters; and a tabular disclosure of net tangible book value per share, as adjusted, for various redemption levels. In the prospectus summary, SPACs will be required to disclose, among other information, the manner in which the SPAC will identify and evaluate potential business combination candidates, period of time in which the SPAC intends to consummate a de-SPAC transaction and its plans in the event it does not consummate such a transaction within the time period including the timeline and potential extensions, the material terms of the trust or escrow account, plans to seek additional financing (and the impact on shareholders), and details on the impact of compensation and securities issuances on dilution. These additional disclosures are meant to reduce the information asymmetry between the SPAC and potential investors. These disclosures will provide enhanced information for investors to assess their investment and voting decisions and to differentiate between the SPAC and other investment options.

We expect Item 1602 will also reduce SPAC investors' information processing costs. Investors in SPACs vary in financial sophistication and ability to process the information provided in SPAC IPO prospectuses, and the potential benefits may accrue more to investors that are less financially sophisticated. Specifically, because investors are likely to allocate their attention selectively,¹²⁵⁹ requiring disclosure regarding important features and associated risks of SPAC investments on the prospectus cover page and in the prospectus summary will increase the likelihood that investors focus on the salient information by making it more noticeable and easier to parse.¹²⁶⁰ In addition, the new disclosures in the

prospectus summary may further reduce information processing costs by providing information about important SPAC features in plain English and in a concise format.¹²⁶¹

Item 1602(b)(6) will require tabular disclosure in the prospectus summary regarding the nature and amount of the compensation received or to be received by, as well as the amount of securities issued or to be issued to, the SPAC sponsor, its affiliates, and promoters separately, and the extent to which this may result in a material dilution of the purchasers' equity interests. There is empirical evidence that visualization improves individuals' perception of information.¹²⁶² For example, one experimental study shows that tabular reports can lead to better decision-making.¹²⁶³ Because information about compensation received by and securities issued to SPAC sponsors and others may be important to SPAC investor decision-making, the tabular format of these required disclosures may help those investors (especially those that are less financially sophisticated) more easily process the implications of such compensation or securities issuances thereby potentially improving their investment decisions.¹²⁶⁴

More broadly, Item 1602 will standardize these disclosures across all registration statements filed for SPAC IPOs, which may make it less costly for investors to compare terms across offerings and thereby promote better investment decisions to the extent these lower costs facilitate broader or more comprehensive analysis.

Finally, to the extent the additional disclosures on the cover page and in the prospectus summary would increase investors' awareness of SPAC sponsors' incentives and potential conflicts of interest, they may have an incremental disciplining effect on SPAC sponsors' behavior. For example, if SPAC

¹²⁶¹ Existing research notes that individuals bear costs in absorbing information and that the ability of individuals to process information is not unbounded. See Richard Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (1980); David Hirschleifer & Siew Hong Teoh, *Limited Attention, Information Disclosure, and Financial Reporting*, 36 J. Acct. & Econ. 337 (2003).

¹²⁶² See, e.g., John Hattie, *Visible Learning: A Synthesis of Over 800 Meta-Analysis Related to Achievement* (2008).

¹²⁶³ See Izak Benbasat & Albert Dexter, *An Investigation of the Effectiveness of Color and Graphical Information Presentation Under Varying Time Constraints*, 10 MIS Q. 59 (1986).

¹²⁶⁴ See *infra* section VIII.B.1.ii.b. for the discussion of Item 1602(a)(4), which would require that the prospectus cover page include a simplified dilution table depicting the estimated remaining net tangible book value, as adjusted, per share at quartile intervals up to the maximum redemption threshold.

¹²⁵⁵ See *supra* section II.A.

¹²⁵⁶ We acknowledge there may exist heterogeneity in risk preferences among investors, but this does not substantially change the incentive misalignment with the SPAC's incentives.

¹²⁵⁷ See *supra* sections II.B and II.C.

¹²⁵⁸ See *supra* section II.E for more information about current disclosure requirements.

¹²⁵⁹ See, e.g., George Loewenstein, Cass R. Sunstein & Russell Golman, *Disclosure: Psychology Changes Everything*, 6 Ann. Rev. Econ. 391 (2014).

¹²⁶⁰ Salience detection is a key feature of human cognition allowing individuals to focus their limited mental resources on a subset of the available information and can cause them to overweight this information in their decision-making processes. See, e.g., Daniel Kahneman, *Thinking Fast and Slow* (2013); Susan Fiske & Shelley E. Taylor, *Social Cognition: From Brains to Culture* (3d ed. 2017). Moreover, for financial disclosures, research suggests that increasing signal salience is particularly helpful in reducing limited attention of individuals with lower education levels and financial literacy. See, e.g., Victor Stango & Jonathan Zinman, *Limited and Varying Consumer Attention: Evidence from Shocks to the Salience of Bank Overdraft Fees*, 27 Rev. of Fin. Stud. 990 (2014).

sponsors face greater scrutiny from investors, they may take additional care in finding and negotiating terms with various parties or take steps to mitigate the extent of any conflict of interests they will have to disclose.

The additional required disclosures on the prospectus cover page and in the prospectus summary may increase compliance costs for SPACs to the extent that they will need to provide more information in their IPO prospectuses than they currently provide. We believe that SPACs are likely to have this information readily available. In addition, based on the experience of the Commission staff reviewing current SPAC filings, SPACs often already disclose some of this information, such as the time frame for the SPAC to consummate a de-SPAC transaction. Thus, we expect that the additional compliance costs resulting from these new items will not be significant.

Investors may also experience additional economic costs from these new disclosures. In particular, it is possible that, by requiring more items to be added to the cover page and the prospectus summary, the salience of the current required disclosures on the cover page and in the prospectus summary may be reduced because they will have to compete with the new required disclosures for investors' attention, a concern voiced by some commenters.¹²⁶⁵ In addition, because Item 501(b) of Regulation S-K limits the information on the outside cover page to one page, it is possible that, under certain facts and circumstances, the amount of information required to be included could reduce the readability of the cover page. As a result, some investors may pay less attention to the cover page as a whole. Conversely, it is

possible that investors may overweigh the salience of certain disclosures of potential outcomes, such as tentative plans to seek additional financing, potentially assuming them to be statements of greater certainty than intended.¹²⁶⁶ However, this potential cost could be mitigated by firms providing clarity as to their assumptions and expectations regarding these disclosures.

b. Dilution (Item 1602(a)(4) and (c))

SPAC investors may experience dilution from various transactions by a number of parties at various stages of a SPAC's lifecycle, and understanding these potential dilutive impacts is important for investment and other decisions.¹²⁶⁷ As an example of such a source of dilution, in different transactions over the life cycle of the SPAC, there may be variations in the amount of consideration paid in exchange for shares of the SPAC that will cause dilutive or anti-dilutive effects. One specific example of such variations involves the SPAC sponsors' "promote," which is typically obtained at a nominal value (e.g., \$25,000, which depending on specific facts and circumstances could result in a per share purchase price of several cents) compared to the SPAC IPO purchase price (typically \$10 per share). SPAC IPO shares are also commonly bundled with warrants and rights, resulting in the potential future impacts on net tangible book value per share, which may be dilutive or anti-dilutive of net tangible book value per share depending on whether the exercise price exceeds net tangible book value per share at the time.

¹²⁶⁶ A similar concern was raised by a letter from Vinson & Elkins.

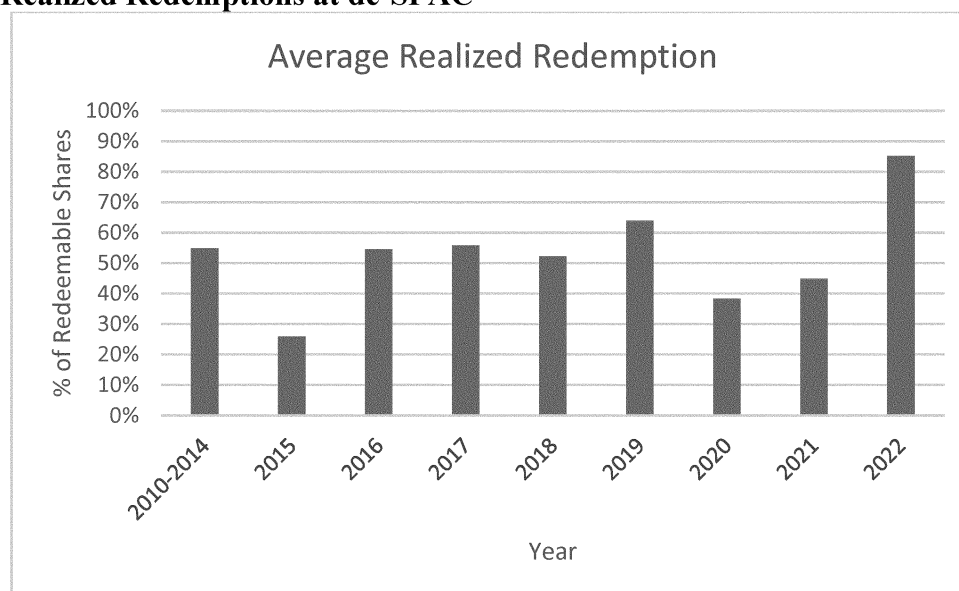
¹²⁶⁷ In this section and throughout the Economic Analysis, references to dilution of SPAC investor interests refer to the dilutive effects on non-redeeming public shareholders, unless otherwise specified.

The impact of dilution is further magnified by a common feature in many SPACs whereby public shareholders may redeem their shares before the de-SPAC transaction and have their original investment returned plus a pro-rata amount of earnings (typically interest) accrued on the original investment proceeds held in the trust account. Following these redemptions, the non-redeeming IPO investors will own a relatively smaller portion of the SPAC relative to the portion owned by the SPAC sponsor (SPAC sponsor shares are typically not redeemable). This change in the relative portion of shares generally has a dilutive effect because the IPO investors often contribute more per share to net tangible book value (typically \$10/share) than do SPAC sponsors (typically several cents per share, as mentioned above).

To put the effects of redemption in context, we present the historical redemption levels below in Figure 2. Figure 2 presents the average realized redemptions from de-SPAC transactions between 2010 and 2022. As shown in Figure 2, typically just over half of the public shareholders opt to redeem their shares on average before the de-SPAC transaction (the average redemption level for de-SPACs from 2010 to 2022 was 55% and the median was 65%), but that the level of redemptions is not consistent over time. For example, in 2022 the average redemption level was 85%, whereas the average in 2020 and 2021 was 38% and 45%, respectively. This time-series variation in average redemption rates is not a result of variation in the average maximum redemption rate, which has remained relatively steady at just above 90% since 2015.¹²⁶⁸

¹²⁶⁸ Based on staff review, many SPACs set maximum redemption thresholds to maintain a minimum of \$5,000,000 net tangible assets to avoid meeting the definition of a "penny stock" in 17 CFR 240.3a51-1(g)(1).

¹²⁶⁵ Letters from ABA, Loeb & Loeb, Ropes & Gray, Vinson & Elkins. See *supra* note 325 and accompanying text.

Figure 2. Realized Redemptions at de-SPAC^a

^a The redemption realizations are based on the sample of SPACs identified in Table 2.

Understanding the sources and extent of dilution, including the impact of potential redemptions, is important for investors to make informed decisions and efficiently allocate capital. As discussed above, the final rules require new disclosures about the sources and extent of expected dilution, which we expect will reduce the information asymmetry between the various SPAC participants by providing information that investors can use to form their expectations about the investment value of a SPAC.¹²⁶⁹ Further, we are requiring disclosures that demonstrate the changing effect on dilution that various levels of redemptions might have.¹²⁷⁰

The dilution disclosures in Item 1602(a)(4) and (c) require measuring dilution using net tangible book value per share, adjusted as if the offering (and assumed redemption levels) have occurred and giving effect to material probable or consummated transactions (other than the de-SPAC transaction itself). Net tangible book value per share, as adjusted, captures effects from changes in net tangible book value, as adjusted, in the numerator (for example, returning cash to redeeming shareholders or other transactions that change the amount of assets held in the SPAC trust account), and/or the number of shares outstanding in the denominator (for example, redemptions of shares or other transactions that change the total shares outstanding).

As a simple illustrative example of how net tangible book value per share,

as adjusted, reflects various dilutive effects, a hypothetical SPAC might conduct an IPO at \$10/share, and sell 80 shares, resulting in \$800 in the trust account. The SPAC sponsor might receive promote shares equal to 25% of the IPO shares sold, or 20 shares, bringing the total shares outstanding to 100 (for simplicity, we omit the typical nominal amount SPAC sponsors often pay for their promote). Assuming no other expenses, the net tangible book value per share, as adjusted, in this simplified hypothetical would be \$800/100 shares or \$8/share. In this hypothetical example, if 75% of public shareholders, representing 60 total shares, were to redeem their shares for \$10/share, then \$600 would be removed from the trust account and paid to those redeeming shareholders, and the SPAC would be left with \$200 in the trust account, 20 shares owned by the public shareholders, and 20 shares owned by the sponsor. In this case, the net tangible book value per share, as adjusted, would be \$200/40 or \$5/share. This \$5/share value can be thought of as reflecting that, of the \$10/share invested by public investors in the IPO, only half remains to be invested in the target. It can also be seen to reflect the fact that the SPAC sponsor and the non-redeeming public investors now have an equal ownership (where initially there was a 4:1 ownership ratio), and the SPAC sponsor owns half of the remaining shares.¹²⁷¹

¹²⁷¹ We note that while this example suggests the redemptions resulted in dilution as measured by net tangible book value per share, as adjusted, the

At the SPAC IPO stage, we expect that the tabular disclosure of net tangible book value per share, as adjusted, under Item 1602(a)(4) and (c) typically may include fewer sources of dilution that factor into such calculation as compared to the number of sources of dilution that factor into tabular disclosure of value.¹²⁷² While many SPACs adopt a standard structure and set of governing terms, and we expect the sources of dilution to be broadly similar across SPACs at the IPO stage, we expect the final rules will enable investors to better differentiate the SPAC from other investment opportunities and, where they exist, identify differences among individual SPACs.

Specifically, Item 1602(a)(4) requires registration statements on Form S-1 or Form F-1 filed by SPACs, including for an IPO, to include on the cover page a tabular disclosure of net tangible book value per share, as adjusted, as of the most recent balance sheet date at quartile intervals based on the percentages of the maximum redemption threshold, and the difference between this value and the offering price.¹²⁷³ This net tangible book value measure must be adjusted “as if” the offering and assumed redemption levels, under Item 1602(a)(4), have occurred and to give effect to material probable or consummated transactions (other than the completion of the de-SPAC transaction itself).

resultant concentration of ownership may be seen by the non-redeeming shareholders as beneficial.

¹²⁷² See *supra* section II.D.

¹²⁷³ *Id.*

¹²⁶⁹ See *supra* section II.D.

¹²⁷⁰ *Id.*

Item 1602(a)(3) also requires a further cover page disclosure of whether the compensation or issuance of securities described in Item 1602(a)(3) may result in material dilution of the purchasers' equity interests. Item 1602(b)(6) requires in the prospectus summary similar disclosure to that of Item 1602(a)(3) but specifies that the registrant should describe the extent (rather than "whether," as required in Item 1602(a)(3)) to which the associated compensation or issuance of securities may result in material dilution of the purchasers' equity interests.

Item 1602(c) requires that registered offerings by SPACs (other than de-SPAC transactions) provide a description of each material potential source of future dilution following the registered offering (e.g., a SPAC's IPO). The item also requires tabular disclosure for the same quartile intervals as in Item 1602(a)(4) of the net tangible book value per share, as adjusted, and the natures and amounts of dilution used to determine the values in the tabular disclosure, as well as other information necessary to understand the disclosure, among other things.¹²⁷⁴ These new disclosures will provide investors with more detailed information on the potential sources of dilution which may better enable them to form expectations regarding the future value of their securities, including their shares should they opt not to redeem.

We expect these dilution disclosures at the SPAC IPO stage will facilitate investor differentiation between SPACs as an investment and other non-SPAC investments by highlighting the sources of potential dilution and demonstrating their effects for investors to incorporate into their investment decisions. While some of this information is available elsewhere as required by existing disclosures (e.g., outstanding share information),¹²⁷⁵ these dilution disclosures centralize and standardize that information, making it more salient and readily available for investors to understand the material differences in a SPAC in contrast with other investments. Similarly, we expect the additional detail of potential sources of dilution and tabular disclosure of net tangible book value per share, as

adjusted, to provide relevant comparison information to investors seeking to differentiate between SPACs. Together, we expect this information will help investors to better understand the effects of dilution on their investments and ultimately to make better-informed investment decisions.

We acknowledge that it is possible the dilution disclosures could be interpreted by investors as conveying more certainty about the sources or effects of dilution (or lack or omission thereof, where those sources are not deemed probable) than is intended by the SPAC.¹²⁷⁶ However, the requirement in Item 1602(c) that the SPAC include a "description of the model, methods, assumptions, estimates, and parameters necessary to understand the tabular disclosure" should mitigate this possibility, and provide investors sufficient context to fully understand the disclosure's underlying assumptions and limitations they impose.

We expect the dilution disclosures at the IPO stage to provide valuable information to investors, both to compare between SPAC IPOs, and as a baseline against which they can compare the de-SPAC dilution disclosures, if and when a de-SPAC transaction is proposed. We expect this dilution disclosure to be especially informative for SPAC investors who remain investors in the combined company, as historically they have been greatly impacted by the above-mentioned dilution effects.¹²⁷⁷ Further, if investors do not understand the full extent of the dilution, it may not be fully reflected in market prices, and thus we expect that requiring clear and concise dilution disclosures will ameliorate this potential mispricing (especially so for potential warrants or other derivative securities) and improve overall allocative efficiency.¹²⁷⁸

Given the empirical evidence that visualization improves individuals' perception of information¹²⁷⁹ and that any dilution caused by redemption may have an adverse effect on investors who choose not to redeem, we expect that the tabular format of these disclosures will help investors (especially those that are less financially sophisticated) more

easily process the financial implications of dilution and consequently improve their investment decisions.

Moreover, the required dilution disclosure should provide prospective SPAC investors with information (with the aforementioned benefits of the tabular format) that more accurately represents the dilution that they might experience if they invest in the SPAC, as compared to current Item 506 disclosures with regard to the effect of potential redemptions.¹²⁸⁰ SPACs currently disclose the potential dilution pursuant to Item 506, and commonly focus solely on a single maximum redemption scenario.¹²⁸¹ This single threshold may be less useful to investors than the new tabular presentation of quartile intervals of redemption levels because the actual redemptions in connection with a de-SPAC transaction rarely reach the maximum allowable amount. Commenters largely agreed with this assessment,¹²⁸² with one commenter noting that "more detailed information on the potential impact of dilution on the value of SPAC shares could help investors better understand the various sources of dilution and the extent to which their investments might drop in value" and that this information could "factor into their decision making."¹²⁸³

The reasoning that a tabular disclosure at multiple levels of redemption will better inform expectations of the ultimate dilution is supported by the evidence in Figure 2, which demonstrates that while the maximum redemption level has been very stable over time, the actual redemption levels have been typically far below the maximum threshold. The final rules will provide investors with more granular information about potential dilution across multiple redemption levels than previously required, which should provide information more congruent with the observed variation in dilution—such as that shown by the variation from one year to another of average realized redemption percentages in Figure 2. This, in turn, should allow investors to better anticipate the effects of such dilution on future returns to these investors from their investment and better inform their investment decision-making.¹²⁸⁴

¹²⁷⁴ See *supra* section II.D for a more detailed description of the disclosure requirements.

¹²⁷⁵ Some commenters raised this issue. See, e.g., letter from Loeb & Loeb. See *supra* note 245 and accompanying text. With regard to outstanding share information, see, e.g., 17 CFR 210.5–02 (Rule 5–02 of Regulation S–X) (requiring disclosure of the title of each class of stock, the number authorized, the number outstanding, and the dollar amount thereof) and Item 11(e) of Form S–1 (requiring financial statements that meet the requirements of Regulation S–X).

¹²⁷⁶ A similar concern was raised by a commenter. See letter from White & Case.

¹²⁷⁷ See Klausner, Ohlrogge, & Ruan, *supra* note 30 (finding that "SPAC shareholders bear all costs" associated with the dilution of cash associated with the SPAC structure and redemptions, based on empirical analysis of post-merger performance using the sample of de-SPAC transactions occurring between Jan. 2019 and June 2020).

¹²⁷⁸ See Gahng, Ritter & Zhang, *supra* note 30; Klausner, Ohlrogge, & Ruan, *supra* note 30.

¹²⁷⁹ See Hattie, *supra* note 1262; Benbasat & Dexter, *supra* note 1263.

¹²⁸⁰ See *supra* note 221.

¹²⁸¹ *Id.* SPAC IPO registration filings currently include dilution disclosures, and these disclosures typically present dilution given 100% redemption.

¹²⁸² See, e.g., letters from Bullet Point Network, CII, Consumer Federation.

¹²⁸³ Letter from Consumer Federation.

¹²⁸⁴ See Klausner, Ohlrogge & Ruan, *supra* note 18.

The disclosures may not include some dilution effects in some SPAC structures. For example, as one commenter explained, “some de-SPAC transactions are structured such that certain funding mechanisms, such as backstop, forward purchase or PIPE arrangements, apply only in the event of certain redemption thresholds.”¹²⁸⁵ We agree that there are significant intricacies involved in SPAC structures that are not known at the time of the SPAC IPO, and that those intricacies can impact the extent and patterns of dilution faced by non-redeeming shareholders. However, we believe there is still significant benefit to investors in a tabular presentation of dilution at different redemption levels for those sources of dilution that qualify as “material probable or consummated transactions” as required under the final rule. Further, we note that the requirement for non-tabular disclosure of “each material potential source of future dilution” under Item 1602(c) may discuss a broader set of items than those that are included for purposes of calculating the tabular dilution measure, which could capture some of the complex effects explained by the commenter. Further, the final rules regarding dilution disclosures should provide more clarity into these complex effects than the current, more simplified disclosures pursuant to Item 506.

We expect the final rules to reduce the costs to investors of conducting a dilution analysis. Without the tabular disclosures we are requiring, each shareholder wishing to understand the net effects of all the financing arrangements would have to calculate the various conditions themselves—which would require a full understanding of the terms and extents to which they interact—before being able to calculate the ultimate impact on dilution. Under the final rules, this process will be completed by the registrant, which already has the full understanding of conditions and terms and is best suited to conduct said calculations.

The tabular format of the disclosures required by Item 1602(a)(4) and (c) will standardize the presentation of dilution information, which we expect will allow investors to analyze and compare more easily across SPACs. This increase in comparability should allow investors to compare the structural differences in dilution across SPACs which, to the extent relevant, should improve investment and capital allocation decisions.

We expect the incremental compliance costs of the final dilution disclosure requirements at the SPAC IPO stage to be low for two reasons. First, registrants should already have the underlying information at their disposal and are therefore unlikely to incur significant additional costs to procure the necessary data (especially so since SPACs currently conduct a dilution calculation pursuant to Item 506).

Second, while Item 1602(a)(4) and (c) require registrants to account in the tabular disclosure for material probable sources of dilution and analyze several levels of redemption, which may require the services or input of quantitative specialists, the material probable sources of dilution are generally common across SPAC offerings and are generally well known and quantifiable. For example, sources of dilution at the IPO stage may include shareholder redemptions, SPAC sponsor compensation or “promote,” general and administrative expenses, underwriting fees, warrants, and other convertible securities.¹²⁸⁶ Because of the consistency that a tabular format should promote, it is likely that a standard approach based on best practices will emerge, reducing registrant costs over time.

We are also amending Form S-1 to no longer require Item 506 dilution disclosures for SPAC filings because the dilution disclosures required in Item 1602 will replace those generic dilution disclosures. We believe these Item 506 disclosures are less informative in the SPAC setting because, based on the Commission staff’s experience reviewing recent SPAC filings, SPACs classify the redeemable shares as temporary equity and exclude the cash raised from sales of those shares from the net tangible book value. This classification results in a dilution measure that excludes the vast majority of the SPAC’s cash holdings.¹²⁸⁷ Thus, to the extent that current Item 506 dilution calculations are duplicative of or less relevant to investment decisions

than the dilution disclosures at the SPAC IPO required by the final rules, we expect the exclusion of the Item 506 dilution disclosures will lessen information acquisition costs for investors without omitting important information.¹²⁸⁸ Removing the Item 506 disclosure requirement will also remove any disclosures costs that would have otherwise been incurred by registrants to produce those disclosures.

c. Sponsors and Conflicts of Interest (Item 1603)

At the SPAC IPO, new Item 1603(a) requires disclosure of certain information regarding a SPAC sponsor, its affiliates, and any promoters. This item requires, among other information, disclosures concerning the SPAC sponsor that include the following: name, form of organization, controlling persons, general character of business, and any arrangements or other agreements between the sponsor and the SPAC, its officers, directors, or affiliates with respect to determining whether to proceed with a de-SPAC transaction. This item also requires, among other information, disclosures about the SPAC sponsor, its affiliates, and promoters that include the following: their experience; material roles and responsibilities and the nature and amounts of their compensation and reimbursements and SPAC securities issued to them or to be issued to them.¹²⁸⁹ To the extent that such disclosures are not already provided or are only partially provided, this new disclosure requirement will provide investors with additional information related to the experience and incentives (such as those due to characteristics of the compensation structure) for the SPAC sponsor and the other parties subject to these disclosures.¹²⁹⁰

These disclosures about the SPAC sponsor, affiliates, and promoters may benefit investors by enabling them to better evaluate the circumstances that may impact their investment decision regarding a specific SPAC.¹²⁹¹ Given

¹²⁸⁶ For a detailed discussion of certain potential sources of dilution and the calculation of net tangible book value per share, as adjusted, see *supra* section II.D.3. We note that many of these sources of dilution captured by net tangible book value per share, as adjusted, follow treatment under GAAP, thus the cost of calculating them is expected to be low, and in many cases required otherwise as part of the SPAC financial disclosures.

¹²⁸⁷ Several commenters similarly expressed the view that Item 506 net tangible book value is less relevant to SPAC investors. See, e.g., letter from White & Case (stating that the current net tangible book value calculation according to U.S. GAAP “produces a result that is not practically relevant to prospective investors in the public shares whatsoever.”).

¹²⁸⁸ The information acquisition costs mentioned would entail gathering, processing, and incorporating the information from the Item 506 dilution disclosure into investors’ existing information and decisions.

¹²⁸⁹ Additionally, Item 1602(a)(5) and (b)(7) will require similar conflict of interest disclosures to be displayed prominently on the prospectus cover page and summary, respectively. We expect this prominence will further heighten the benefits discussed in this section, while incurring limited additional compliance cost, as the information is largely already disclosed elsewhere in Item 1603.

¹²⁹⁰ See *supra* section II.B for more information about current disclosure requirements.

¹²⁹¹ Academic literature provides some evidence that characteristics of a SPAC sponsor, such as

¹²⁸⁵ Letter from White & Case.

that investor expectations about the investment value of a SPAC incorporate expectations about the target search process and resulting de-SPAC transaction, investors' assessments likely rely on specifics about the SPAC sponsor and SPAC compensation structure, which these disclosures should help ensure is available.

Item 1603(a) may increase compliance costs at the SPAC IPO, mainly in the form of collecting, preparing, and filing the required information for disclosures about SPAC sponsors, their affiliates, and their promoters. While SPAC sponsors, their affiliates, and promoters may be external to the SPAC, we believe the close relationships typically between the SPAC and these parties will enable the SPAC to request the data required to be disclosed under the final rules with little additional difficulty compared to compiling the same information from persons internal to the SPAC, such as its officers and directors subject to the rules. Overall, we do not expect registrant compliance costs to be substantial because most of this information should be readily available; some of this information is currently being provided by SPACs, as suggested by commenters.¹²⁹² The extent to which this information is already being provided will affect both the additional compliance costs and marginal information benefits commensurately. The final rules will create a uniform and transparent framework across-the-board, maintaining a minimum floor standard should market practice change.

Item 1603(b) requires disclosure of conflicts of interest between: (1) a SPAC sponsor or its affiliates; the SPAC's officers, directors, or promoters; or the target company's officers and directors and (2) the unaffiliated security holders of the SPAC. We expect these disclosure requirements will enable investors to better assess any actual or potential material conflict of interest, including any material conflict of interest that may arise in determining whether to proceed with a de-SPAC transaction and any material conflict of interest arising from the manner in which the SPAC compensates SPAC sponsors, officers, and directors or the manner in which SPAC sponsors compensate its officers and directors. Such enhanced ability to evaluate conflicts should benefit

investors by enabling them to more accurately assess potential adverse selection risks, thereby facilitating better investment decisions. Further, information about conflicts of interest at the SPAC IPO stage should improve investors' ability to differentiate investments in a SPAC from other investment opportunities and to differentiate one SPAC from another SPAC.

With respect to the conflicts of interest disclosures required by Item 1603(b), SPACs could bear direct costs associated with: (i) reviewing and preparing disclosures describing any such conflict of interest; (ii) developing and maintaining methods for tracking any such conflict of interest; and (iii) seeking legal or other advice. While the additional direct costs associated with Item 1603(b) disclosure requirements will depend on the extent to which a SPAC already provides this disclosure under current practices, we expect these costs to generally be low.¹²⁹³ SPACs may also incur additional indirect costs if, although not required under Commission rules, they choose to take actions to mitigate any identified conflict of interest as a result of the final rule. For example, there may be cases where the SPAC would not have otherwise reviewed the conflicts or in cases where the SPAC would not have taken actions to mitigate any identified conflict of interest but for the requirement to publicly disclose the conflicts. However, to the extent a SPAC takes such mitigating actions, there will also be an indirect benefit to investors who will face less adverse selection costs as a result.

Item 1603(c) requires disclosure about the fiduciary duties that a SPAC's officers and directors owe to other companies. We expect that this disclosure will allow investors to assess the extent to which the officers and directors may face outside obligations, including the possibility that they might be compelled to act in the interest of another company that competes with the SPAC. The extent that a SPAC's officers or directors owe fiduciary duties to other companies may also limit the attention that they are able to provide to

the SPAC. We expect that these disclosures will benefit investors by allowing them to better assess the ability and incentives of the officers and directors managing the SPAC.

We do not expect the disclosures of a SPAC officer's or director's fiduciary duties to other companies pursuant to Item 1603(c) will generally impose significant costs on SPACs. Officers and directors who manage the business of the SPAC should know their own roles in connection with other companies, so this information is likely known and easily accessible to the SPAC. Depending on specific facts and circumstances of a SPAC, however, the SPAC officers and directors may incur costs to comply with Item 1603(c) if they must research or seek the advice of counsel to determine whether a fiduciary relationship with another company exists. These costs may be minimal where little or no research or outside advice is required, such as in the absence of any other fiduciary relationships or when those relationships are already known. However, those costs are likely to increase as more research or outside advice is required.¹²⁹⁴ These additional costs (and the corresponding benefits) will be mitigated to the extent a newly formed SPAC would have provided Item 1603(c)-type disclosure even in the absence of the final rule.

d. Structured Data Requirement (Item 1610)

Item 1610 requires all disclosures in Items 1601 through 1609 of Regulation S-K to be tagged in Inline XBRL.¹²⁹⁵ We expect that this requirement will augment the informational benefits of the new disclosure requirements at the SPAC IPO stage by making them easier to retrieve, aggregate, compare, filter, and analyze.

These final rules should be especially beneficial for investors differentiating between SPAC features, particularly due to the standardization of SPAC IPO disclosures, as specified in Items 1602 and 1603. Together, we expect the adopted disclosure rules will facilitate investors' ability to process more

experience or network, may be indicative of the SPAC's ability to select and execute quality transactions. See, e.g., Chen Lin, Proposing Release, *supra* note 7, at 29462, n.30. Additionally, the staff's general experience in observing the SPAC industry is that market participants often emphasize the skill or experience of the SPAC sponsor as important to the performance of the SPAC.

¹²⁹² See, e.g., *supra* notes 128 and 182.

¹²⁹³ The common practice of a SPAC disclosing the presence of actual or potential conflicts of interest as a material risk factor predates SPACs listing on national exchanges. See Vijay M. Jog & Chengye Sun, *Blank Check IPOs: A Home Run for Management* (Working Paper, 2007), available at <https://ssrn.com/abstract=1018242> (retrieved from SSRN Elsevier Database). This evidence suggests that most SPACs are generally aware of these actual or potential conflicts and would therefore only bear costs insofar as our new requirements would involve providing greater detail or specificity in the disclosures of conflicts of interest.

¹²⁹⁴ There may be circumstances in which analysis of the law and governing documents of another company may be required to determine if a role at that company carries fiduciary obligations (such as those that might be commonly owed by a director of a corporation to stockholders depending upon applicable law). Examples of this include situations in which: (1) the role at the other company is an officer role, (2) the relationship with the other company is as a controlling stockholder, or (3) the role is one where the person is involved in governance of another company that is an alternative entity (such as a limited liability company or limited partnership).

¹²⁹⁵ See *supra* section II.I.

information across a wider sample of SPAC IPOs (due to Items 1602 and 1603 requiring SPAC specific information in a standardized format) at a lower relative cost (due to the tagging requirements in Item 1610).

Research evidence suggests that XBRL requirements for public operating company financial statement disclosures mitigate information asymmetry by reducing information processing costs, thereby making the disclosures easier to access and analyze.¹²⁹⁶ Reductions in information processing costs may facilitate the monitoring of companies by external parties, and, as a result, influence companies' behavior, including their disclosure choices.¹²⁹⁷

¹²⁹⁶ See, e.g., Young W. Kim, Jee-Hae Lim & Won Gyun No, *The Effect of First Wave Mandatory XBRL Reporting Across the Financial Information Environment*, 26 J. Info. Sys. 127 (2012) (finding evidence that "mandatory XBRL disclosure decreases information risk and information asymmetry in both general and uncertain information environments"); Yuyun Huang, Jerry Parwada, Yuan George Shan & Joey (Wenling) Yang, *Insider Profitability and Public Information: Evidence from the XBRL Mandate* (working paper, Sept. 17, 2019, last revised May 28, 2020), available at <https://ssrn.com/abstract=3455105> (retrieved from SSRN Elsevier database) (finding that XBRL levels the playing field between insiders and non-insiders, in line with the hypothesis that "the adoption of XBRL enhances the processing of financial information by investors and hence reduces information asymmetry"). We do not expect these findings to materially differ with regards to Inline XBRL requirements.

¹²⁹⁷ See, e.g., Jeff Zeyun, Hyun A. Hong, Jeong-Bon Kim & Ji Woo Ryou, *Information Processing Costs and Corporate Tax Avoidance: Evidence from the SEC's XBRL Mandate*, 40 J. Acct. & Pub. Policy 106822 (2021) (finding XBRL reporting decreases likelihood of firm tax avoidance because "XBRL reporting reduces the cost of IRS monitoring in terms of information processing, which dampens managerial incentives to engage in tax avoidance behavior"); Paul A. Griffin, Hyun A. Hong, Jeon-Bon Kim & Jee-Hae Lim, *The SEC's XBRL Mandate and Credit Risk: Evidence on a Link between Credit Default Swap Pricing and XBRL Disclosure* (Am. Acct. Assoc. Annual Meeting conference paper, Aug. 6, 2014) available at https://www.business.kaist.edu/_prog/seminar/download.php?file=seminar_1_1478854039.pdf&ori_filename=paper.pdf&filedr=kr (finding XBRL reporting enables better outside monitoring of firms by creditors, leading to a reduction in firm default risk); Elizabeth Blankespoor, *The Impact of Information Processing Costs on Firm Disclosure Choice: Evidence from the XBRL Mandate*, 57 J. Acct. Research 919 (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463897 (retrieved from SSRN Elsevier database) (finding "firms increase their quantitative footnote disclosures upon implementation of XBRL detailed tagging requirements designed to reduce information users' processing costs," and "both regulatory and non-regulatory market participants play a role in monitoring firm disclosures," suggesting "that the processing costs of market participants can be significant enough to impact firms' disclosure decisions"). While these studies looked at operating company financial statement disclosures rather than SPAC disclosures specifically, given the general similarity in disclosure settings, the

In addition, we expect Inline XBRL will facilitate increased insight into the specialized SPAC IPO disclosures, and will allow for easier, less costly comparisons with other SPACs by providing additional functionality such as detailed filtering by criteria such as offering size, dilutive impact, or SPAC sponsor name.¹²⁹⁸ Also, as with Inline XBRL tagging of financial statements and notes, the specialized SPAC disclosures will include tagged narrative discussions in addition to tagged quantitative values.¹²⁹⁹ Tagging narrative disclosures in the context of SPAC IPOs should facilitate beneficial analyses, such as automatic comparison or redlining of these disclosures against those provided by other SPACs or targeted assessments of specific SPAC specialized disclosures. For example, without Inline XBRL tagging, using the search term "warrant" to search through the text of all SPAC IPO registration statements to determine how many such offerings disclosed the inclusion of warrants as part of the SPAC sponsor "promote" could return many narrative disclosures outside of that discussion (e.g., disclosures related to warrants offered to investors as part of the IPO).

We expect the requirement to tag SPAC-specific disclosures in Inline XBRL will impose compliance costs on SPACs at an earlier stage of their life cycle than under the current baseline. Currently, SPACs are required to tag financial statements (including notes) and cover page information in certain registration statements and periodic reports in Inline XBRL.¹³⁰⁰ However, SPACs are currently not obligated to tag any disclosures until they file their first post-IPO periodic report on Form 10-Q, Form 20-F, or Form 40-F.¹³⁰¹

Various preparation solutions have been developed and used by operating companies to fulfill XBRL tagging requirements, and some evidence suggests that XBRL compliance costs

findings of these studies suggest that the Inline XBRL requirements in the final rules could directly or indirectly (i.e., through information intermediaries, such as financial media, data aggregators, and academic researchers) provide investors in SPACs with similar benefits.

¹²⁹⁸ See, e.g., Nina Trentmann, *Companies Adjust Earnings for Covid-19 Costs, But Are They Still a One-Time Expense?*, Wall St. J., Sept. 24, 2020 (citing an XBRL research software provider as a source for the analysis described in the article); Bloomberg Lists BSE XBRL Data, XBRL.ORG (2018); Rani Hoitash & Udi Hoitash, *Measuring Accounting Reporting Complexity with XBRL*, 93 Acct. Rev. 259 (2018).

¹²⁹⁹ For example, Item 1603 consists largely of narrative disclosure regarding the SPAC sponsor but also includes quantitative disclosure regarding the compensation paid (or to be paid) to the SPAC sponsor, its affiliates, and any promoters.

¹³⁰⁰ See *supra* section II.I.

¹³⁰¹ See 17 CFR 229.601(b)(101)(i)(A).

have decreased over time for smaller companies.¹³⁰² Generally, registrants without prior experience using such compliance solutions often incur initial implementation costs associated with Inline XBRL tagging, such as costs associated with licensing Inline XBRL compliance software and training staff to use the software to tag the disclosures. Because SPACs are shell companies, which have no or nominal operations, it may be more likely that SPACs outsource their tagging obligations to a third-party service provider. In such cases, a SPAC would avoid the aforementioned software licensing and training costs but incur the costs of retaining such third-party services.

iii. De-SPAC Transactions

Given the hybrid nature of the de-SPAC transaction (i.e., that it contains elements of both an IPO and an M&A transaction), the de-SPAC transaction involves information asymmetries and incentives that are different from those present at the SPAC IPO stage or in traditional IPOs. The de-SPAC transaction represents the introduction of the target company to the SPAC shareholders, who typically vote on approval of the de-SPAC transaction and decide whether to redeem their shares.¹³⁰³ We expect both voting and redemption decisions will benefit from the informational improvements and liability protections arising from the final rules.

a. Sponsors and Conflicts of Interest (Item 1603)

As discussed above, Item 1603 includes, among other things, disclosure of details about the SPAC sponsor, its affiliates, and promoters, and conflicts of interest generally between those parties and SPAC shareholders. Similar to the final rule requirements that apply

¹³⁰² An AICPA survey of 1,032 reporting companies with \$75 million or less in market capitalization in 2018 found, for fully outsourced XBRL creation and filing, an average cost of \$5,850 per year, a median cost of \$2,500 per year, and a maximum cost of \$51,500 per year. This represented a 45% decline in average cost and a 69% decline in median cost since 2014. See AICPA, *XBRL Costs for Small Companies Have Declined 45% Since 2014* (2018), available at <https://us.aicpa.org/content/dam/aicpa/interestareas/frc/accounting/financialreporting/xbrl/downloadabledocuments/xbrl-costs-for-small-companies.pdf>; Letter from Nasdaq, Inc., Mar. 21, 2019, to the Request for Comment on Earnings Releases and Quarterly Reports; Release No. 33-10588 (Dec. 18, 2018) [83 FR 65601 (Dec. 21, 2018)] (stating that a 2018 Nasdaq survey of 151 listed registrants found an average XBRL compliance cost of \$20,000 per quarter, a median XBRL compliance cost of \$7,500 per quarter, and a maximum XBRL compliance cost of \$350,000 per quarter).

¹³⁰³ See *supra* note 31 and accompanying text.

at the SPAC IPO stage discussed above, at the de-SPAC transaction stage, Item 1604(a)(4) and (b)(3) require certain conflict of interest disclosures to be displayed prominently on the prospectus outside front cover page and in the summary.

We expect the benefits of Item 1603 (and Item 1604(a)(4) and (b)(3)) in connection with disclosures at the de-SPAC transaction stage on a proxy, information, or registration statement or on a Schedule TO to be largely the same as the effects of the same Item 1603 disclosures made in connection with the SPAC IPO, as discussed above.¹³⁰⁴ These benefits, however, may be incrementally greater insofar as the disclosures could also guide voting and redemption decisions at the de-SPAC transaction stage, which would not occur in connection with a SPAC IPO.¹³⁰⁵ We similarly expect the costs of compliance with Item 1603 (and Item 1604(a)(4) and (b)(3)) to be comparable at the de-SPAC transaction stage to the costs of compliance at the SPAC IPO stage, as discussed above. However, because application of Item 1603 (and Item 1604(a)(4) and (b)(3)) at the SPAC IPO stage results in SPACs already having prepared and disclosed much of the required information, the costs of updating those disclosures for evolved circumstances at the de-SPAC transaction stage should be lower.

b. Prospectus Cover Page, Summary, and Other Disclosures (Item 1604)

Currently, a de-SPAC transaction may be registered on a Form S-4 or Form F-4, and, to the extent that a de-SPAC registration statement must be filed due to the operation of Rule 145a, we expect that there will be additional registered de-SPAC transactions as a result of the final rules. Item 1604(a) and (b) require any prospectus at the de-SPAC transaction stage to include certain information about the de-SPAC transaction on the outside front cover page and in the prospectus summary, similar to the requirements of Item 1602 at the SPAC IPO stage.¹³⁰⁶ This includes disclosure on the cover page of, among other information: the determination, if any, of the board of directors (or similar governing body) of the SPAC disclosed in response to Item 1606(a) and, if applicable, that the SPAC or the SPAC sponsor received a report, opinion, or appraisal referred to in Item 1607(a); descriptions of certain material

financing transactions; compensation received or to be received by the SPAC sponsor, its affiliates and promoters (including securities issued); and any actual or potential conflict of interest between specified parties of the SPAC and target on the one hand and unaffiliated security holders of the SPAC on the other hand. In the prospectus summary, SPACs will be required to include a brief description of, among other information: the background and material terms of the de-SPAC transaction; the determination, if any, of the board of directors (or similar governing body) of the SPAC disclosed in response to Item 1606(a) and any reports, opinions or appraisals referred to in Item 1607(a); any actual or potential material conflict of interest between specified parties of the SPAC and target on the one hand and unaffiliated security holders of the SPAC on the other hand; compensation received or to be received by the SPAC sponsor, its affiliates, and promoters (including securities issued) in tabular format and the impact of these compensation and securities issuances on dilution in narrative form; the material terms of certain financing transactions; and the redemption rights of security holders and the potential dilutive impact of redemptions on the value of the securities owned by non-redeeming shareholders.

We expect that final Item 1604(a) and (b) will have similar potential direct benefits for investors as those we discussed for Item 1602 above—that is, the additional disclosures on the de-SPAC transaction prospectus cover page and in the prospectus summary may increase the likelihood that investors pay attention to and process this information by making it more salient.¹³⁰⁷ Additionally, the new disclosures in the de-SPAC transaction prospectus summary may reduce information-processing costs for investors, particularly less financially sophisticated investors, by providing certain SPAC-specific disclosures in a concise format. Moreover, as with Item 1602(b)(6) at the IPO stage, Item 1604(b)(4) requires tabular disclosure in the prospectus summary regarding the terms and amount of the compensation received or to be received by the SPAC sponsor, its affiliates, and promoters and the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates, and promoters and the price paid or to be paid for such securities in connection with the de-

SPAC transaction or any related financing transaction, and, outside of the table, the extent to which that compensation and securities issuance has resulted or may result in a material dilution of the equity interests of non-redeeming shareholders of the SPAC. Presenting this information in tabular format may further help reduce information-processing costs for some investors.¹³⁰⁸ Additionally, Item 1604(a) and (b) standardize the required information across all registration statements filed for de-SPAC transactions, making it potentially easier and less costly for investors to compare terms across de-SPAC transactions by different SPACs. Overall, because of the aforementioned beneficial effects of increasing investors' attention and reducing their information processing costs, we expect the additional disclosures on the prospectus cover page and in the prospectus summary will help improve the compounding of important information into investors' investment decisions at a relatively lower cost.

In addition to the direct benefits discussed above, certain information that Item 1604 requires registrants to disclose may benefit investors through incrementally improved SPAC governance. For example, the inclusion of disclosures regarding material potential or actual conflicts of interest could increase investors' attention to such issues, allowing them to identify and focus in on those conflicts they deem potentially adverse to their own interests.¹³⁰⁹ In turn, the disclosures may have an ex ante disciplining effect on SPAC sponsors and others whose conflicts must be disclosed that could mitigate the potential costs to investors of those conflicts of interests.

The additional information that Item 1604(a) and (b) require in the de-SPAC transaction prospectus may increase compliance costs for SPACs if it would result in SPACs needing to gather and disclose information they would not otherwise have provided in a de-SPAC transaction. Additionally, as with Item 1602, it is possible that the disclosures required under Item 1604 could result in additional processing costs for investors.¹³¹⁰ However, to the extent that a SPAC may have otherwise intended to disclose information similar to that required under Item 1604, which based on staff review of existing filings is often the case, or where the SPAC has

¹³⁰⁴ See *supra* section VIII.B.1.ii.

¹³⁰⁵ *Id.*

¹³⁰⁶ See *supra* section II.E for more information about the regulatory baseline. The prospectus is a part of the registration statement.

¹³⁰⁷ See discussion in *supra* section VIII.B.1.ii.b. Also note that Item 1604(c) is discussed separately in the following section.

¹³⁰⁸ See *supra* notes 1262 and 1263 and accompanying text.

¹³⁰⁹ See *supra* section II.C for more detail on the specifics of the required conflict of interest disclosures.

¹³¹⁰ See *supra* note 1265 and accompanying text.

this information readily available, these additional costs and benefits would be mitigated.¹³¹¹

c. Dilution (Item 1604(a)(3), (b)(4), (5), and (6), (c))

By the time a SPAC finds a target company and prepares its de-SPAC transaction, many facts and circumstances that affect dilution and the financial position of the SPAC have changed, both when compared to the SPAC at its IPO stage as well as when compared to other SPACs. The result of this evolution is that, unlike at the SPAC IPO stage when most SPACs exhibit similar features, de-SPAC transactions are often more complex and idiosyncratic. By the time of the de-SPAC transaction, many new sources of dilution are likely to have arisen. For example, a SPAC may determine a potential PIPE investment or potential change to a SPAC sponsor's compensation or securities issued to a SPAC sponsor is a "material probable transaction." Pursuant to Item 1604(c), in calculating dilution, a SPAC will be required to make adjustments to net tangible book value per share, as adjusted, to reflect such events.

Item 1604(a)(3) requires the outside cover page of the prospectus at the de-SPAC transaction stage to contain a statement as to whether certain compensation and securities issuances disclosed pursuant to this item may result in a material dilution of the equity interests of non-redeeming shareholders who hold the securities until the consummation of the de-SPAC transaction. Item 1604(b)(4) requires disclosure in the prospectus summary of the extent to which certain compensation and securities issuances have resulted or may result in a material dilution of the equity interests of non-redeeming shareholders of the SPAC. Item 1604(b)(5) requires disclosure of the dilutive impact on non-redeeming shareholders that any financing transactions associated with the de-SPAC transaction may have. Item 1604(b)(6) requires disclosure of the potential dilutive impact on non-redeeming shareholders of the rights of security holders to redeem their outstanding securities.

Item 1604(c) requires tabular disclosure of the impact from dilutive sources on net tangible book value per share, as adjusted, at intervals representing selected potential

redemption levels that may occur across a reasonably likely range of outcomes. Specifically, Item 1604(c) requires disclosure of the net tangible book value per share, as adjusted, as if the selected redemption levels have occurred and to give effect to, while excluding the de-SPAC transaction itself, material probable or consummated transactions and other material effects on the SPAC's net tangible book value per share, as adjusted, from the de-SPAC transaction. The requirement in Item 1604(c) to provide these disclosures across "a reasonably likely range of outcomes" instead of the fixed quartiles required in Item 1602(c) will allow registrants to account for facts and circumstances that are unique to each SPAC and allow for more customized disclosures that still conform to a consistent and comparable format.¹³¹²

The tabular disclosure in Item 1604(c) is also required to include separate quantification of the dilutive impact from each source of dilution, which will provide detailed disaggregated information on the various sources of dilution.¹³¹³ Lastly, Item 1604(c)(1) requires disclosure at each redemption level of the company valuation at or above which the potential dilution results in the amount of the non-redeeming shareholders' interest per share being at least the initial public offering price per share of common stock.

Generally, we expect Item 1604(c) to result in similar benefits and costs as those discussed above with regard to dilution disclosures at the SPAC IPO stage.¹³¹⁴ As the disclosure calculations in Item 1604(c) will likely include additional factors—such as "material probable transactions"—that were not included in the SPAC IPO stage disclosures, we expect these disclosures at the de-SPAC transaction stage will be more informative for investor expectations about dilution. Consequently, our discussion below focuses on the novel aspects of dilution disclosures at the de-SPAC transaction stage (as compared to dilution disclosure at the IPO stage) and should be considered in addition to our discussion above of the costs and

benefits of dilution information at the SPAC IPO stage.

The dilution disclosure at redemption levels across a "reasonably likely range of outcomes" required in Item 1604(c) will provide investors with information that should more accurately represent the dilution that they might experience if they choose not to redeem their shares, as compared to current disclosures.¹³¹⁵ Further, the specific redemption levels registrants choose to include in the table should convey information about registrant expectations of redemption scenarios that should allow investors to better anticipate the effects of the dilution on their investment value.¹³¹⁶ In addition, as discussed above, we expect that the tabular format of this disclosure will further help investors (especially those that are less financially sophisticated) more easily process the financial implications of dilution.¹³¹⁷

Allowing registrants discretion to select "reasonably likely" redemption levels may impact the comparability of these disclosures across SPACs to the extent that the final rule results in tables with different numbers of chosen redemption scenarios or at different values or with differences in both respects. On the other hand, such allowance should result in registrants selecting redemption levels based on registrant-specific information (for example, if a PIPE investment has a firm commitment to buy if redemption thresholds are reached), which could result in disclosures that are more informative to investors. We expect the informational value of de-SPAC-transaction-specific redemption sensitivity will offset the reduced direct comparability across SPACs.¹³¹⁸ Also, to the extent there is reduced direct comparability, we expect this will be mitigated by some investors using analytic techniques to infer dilution at redemption levels other than those selected by registrants.

We expect some incremental compliance costs from Item 1604(c) for registrants in future de-SPAC transactions that did not already intend to provide disclosures similar in nature

¹³¹⁵ See *supra* note 221.

¹³¹⁶ The specific levels selected would be informative to the extent registrants choose redemption levels specific to their circumstances, rather than adopting fixed or industry standard ranges.

¹³¹⁷ See Hattie, *supra* note 1262; Benbasat & Dexter, *supra* note 1263.

¹³¹⁸ If, as mentioned above (*supra* note 1316), registrants adopt industry standard redemption levels for the purposes of this disclosure, then the decrease in registrant-specific information will be concomitant with an increase in comparability due to the industry standard.

¹³¹¹ We note that even when SPACs would have otherwise intended to disclose similar information, the final rules should still provide value to the extent they result in more consistent standardization than has, or would have, arisen organically.

¹³¹² At this later stage, the SPAC likely has more information with which to estimate the number of shareholders it expects to redeem their shares, potentially allowing for more informative outcome choices in the tabular disclosure.

¹³¹³ In this respect, Item 1604(c) tabular dilution disclosure should be similar to Item 1602(c) tabular dilution disclosure as, in order to quantify the source of dilution for purposes of the table, registrants should present it as an individual line-item in the calculations in the table.

¹³¹⁴ See *supra* section VIII.B.ii.b.

to what is required by this item. Many of these incremental costs to registrants are similar to those at the SPAC IPO stage discussed above, such as the costs of aggregating data and employing quantitative expertise. Factors that mitigate those costs are also similar to those at the IPO stage discussed above, such as data availability and adoption of standard practices.¹³¹⁹ To the extent the multiple dilution disclosures at the de-SPAC transaction stage capture more transactions and complexity than those at the IPO stage, we expect the associated costs to registrants to be relatively higher than those incurred by the SPAC at the IPO stage. However, we also expect these Item 1604 dilution disclosures will have greater informational value to investors at this later, more heterogeneous stage.

d. Background, Material Terms, and Effects of the De-SPAC Transaction (Item 1605)

Item 1605(a) through (c) of Regulation S-K require disclosure of the background of the de-SPAC transaction (e.g., description of any contacts, negotiations, transactions that have occurred), material terms of the de-SPAC transaction, and effects of the de-SPAC transaction and any related financing transactions. Item 1605(d) requires disclosure of any material interests in the de-SPAC transaction or any related financing transaction: (i) held by the SPAC sponsor or the SPAC's officers or directors, including fiduciary or contractual obligations to other entities as well as any interest in, or affiliation with, the target company; or (ii) held by the target company's officers or directors that consist of any interest in, or affiliation with, the SPAC sponsor or the SPAC.¹³²⁰ These disclosures under Item 1605(a) through (d) should benefit investors by providing them with detailed information about the de-SPAC transaction, thereby enabling them to make more informed investment decisions (including voting and redemption decisions, if allowed). For example, the required disclosure could allow investors to assess whether the de-SPAC transaction or any related financing transaction has been structured in a manner that would benefit the SPAC sponsor to the detriment of the other security holders of the SPAC.

Item 1605(e) requires disclosure as to whether security holders are entitled to any redemption or appraisal rights, and if so, a summary of the redemption or

appraisal rights. These disclosures should help investors to better understand their rights and assess the impact of any redemption or appraisal rights on a proposed de-SPAC transaction, including whether the existence of such rights might lead some investors to redeem their securities after voting in favor of a de-SPAC transaction.¹³²¹

Item 1605 could increase registrants' compliance costs related to de-SPAC transactions. The magnitude of the incremental increase in these costs will depend on the amount of information that SPACs and target companies would have intended to disclose in connection with future de-SPAC transactions in the absence of the final rule. Based on staff experience of market practice and current disclosure requirements, we expect registrants to have already planned to disclose much of what is required by Item 1605(a), (b), (d), and (e).¹³²² The disclosures required by Item 1605(c) are not common practice in the staff's experience; thus, they may result in additional costs to registrants (for example, this disclosure may require additional legal advice and management time to gather and analyze information to assess the effects of the de-SPAC transaction). To the extent that registrants already intended to disclose information required by Item 1605 or have the information readily available, the incremental increase in these costs and benefits would be mitigated.¹³²³

e. Board Determination About the De-SPAC Transaction (Item 1606)

If the law of the jurisdiction in which the SPAC is organized requires its board of directors (or similar governing body) to determine whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its shareholders, or otherwise make any comparable determination, Item 1606(a) requires disclosure of that determination. Item 1606(b) requires a discussion of the material factors considered in making the determination, including but not limited to, to the extent considered, the target company valuation, financial projections relied upon by the board of directors (or similar governing body) of

the SPAC, and the terms of financing materially related to the de-SPAC transaction. Item 1606(c) through (e) require disclosure about the de-SPAC transaction, including whether a majority of unaffiliated security holders is required to approve the de-SPAC transaction, the involvement of any unaffiliated representative acting on behalf of unaffiliated security holders, whether the de-SPAC transaction was approved by a majority of the directors (or members of similar governing body) of the SPAC who are not employees of the SPAC, and if known after making reasonably inquiry, the reason behind any abstentions or votes against the transaction.

Investors should benefit from the requirements of Item 1606(a) and (b) as disclosure thereunder will reduce information asymmetry between the SPAC investors and the SPAC by providing information about the board's determination and decision making regarding the de-SPAC transaction. Information disclosed under Item 1606(c) through (e) will benefit investors by providing further details about the de-SPAC transaction bargaining and voting process, including important information regarding potential dissenting director votes, which could potentially mitigate conflicts of interest. These disclosures provide information that collectively should allow investors to understand the multiple factors undergirding the decisions of the board, thereby improving investment decision-making by investors in connection with the de-SPAC transaction.

We expect Item 1606(a) and (b) will result in limited increases in compliance costs for registrants because this information should be readily available to the SPAC as the directors are likely to have already assembled the information necessary to provide these disclosures in carrying out their fiduciary duties to the SPAC, and the disclosure is only required if the law of the jurisdiction in which the SPAC is organized requires such board determination.¹³²⁴ Similarly, we expect the compliance costs of Item 1606(c) through (e) to be minimal as, again, the information is likely readily available, for example because it is recorded in board meeting minutes or found in governance documents. To the extent that registrants already intended to disclose some of the information required by Item 1606 or have this information readily available, the

¹³¹⁹ Redemption decisions by investors can have significant impacts on the dilution faced by non-redeeming shareholders. See *supra* sections VIII.B.1.ii.b and VIII.B.1.iii.c.

¹³²² This is also consistent with comments received. See *supra* note 352.

¹³²³ Again, we note that even when SPACs would have otherwise intended to disclose similar information, the final rules should still provide value to the extent they result in more consistent standardization than has, or would have, arisen organically.

¹³²⁴ Given the data in Table 4, this would apply to most SPACs.

¹³¹⁹ See *supra* section VIII.B.1.ii.b.

¹³²⁰ See *supra* section II.F.1 for information about the regulatory baseline.

incremental increase in the registrant's costs would be mitigated.

One commenter raised the possibility that requiring the identification of members of the governing body that do not vote for the transaction (and the reasoning for their abstention or vote against) might disincentivize them to vote accordingly and "could also have the effect of inhibiting discussion among directors at board meetings."¹³²⁵ Directors are generally subject to fiduciary duties imposed by State or foreign law. As a result, we expect that directors will generally seek to make voting decisions consistent with those fiduciary duties to shareholders or the company irrespective of whether they will be identified as voting against the transaction or abstaining. Further, while it is possible that directors could believe they face increased cost to dissenting publicly (via their official recorded vote) because of this requirement, we do not expect the final rules will detrimentally limit any private conversations among the board of directors, contrary to the assertion of the commenter.¹³²⁶ Consequently, we do not believe this requirement will result in significant instances of de-SPAC transactions being approved even when the majority of directors would have voted against approval but for the final rule, because in those cases, we expect the privately dissenting majority to communicate their dissent and successfully vote to not approve the transaction, in which case no disclosures would be required for such failing votes.

f. Reports, Opinions, Appraisals, and Negotiations (Items 1607)

Item 1607(a) requires disclosure of the information required by Item 1607(b) if the SPAC or the SPAC sponsor received any report, opinion (other than an opinion of counsel), or appraisal from an outside party or an unaffiliated representative referred to in Item 1606(d) that materially relates to any determination disclosed in response to Item 1606(a), the approval of the de-SPAC transaction, the consideration or fairness of the consideration to be offered to security holders of the target company in the de-SPAC transaction, or the fairness of the de-SPAC transaction to the SPAC, its security holders, or SPAC sponsor. Item 1607(b) requires, among other things, disclosure about the preparer of the reports, opinions or

appraisals referred to in Item 1607(a) or negotiations or reports described in response to Item 1606(d), and a summary of those negotiations, reports, opinions or appraisals.¹³²⁷ Item 1607(c) requires all reports, opinions, or appraisals referred to in Item 1607(a) and (b) to be filed as exhibits to the registration statement (e.g., Form S-4, Form F-4) or schedule or included in the schedule if the schedule does not have exhibit filing requirements.¹³²⁸

The Item 1607 disclosures will help ensure that SPAC shareholders have access to information that the SPAC or a SPAC sponsor received from an outside party or unaffiliated representative (referred to in Item 1606(d)) when determining whether to proceed with a de-SPAC transaction. We expect this additional information will improve investors' ability to make informed investment decisions and thus will contribute to price efficiency of the combined company. Moreover, we expect the reduction in asymmetric information will contribute to improved liquidity of the combined company.

As discussed above, Item 1607 requires, among other things, with respect to certain reports, opinions, or appraisals: a summary of findings and recommendations; filing of the report, opinion, or appraisal; and a summary of the bases for and methods of arriving at the findings and recommendations. We expect the requirements of Item 1607 will improve investor investment decision-making. For example, the summary of findings and recommendations should help investors understand the report contents. Even where a report is brief, it may be written in a particular standardized format that the outside party requires in connection with all such reports they provide, which some investors may have difficulty understanding. The summary version disclosed in the filing may present the information in a narrative fashion that enhances investor understanding. If investors prefer additional details, they can consult the actual report filed with the filing that contains the summary. Additionally, the requirement to disclose the bases and methods underlying the findings should provide important information to the investor that may not be part of the report itself but may be necessary to understand the basis for the report's conclusions.

The Item 1607 disclosures should also help investors assess the reliability and relevance of the report. In particular, we expect disclosure related to compensation, method of selection, and material relationships will help investors understand the incentives, potential conflicts of interest, or potential biases that could influence the outside party in preparing the report, opinion, or appraisal. Similarly, we expect the disclosure requirements related to identity, qualifications, instructions, limitations on scope of the investigation, will help investors assess the relevance of the report to their assessment of the proposed combination.

We expect the cost of gathering the information necessary to make the required Item 1607 disclosures related to identity, qualifications, compensation, selection process, instructions and limitations on the scope of the investigation will not be significant because we expect that the information required will generally be readily available to the registrant or the outside party that prepared the report or both.

Regarding material relationships, we expect the limited two-year look-back period will limit the burden on the SPAC to research relevant past relationships. We expect the SPAC and SPAC sponsor (or advisor or other unaffiliated representative) will have this information readily available in internal records, such as agreements between the relevant persons or records of financial transactions. We expect, however, the SPAC or its advisors will incur some costs to perform additional research in order to ensure it has identified the affiliates of the outside party.¹³²⁹

The incremental costs and benefits of the final rules will be somewhat mitigated to the extent that some of these disclosures would otherwise be required to comply with other rules, such as Regulation M-A or FINRA Rule 5150.

Item 1607(c) requires the filing of the relevant report, opinion, or appraisal. As a result of this requirement, registrants will need to ensure the report, opinion, or appraisal is formatted so it can be filed in EDGAR. Based on the Commission staff's experience, we do not expect registrants

¹³²⁵ Letter from Freshfields.

¹³²⁶ *Id.* The commenter did not provide reasoning nor evidence for the conclusion that the final rule would inhibit private discussion among board members, and we are not aware of any economic cost imposed by the final rule that would affect such private conversations.

¹³²⁷ See *supra* section II.G.12.

¹³²⁸ The Item 1607(c) requirements to file reports, opinions, or appraisals as exhibits to the schedule or to include them in the schedule if the schedule does not have filing requirements are relevant to Schedules TO, 14A and 14C.

¹³²⁹ With respect to affiliates of the SPAC sponsor, we do not expect there will be information-gathering costs in addition to those already incurred in connection with Item 1603(a)(7) (regarding indirect material interests in the SPAC sponsor). We discuss those costs above in connection with the discussion of Item 1603, *supra* section VIII.B.1.i.ii.c.

to incur substantial costs in formatting or paying a vendor to format the relevant material for filing in EDGAR.

The final rules may also impact the cost of obtaining third-party reports.¹³³⁰ For example, some parties may be concerned about liability related to reliance on their report, which may prompt them to increase the cost of providing the report.¹³³¹ Additionally, disclosure requirements about the bases and methods underlying the findings may prompt registrants to ask third parties to include fully comprehensive descriptions of their methods and bases, which would potentially increase the fees charged by those third parties. Finally, the compensation disclosures could result in the revelation of competitive business information, which may influence fees for these services.

Finally, while Item 1607 does not mandate registrants to obtain any report, opinion, or appraisal, we acknowledge that it is possible that the requirement could prompt some registrants to obtain reports, opinions or appraisals to avoid the appearance of failing to adequately assess the target companies' prospects and financial condition. As discussed in the baseline, approximately 68% of de-SPAC transactions in 2022 did not disclose that a fairness opinion was obtained in connection with the transaction. Conversely, the requirement may also deter some SPACs from relying on third-party reports, choosing instead to rely on internal assessments (as Item 1607 does not apply to internal work product). As a result, some SPACs may fail to identify low-quality targets during the due-diligence process, to the extent that such internal assessments do not include the depth of analysis or expertise that would ordinarily be reflected in a fairness opinion. Finally, any impact of the rule on decisions to obtain third-party opinions or valuations could depend on the prospects of the target company. That is, sponsors may be more likely to seek third-party opinions for deals that they view as being more likely to result in favorable opinions.

g. Tender Offer Filing Obligations (Item 1608)

We are adopting Item 1608 of Regulation S-K to codify the staff position that a Schedule TO filed in

connection with a de-SPAC transaction should contain substantially the same information about a target company that is required under the proxy rules and clarify that a SPAC must comply with the procedural requirements of the tender offer rules when conducting any transaction for which a Schedule TO is filed, which includes extensions as well as de-SPAC transactions.¹³³² For example, Item 1608 clarifies that SPACs that file a Schedule TO for a redemption must comply with the procedural requirements of Rule 13e-4 and Regulation 14E, such as the requirements to keep the redemption period open for at least 20 business days and to include a fixed expiration date.¹³³³

There were 23 Schedule TOs filed by 21 SPACs from 2020 to 2022.¹³³⁴ A minority of these Schedule TO filings (approximately 35% or 8 Schedule TOs) occurred alone *i.e.*, without the concurrent filing of a proxy statement (Schedule 14A), information statement (Schedule 14C), or registration statement (Form S-4 or F-4) that would provide additional disclosures regarding the de-SPAC transaction. These findings are consistent with our review of Schedule TO filings from 2000–2021 in the Proposing Release.¹³³⁵

¹³³² See *supra* section II.H.

¹³³³ *Id.*

¹³³⁴ A study of 462 de-SPAC transactions that were completed in 2020 and 2021 found that approximately 99% of such transactions were accompanied by proxy disclosures and 81% involved a related filing of a registration statement on either Form S-4 or Form F-4. Of the 81% of de-SPAC transactions that involved the filing of a registration statement, 85.4% were accompanied by a proxy statement on Schedule 14A, and the remaining 14.6% were accompanied by an information statement on Schedule 14C as a result of a consent solicitation. See Michael Levitt, Valerie Jacob, Sebastian Fain, Pamela Marcogliese, Paul Tiger, & Andrea Basham, *supra* note 1231. In a corresponding report covering transactions that were completed in 2022, approximately 87% of de-SPAC transactions involved a registration statement filing on either Form S-4 or F-4, of which approximately 91% were accompanied by a proxy statement and 9% by an information statement as a result of a consent solicitation. See Freshfields, *2022 De-SPAC Debrief: A Comprehensive Review of All 102 De-SPAC Transactions that Closed in 2022*, Freshfields.us (Jan. 2023), available at <https://www.freshfields.us/490963/globalassets/noindex/documents/2022-de-spac-debrief.pdf>.

¹³³⁵ See Proposing Release, *supra* note 7, at 29529, n.501. The historic use of a Schedule TO in connection with a de-SPAC transaction corresponds to a period when share redemption was more limited and de-SPAC transactions were more commonly targeted by hedge funds engaged in 'greenmailing.' See, e.g., Lucian Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, *Dancing with Activists*, 137 J. Fin. Econ. 1 (2020) (describing "greenmail" as an event in which a company targeted by an activist shareholder (such as a hedge fund) purchases shares from the activist at a premium to the market price). In the SPAC context, the activists were most commonly hedge funds that would threaten to prevent an acquisition by voting

Given that the staff has historically expressed the view that a Schedule TO¹³³⁶ should include the same information about the target company that would be required in a Schedule 14A, in view of the requirements of Item 11 of Schedule TO and Item 1011(c) of Regulation M-A and the importance of this information in making a redemption decision, Item 1608 is unlikely to result in a meaningful difference in the nature or amount of information provided by registrants. Further, Rule 145a may reduce the number of SPACs filing a standalone Schedule TO in connection with a de-SPAC transaction thereby also reducing the number of potential parties affected by Item 1608 going forward. While we recognize that, for other redemption events where only a Schedule TO is filed—for instance, when a SPAC intends to extend or is otherwise not engaging in a concurrent de-SPAC transaction—an individual SPAC may incur incremental additional transaction and logistic costs,¹³³⁷ we nevertheless expect the aggregate costs associated with these requirements to remain small because such events are rare.

h. Enhanced Projections Disclosure Requirements (Item 1609)

Item 1609 complements the amendments to Item 10(b) of Regulation S-K¹³³⁸ and applies to projections made in a filing (or any exhibit thereto) in connection with a de-SPAC transaction.¹³³⁹ Item 1609 requires registrants to disclose the purpose for

against a de-SPAC transaction and redeeming a large enough block of shares to cross the SPAC's redemption threshold if the SPAC refused to buy back its shares at a premium. See, e.g., Leerskov, *supra* note 1227 ("Many of these funds are arbitrage investors . . . turning a profit by voting against an acquisition, therefore recouping their initial investment while holding the associated warrants against any possible upside from a successful acquisition. Additionally, more investors began threatening to veto potential SPAC mergers in 2006 and 2007 unless they received deal sweeteners. Mostly, investors asked to be bought out at a premium in exchange for their votes in favor of a merger."). This activity decreased, as did the use of a Schedule TO in connection with a de-SPAC transaction, as SPAC redemption thresholds increased in the early 2000s from approximately 20% on average to approximately 80% on average. See, e.g., Milan Lakicevic, Yochanan Shachmurove & Milos Vulcanovic, *Institutional Changes of Specified Purpose Acquisition Companies (SPACs)*, 28 N. Am. J. Econ. & Fin. 149 (2014) (20.47% to 84.24% from 2003–2006 to 2009–2012); Vulcanovic, *supra* note 1225 (20% to 81.52% from 2003–2013).

¹³³⁶ Additionally, relatively few de-SPAC transactions have historically involved the filing of a Schedule TO alone. See *supra* note 1335 and accompanying text.

¹³³⁷ See letter from ABA.

¹³³⁸ See *supra* section V; *infra* section VIII.B.4.

¹³³⁹ See *supra* section III. For additional information about the regulatory baseline for Item 1609, see *supra* section V.A.

¹³³⁰ In 2021, the average costs for fairness opinions obtained by SPAC acquirers where such information was presented in an SEC filing was approximately \$270,000. See *supra* section VIII.A.2.

¹³³¹ See, e.g., letter from Goodwin ("Most professionals preparing these materials are not trained to prepare these documents in a manner that would be appropriate for public disclosure.").

which the projections were prepared and the party that prepared the projections. It also requires a discussion of all material bases of the disclosed projections and all material assumptions underlying the projections, and any material factors that may affect such assumptions.

If the projections relate to the performance of the SPAC, the rule requires a statement of whether or not the projections reflect the view of the SPAC's management or board about its future performance as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to security holders. If the projections relate to the target company, the rule requires disclosure of whether the target company has affirmed to the SPAC that its projections reflect the view of the target company's management or board about its future performance as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to security holders. If the projections no longer reflect the views of the SPAC's or the target company's management or board regarding the future performance of their respective companies as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to security holders, the rule requires a statement of the purpose of disclosing the projections and the reasons for any continued reliance by the management or board on the projections.

We expect Item 1609, along with the amendments to Item 10(b), will result in improved disclosure about forward-looking information provided to investors, allowing them to better understand and consider the disclosed projections when making their investment decisions. We also expect that the final rules will result in increased standardization of the presentation of projections, which will further reduce information acquisition costs and facilitate comparisons across SPACs.

The required disclosure of preparers' identities and purposes for which the projections were prepared should mitigate information asymmetry between the SPAC and investors as those disclosures may reveal preparers' potential conflicts of interest or allow assessment of their qualifications or abilities to perform projections. This is expected to be beneficial as the existing academic literature provides evidence that SPAC projections are common but

often overly optimistic.¹³⁴⁰ Another study found that optimistic forecasts are correlated with retail investor trading behavior but not so for institutional investor trading, indicating that retail investors may benefit more from the disclosures.¹³⁴¹

We also expect the final rule will benefit investors by providing them with the information necessary to better determine the degree to which they may wish to rely on projections. Specifically, the requirement to discuss material bases and assumptions and their underlying rationales should enable investors to understand how the projections were derived, and subsequently how investors may choose to incorporate these projections into their expectations and decision-making. The requirement to disclose whether any projections disclosed in a filing still reflect the views of management or the board of the SPAC or target company (as the case may be) may also help investors evaluate the reliability of the projections. Because we expect the company that is the subject of the projections to have more information about itself than outsiders, this information also could reduce information asymmetry between the SPAC and/or target company and investors regarding the reliability of those projections. Overall, the adopted disclosure under Item 1609 should benefit investors by helping them assess whether and to what extent to rely on projections used in a de-SPAC transaction in making voting, redemption, and investment decisions.¹³⁴²

¹³⁴⁰ Blankespoor, Hendricks, Miller & Stockbridge, *supra* note 1240, empirically found that: revenue forecasts occur among 80% of SPACs, only 35% of firms meet or beat those forecasts, and SPACs have growth targets that are approximately three times larger than expected (compared to a matched samples of IPO and established firms).

¹³⁴¹ Michael Dambra, Omri Even-Tov & Kimberlyn Munevar, *Are SPAC Revenue Forecasts Informative?* 98 *Acct. Rev.* 1 (2023), empirically found that revenue forecasts are positively associated with abnormal returns in a short window around the merger announcement—and further, that this response is driven by retail investors, with no such response from institutional investors (based on 13F holding filings)—but negatively correlated over longer horizons. The paper caveats that structural differences between firms could also explain the retail investor trading trends, which would dampen the extent to which protections accrue to retail investors.

¹³⁴² D. Eric Hirst, Lisa Koonce & Shankar Venkataraman, *How Disaggregation Enhances the Credibility of Management Earnings Forecasts*, 45 *J. Acct. Res.* 811 (July 17, 2007), available at <https://doi.org/10.1111/j.1475-679X.2007.00252.x> (experimentally shows that disaggregated forecasts, which include forecasts of individual income statement line items, e.g., revenue and costs, are more credible to investors than aggregated forecasts that provide only the bottom-line earnings forecasts). See also, Zahn Bozanic, Darren T.

As discussed above, Item 1609 requires registrants to identify providers of projections. Studies of the behavior of auditors of financial statements found that similar identification was associated with audit quality increases and misreporting decreases.¹³⁴³ We expect Item 1609 will have analogous effects and will increase preparers' sense of accountability and potentially increase preparers' incentives to make reliable projections. We expect this benefit will apply regardless of whether the projections are provided by the management or board of the SPAC or the target company or a third-party provider.

We do not expect the direct compliance costs of Item 1609(a) and (b) to be substantial because companies should have the required information readily available given that the information required to be disclosed largely is what is necessary to perform the projections in the first place.

However, there may be indirect costs to these amendments, such as registrants incurring increased liability costs¹³⁴⁴ or increased proprietary or other disclosure costs,¹³⁴⁵ especially in

Roulstone, & Andrew Van Buskirk, *Management Earnings Forecasts and Other Forward-looking Statements*, 65 *J. Acct. & Econ.* 1 (2018), available at <https://doi.org/10.1016/j.jacceco.2017.11.008> (demonstrating that non-earnings-forecast of items other than earnings forward-looking statements can generate significant responses from both investors and analysts and finding that the forward-looking statements, even statements unrelated to earnings, can provide value-relevant information to the capital market participants).

¹³⁴³ Auditing literature provides evidence that audit quality increases and misreporting decreases when engagement partners are required to sign the audit report or when their identities are disclosed. Joseph V. Carcello & Chan Li, *Costs and Benefits of Requiring an Engagement Partner Signature: Recent Experience in the United Kingdom*, 88 *Acct. Rev.* 1511 (2013) (documenting evidence that audit quality and audit fees increase in the first year when engagement partners are required to sign the audit report in the United Kingdom); Allen D. Blay, Eric S. Gooden, Mark J. Mellon & Douglas E. Stevens, *Can Social Norm Activation Improve Audit Quality? Evidence From an Experimental Audit Market*, 156 *J. Bus. Ethics* 513 (2019) (experimentally demonstrates that PCAOB's requirement of disclosing engagement partners' identity can reduce misreporting).

¹³⁴⁴ Increased liability costs could occur due to the adoption of the PSLRA amendments resulting in projection disclosures no longer being afforded protection under the PSLRA, thereby increasing the expected costs to registrants of forward-looking disclosures. See *infra* section VIII.B.2.ii.

¹³⁴⁵ For example, if a target has a new product line it has yet to announce, but factors the product line into its disclosed projections, it may be required to disclose the product line as one of the "material bases" for the projections. Consequently, disclosure of this new product line could inform the target's competitors about the new product line earlier than the target would find otherwise optimal and result in the target choosing not to undertake the action (i.e., go public) that would require such

combination with the co-registration requirement and the definitions of blank-check company for the purposes of the PSLRA we are also adopting. If SPACs believe these indirect costs are sufficiently high, these amendments could dampen their willingness to disclose projections, which could lead to a decrease in the amount of forward-looking information made available to investors. If this leads SPACs to omit projections that are informative to investors, their absence could result in increased valuation uncertainty. This effect could impact some SPACs more than others, depending on the disclosure requirements of their local jurisdictions, or on other factors.¹³⁴⁶ In these cases, if SPACs view these additional indirect costs to be too high, this dampening effect could result in not only a decrease in disclosure of projections, but a reduction in the utilization of projections by the SPAC entirely. However, as the potential dampening is likely to affect projections without reasonable bases more than those with reasonable bases (because the former are likely to be more difficult and costly to justify quantitatively and thus be seen as a larger litigation risk), we expect the potential for this dampening to be heightened in cases where the projections are more uncertain.

We also acknowledge that the requirements of Item 1609(c) may impose additional costs on SPACs due to the timing mismatch between the original preparation of projections and their inclusion in subsequent filings, as echoed by some commenters.¹³⁴⁷ Further, given the co-registrant rules and new definitions of blank check company,¹³⁴⁸ disclosures made in response to Item 1609(c) will not benefit from the PSLRA safe harbor and could be subject to greater litigation risk than under the baseline, and thus could create further liability costs for the SPAC and target. Therefore, the provisions of Item 1609(c) might result in one or more of: (a) increased compliance costs due to additional pre-filing verification of circumstances, data, assumptions, etc., that underlie the

disclosure. See, e.g., Michael Dambra, Laura Casares Field & Matthew T. Gustafson, *The JOBS Act and IPO Volume: Evidence That Disclosure Costs Affect the IPO Decision*, 116 J. Fin. Econ 121 (2015) (presenting evidence that firms make decisions not to IPO because of such proprietary costs). Such costs were discussed by commenters, see letter from Michael Dambra, Omri Even-Tov, and Kimberlyn George, *citing Dambra, Even-Tov & Munevar*, *supra* note 1341.

¹³⁴⁶ See *supra* note 363 and accompanying text.

¹³⁴⁷ Letters from ABA, Freshfields, Goodwin Procter, Kirkland & Ellis.

¹³⁴⁸ See *supra* sections III.E, VIII.B.2.

projections (and updating if so¹³⁴⁹); (b) disclosure that the board continues to rely on the projections because they have no expectation that circumstances have changed; or (c) disclosure acknowledging that the projections were based on past facts and circumstances, which may have changed and thus are no longer relied upon by the SPAC, but are still being included to provide insight into historical decision-making or for some other reason. These outcomes might result in increased information in the projections (in the case of (a) above), increased information about the projections (in the case of (b) or (c) above), and/or increased liability costs for the registrants (in the case of (b) or (c) above).¹³⁵⁰

To the extent that Item 1609 elicits additional contextual information disclosures related to SPAC projections, investors could incur incremental costs in processing the added information.¹³⁵¹

i. Structured Data Requirement (Item 1610)

As with the specialized disclosure requirements applicable to SPACs at the IPO stage as discussed above, Item 1610 also requires that the disclosures prepared in compliance with respective sections of subpart 1600 of Regulation S-K applicable to de-SPAC transactions be tagged in Inline XBRL.¹³⁵² For the same reasons discussed above, we expect that the tagging requirement for de-SPAC transaction disclosures will augment the informational benefits to investors resulting from the new disclosure requirements.¹³⁵³ For example, tagging the disclosure of terms and amounts of the compensation received or to be received by a SPAC sponsor and its affiliates in connection with a de-SPAC transaction and the potential dilutive effects related to such compensation could allow investors to

¹³⁴⁹ If SPACs determine that it is necessary to update their projections, further costs might be incurred if they also believe any fairness or best interest determination based on those projections also requires updating, a concern voiced by one commenter. See letter from Kirkland & Ellis.

¹³⁵⁰ We differentiate between information in the projections, such as the projections being updated to reflect new facts or circumstances, and information about the projections, such as investors being able to assess whether or how they should factor those projections into their expectations (for example, knowing to discount outdated projections).

¹³⁵¹ See Elizabeth Blankespoor, Ed deHaan & Iván Marinovic, *Disclosure Processing Costs, Investors' Information Choice, and Equity Market Outcomes: A Review*, 70 J. Acct. & Econ. 1 (2020). The authors suggest that it is costly to process firms' disclosures, even for the most sophisticated investors, and they conceptualize processing costs as awareness cost, acquisition cost, and integration cost.

¹³⁵² See *supra* sections II.I and VIII.B.1.ii.d.

¹³⁵³ See *supra* section VIII.B.1.ii.d.

make quantitative and qualitative comparisons to similar disclosure in other de-SPAC transactions. Additionally, the tagging requirement will make it easier to compare both numeric values and narrative discussion to those presented at the SPAC's IPO stage.

Unlike the Inline XBRL tagging requirement being adopted for SPAC specialized disclosures, which applies to registration statements for IPOs, the tagging requirement being adopted for de-SPAC transaction disclosures typically will not impose a tagging obligation on a SPAC to which the SPAC was not previously subject because a SPAC would be subject to Inline XBRL tagging obligations as of their first periodic report on Form 10-Q, Form 20-F, or Form 40-F.¹³⁵⁴ As such, the Inline XBRL tagging requirement for de-SPAC transaction disclosures for the SPAC will be limited to the cost of selecting, applying, and reviewing Inline XBRL tags to a new set of disclosures or paying a third party to do so. The tagging requirement being adopted will impose compliance costs on SPACs at an earlier stage of the SPAC life cycle than under the baseline. As noted above, there is some indication that data-tagging costs in general have trended downward in the years since the initial adoption of XBRL requirements for SEC filings, and due to their similarities we expect this trend to hold for Inline XBRL tagging costs as well.¹³⁵⁵

j. Re-Determination of SRC Status

The final rules provide that, upon the consummation of a de-SPAC transaction, an issuer must re-determine its status as an SRC prior to its first filing, other than pursuant to Items 2.01(f), 5.01(a)(8), and/or 9.01(c) of Form 8-K, following the de-SPAC transaction and reflect this re-determination in its filings, beginning 45 days after consummation of the de-SPAC transaction. As an example of the effect of the final rules, consider a SPAC that qualifies as an SRC that conducts a de-SPAC transaction with a target company that results in a post-combination company that does not qualify as an SRC. Under current rules, the company would retain the SRC status throughout the fiscal year that includes its next re-determination date (at second fiscal quarter-end of that fiscal year), which could be up to 18 months if the de-SPAC transaction occurs at the beginning of the third quarter. In contrast, that same target

¹³⁵⁴ See *supra* note 476 and accompanying text.

¹³⁵⁵ See *supra* note 1302 and accompanying text.

company going public via a traditional IPO might not qualify for SRC status at all. Under the final rules, the post-combination company will have 45 days following the de-SPAC transaction before the loss of SRC status will have to be reflected.

The final rules should result in a level of disclosure appropriate to the post-combination entity's facts and circumstances and be similar to those applicable in the traditional IPO setting. We expect this will reduce any regulatory arbitrage by requiring a target company going public through a de-SPAC transaction to provide an appropriate level of information to investors as it would were it to conduct a traditional IPO.¹³⁵⁶ For larger target companies, this will require more comprehensive and detailed disclosure to investors soon after the de-SPAC transaction is consummated. Overall, we expect these final rules will increase investor protection by allowing investors to assess the combined company more thoroughly through access to information appropriate to the post-combination company's float and revenues. Large target companies may also reap the benefit of reduced cost of capital insofar as providing additional historical periods of financial statement data improves price efficiency.¹³⁵⁷

The re-determination of SRC status is based on annual revenues and the public float on the measuring day, with such public float being measured within the four-business day window following the de-SPAC transaction. The calculation of public float depends on the market price at which the common equity was last sold on that selected date, or the average of the bid and asked prices of the common equity. The public float calculation allows for secondary market trading to determine the public float of the SPAC used for SRC re-determination. To the extent that the secondary market might not reflect all the information about the post-combination business within four business days, this could result in an inappropriate determination of SRC status or lack thereof. However, this reflection of market price in SRC status determination exists at every second quarter-end¹³⁵⁸ for public companies, and thus does not reflect a cost relative to the baseline, timing differences notwithstanding. Further, because the final rule allows for up to four business days to re-determine this public float, there is some flexibility for firms to

avoid volatility they deem temporary, although this discretion also implies potential information asymmetry costs to the extent firm discretion would bias towards SRC status.¹³⁵⁹

The final rules will increase compliance costs compared to the baseline for combined companies that do not meet the SRC definition as of the accelerated re-determination date. Those companies may need to provide more detailed disclosure to investors sooner after the de-SPAC transaction than they would under current disclosure requirements. To the extent that the amendment to the public float calculation timing creates an effective difference between the IPO and de-SPAC transaction settings, whereby the latter is affected by secondary market trading where the former is not, the effect of this difference is not expected to systematically generate inefficiencies with regards to the de-SPAC transaction setting. This is because the effect of market trading on the public float calculation could result in both increases and decreases in post-de-SPAC transaction public float (based on observations of historical de-SPAC outcomes).¹³⁶⁰

A potential cost of the re-determination is that, under certain circumstances, a SPAC that qualifies as an SRC could file two years of audited financial statements in conjunction with the de-SPAC transaction, but then upon re-determination lose its SRC qualification, and potentially be required to include an additional year of audited financial statements in subsequent registration statements. This scenario would result in additional costs, such as engaging audit services for the additional historical year, that would not be incurred without the re-determination.¹³⁶¹ These costs, however, are partially mitigated by the provision in the final rules of the 45-day window before SRC status is required to be reflected following a de-SPAC

transaction. For combined companies that, based on public float calculations as within four business days following the de-SPAC transaction, no longer qualify for SRC status under the final re-determination rules, this window allows them to continue to reflect SRC status on registration statements filed within this 45-day window after the de-SPAC transaction, thereby avoiding those extra costs associated with the loss of SRC status.

Some of the companies that lose SRC status but meet the EGC definition could avail themselves of the accommodations associated with EGC reporting requirements, which could mitigate some of the disclosure costs required by the adopted amendment.

k. Minimum Dissemination Period

We are adopting final rules that require a minimum dissemination period for registration statements, proxy statements, and information statements filed in connection with de-SPAC transactions.¹³⁶² We expect these rules will benefit SPAC shareholders by providing a minimum amount of time to review the information disclosed in these documents before making voting, redemption, and investment decisions.¹³⁶³ To the extent that this results in investors having more time to review the information than they would otherwise have, the minimum distribution period will allow them to more thoroughly consider their choices. This amendment will likely provide its greatest potential benefits to SPAC shareholders in de-SPAC transactions where there are no required advance dissemination periods, such as in the cases of SPACs that are not organized in a jurisdiction with equivalent delivery requirements for notices of stockholder meetings,¹³⁶⁴ do not file a Schedule

¹³⁶² Specifically, the final rules require dissemination no later than the lesser of 20 calendar days prior to the date on which the meeting of security holders is to be held or action is to be taken in connection with the de-SPAC transaction or the maximum number of days permitted for disseminating the prospectus under the applicable laws of the jurisdiction of incorporation or organization.

¹³⁶³ The final minimum dissemination rules do not apply with respect to Schedule TO. The combined effect of certain tender offer rules currently effectively provides for a comparable, slightly longer minimum 20-business-day period for investors to make decisions. See 17 CFR 240.14e-1 under the Exchange Act (prohibiting tender offers that are held open for less than 20 business days from the date the tender offer is first published or sent to security holders).

¹³⁶⁴ For example, while Delaware General Corporation Law only requires that due notice of an upcoming meeting be provided 20 days prior to the event (in connection with certain transactions such as mergers) and does not mandate a minimum

¹³⁵⁶ See *infra* section III.D for more information on the regulatory baseline.

¹³⁵⁷ See *supra* note 1191.

¹³⁵⁸ See *supra* 633 and accompanying text.

¹³⁵⁹ Because SRC status entails lower disclosure and regulatory compliance costs, it is likely that firms would prefer to have SRC status than not.

¹³⁶⁰ Florian Kiesel, Nico Klingelhöfer, Dirk Schiereck & Silvio Vismara, *SPAC Merger Announcement Returns and Subsequent Performance*, 29 Eur. Fin. Mgmt. 399, 399–420 (2023).

¹³⁶¹ Because SPACs would have an existing history of audits, including for the filings required as part of the de-SPAC transaction, we expect the cost of auditing the additional historical year would be mitigated. We note that the opposite scenario, namely a non-SRC SPAC resulting in a post-combination firm that is re-determined to be an SRC would file fewer years of financials in subsequent registration statements. However, this scenario does not represent a concomitant reduction of cost, because those auditing or other costs would already be incurred.

TO,¹³⁶⁵ or do not incorporate information by reference in their Form S-4/F-4 filings.¹³⁶⁶

The costs of this amendment, including printing and mailing costs, management time, and or consulting fees, may be limited by the fact that, under the baseline, SPACs may have incentives to provide the required disclosure materials in advance of a minimum deadline. For example, as retail ownership of its shares increases, a SPAC may face increasing pressure to communicate with its investors earlier, more extensively, and with greater frequency to ensure that a quorum will be present at the shareholder meeting to approve a de-SPAC transaction and that a sufficiently high number of votes are cast in favor of the transaction. In these cases, we do not expect the final rules will cause a change in behavior for firms already submitting these statements 20 calendar days or greater in advance.

The additional time required by the amendment could, in effect, shorten a SPAC's time to otherwise complete a business combination within its limited lifespan, and this amendment will remove the option value inherent in the

period for dissemination of proxy statements or joint prospectus/proxy statements required by the Federal securities laws. As noted in the Proposing Release (*supra*, note 7, at 29531), Commission staff, in reviewing filings, has observed that the notices of the meeting mandated by Delaware General Corporation Law are often included in the proxy statement or joint prospectus/proxy statements, with many companies then delivering the proxy statements or joint prospectus/proxy statements in time to meet the Delaware General Corporation Law notice requirement. *See also* letter from Vinson & Elkins ("Under the existing regulatory framework, which is dictated by the laws of the SPAC's jurisdiction of formation and the proxy rules, SPACs are typically required to deliver notice of the special meeting not less than 10 days before the meeting and, if the SPAC is a Delaware entity and will be directly merging with another entity, such notice is typically required at least 20 days before the meeting. This notice is included at the beginning of the SPAC's proxy statement and effectively requires that final versions of all proxy materials be delivered to the SPAC's shareholders at least 10 days (or 20 days, as applicable) before the SPAC's special meeting." (Footnotes omitted)). *See also* Table 4 in section VIII.A.2.iv.

¹³⁶⁵ Because a Schedule TO filed in connection with a de-SPAC transaction must already be filed 20 business days in advance of the close of the redemption period, the 20-calendar-day minimum dissemination period will not have an incremental effect.

¹³⁶⁶ There will be no incremental effect on the dissemination of Form S-4 or F-4 in connection with a de-SPAC transaction if the form incorporates information by reference because a 20-business-day minimum dissemination requirement already applies, a period lengthier than 20 calendar days. *See supra* note 501.

existing flexibility in dissemination timing. Costs associated with adopting this proposal could also increase in proximity to the SPAC's dissolution date, because, under such conditions, logistical costs like expedited reviewing and printing would accrue.¹³⁶⁷ It is also possible that the minimum dissemination period could cause SPACs to enter into sub-optimal deals earlier in the process to avoid the risk of failing to acquire a company later in the window, or, in the extreme, a de-SPAC transaction would not be able to proceed due to these new timing requirements. However, as discussed above, we believe such costs would rarely be incurred given the significance of a de-SPAC transaction to SPACs and targets and the amount of time that SPACs have to find a target and engage in a de-SPAC transaction relative to the length of the dissemination period. Rather, we believe it is more likely that SPACs and targets will account for the amended dissemination period in establishing a timeline for their business combination in the event that it would not have already been met or otherwise required.

Furthermore, because we are also adopting Rule 145a, which will require the filing of a registration statement or reliance on an exemption for a de-SPAC transaction, and because de-SPAC transactions can incorporate information by reference, we expect there may be few future de-SPAC transactions to which the minimum dissemination period requirement would impose an otherwise additional binding time constraint.

1. Aligning Non-Financial Disclosures in De-SPAC Disclosure Documents

We are adopting amendments such that target companies in a de-SPAC transaction not subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act must include in their registration statement or schedule filed in connection with the de-SPAC, disclosures relating to the target company that would be provided in a Form S-1 or F-1 for an IPO. These final amendments would require disclosure with respect to the target comprising: (1) Item 101 (description of business); (2) Item 102 (description of property); (3)

Item 103 (legal proceedings); (4) Item 304 (changes in and disagreements with accountants on accounting and financial disclosure); (5) Item 403 (security ownership of certain beneficial owners and management), assuming the completion of the de-SPAC transaction and any related financing transaction; and (6) Item 701 (recent sales of unregistered securities).¹³⁶⁸ The final amendments also require, where a Form S-1 or Form F-1 is used to register securities in connection with a de-SPAC transaction, that these registration statements include the information required in Form S-4 and Form F-4, respectively, and that any Schedule TO or Schedule 14A filed for a de-SPAC transaction incorporate the disclosure provisions of Items 1603 through 1609 and the structured data provision of Item 1610.

The costs and benefits of these final amendments depend on the baseline level of information available that is required to be disclosed in the Form 8-K with Form 10 information that is currently disclosed in advance of the filing of the Form 8-K.¹³⁶⁹ To assess the extent to which registrants may already disclose Form 10 information about the target company in a different Commission filing before filing the Form 8-K, the staff examined the frequency and scope of incorporation by reference in such 8-K filings, finding that 95% of the 8-K filers incorporated at least one of the required Form 10 items by reference.¹³⁷⁰ Most of the Form 8-K filings that incorporated items by reference referred to disclosures previously filed in a proxy or information statement (88% of filers), and 46% of these filings incorporated disclosures from a registration statement filed in connection with the de-SPAC transaction.¹³⁷¹

¹³⁶⁸ Where the target is an FPI, the amendment includes the option for accordant disclosures. *See supra* section III.A.1.

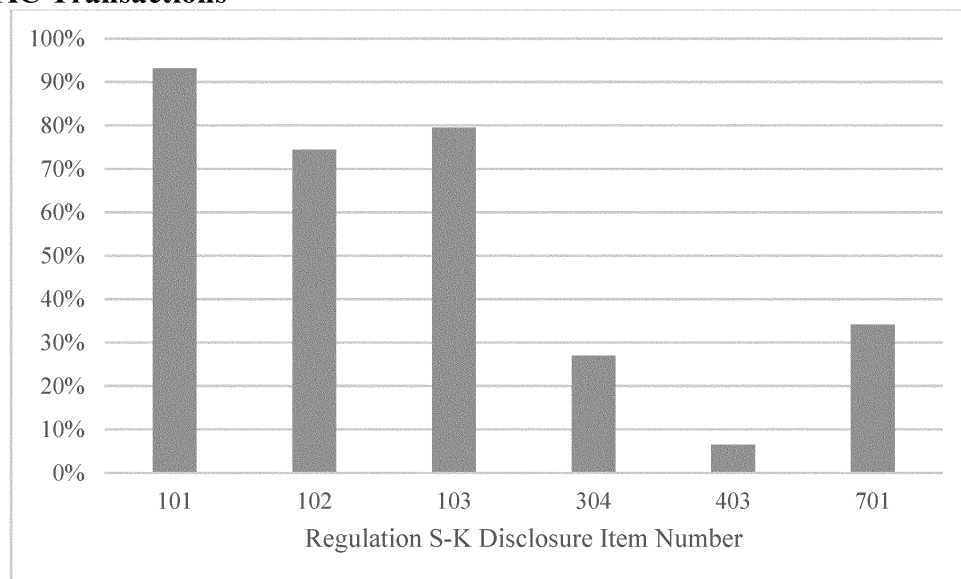
¹³⁶⁹ The Form 8-K with Form 10 information (often referred to as the "Super 8-K") is due four business days after consummation of the de-SPAC transaction. *See* Item 2.01(f), Form 8-K.

¹³⁷⁰ Items 2.01(f), 5.01(a)(8), and 9.01(c) of Form 8-K each provide that if any required disclosure under these items has been previously reported, the registrant may, in lieu of including that disclosure in the Form 8-K, identify the filing in which that disclosure is included.

¹³⁷¹ Because some filers incorporate disclosure by reference from more than one source, the total percentage of usage across sources exceeds 100%.

¹³⁶⁷ We note discussion in section III.B clarifying that the deadline is met when the materials are mailed; thus, the delivery timing is not a consideration. *See supra* note 512.

Figure 3. Incorporation by Reference in Form 8-K by Regulation S-K Disclosure Item in de-SPAC Transactions^a



^a Data here represents the frequency of incorporation by reference per item that would be affected by the amendment as a percent of Forms 8-K that could be identified, based on staff review, as filed in connection with a de-SPAC transaction that occurred between Jan. 1, 2006, and Dec. 31, 2022, that incorporated any item by reference.

Figure 3 shows the information that is incorporated by reference in the Forms 8-K filed in connection with de-SPAC transactions, as identified by the item requirement of Regulation S-K. Disclosures pursuant to Item 101 (description of business), Item 102 (description of property), and Item 103 (legal proceedings) of Regulation S-K are most commonly incorporated by reference. Less frequently incorporated by reference are disclosures pursuant to Item 304 (changes in and disagreements with accountants on accounting and financial disclosure), Item 403 (security ownership of certain beneficial owners and management, assuming the completion of the de-SPAC transaction and any related financing transaction), and Item 701 (recent sales of unregistered securities) of Regulation S-K.¹³⁷² Thus, to the extent that registrants already provide this information in the proxy statements,

information statements, registration statements, and Schedules TO filed in connection with the de-SPAC transaction, the benefits and costs of compliance with the final amendments may be mitigated.

These final amendments will ensure information about the target company is provided before shareholders potentially make voting, redemption, or investment decisions in connection with the de-SPAC transaction (whereas under the baseline this information is required to be included in a Form 8-K with Form 10 information that must be filed within 4 business days after the completion of a de-SPAC transaction). This timing change could reduce potential opportunities to engage in regulatory arbitrage, minimize differences in informational content, timing, and presentation, and potentially provide investors with more information about the target company when making such decisions, relative to the baseline. The benefits of such alignment to unaffiliated investors would depend on the ability of investors to otherwise procure such information prior to the filing of the Form 8-K with Form 10 information.

As a result of the final amendments, investors may obtain disclosure required by Item 403 of Regulation S-K regarding the target company's beneficial ownership structure before making a voting, redemption, or

investment decision in connection with the de-SPAC transaction, which could, in some cases, represent a meaningful change to the informational environment in advance of the completion of a de-SPAC transaction, particularly when this information may be critical to an investor's ability to evaluate potential conflicts of interest. In addition, the disclosures may allow investors to identify potential misalignments of interests between non-redeeming shareholders and other parties to the de-SPAC transaction. The final amendments therefore should provide increased investor protections and generally improve the information environment for investors making a voting, redemption, or investment decision in connection with the de-SPAC transaction.

The final amendments require disclosure of information that must already be included in the "Super 8-K" filed after closing of the de-SPAC transaction. Thus, we expect the compliance costs of these amendments to be low to the extent they will primarily stem from the accelerated filing timeline for these disclosures (with the exception of cases involving failed de-SPAC transaction votes), although we recognize that some items may be more costly to disclose earlier than others. Further, these additional compliance costs should be limited to the extent they are consistent with

¹³⁷² While these items are less frequently incorporated by reference, their absence may not indicate missing information. For example, filers may not have provided Item 304 or Item 701 disclosures in earlier filings because there were no changes in or disagreements with accountants on accounting and financial disclosures or recent sales of unregistered securities to report. When disclosures are presented in the Form 8-K, Item 304 disclosures are incorporated by reference in approximately 32% of filings and newly disclosed in 68% of filings. Similarly, for Item 701 disclosures, the proportions of Forms 8-K that incorporate by reference and include new disclosure, are respectively approximately 35% and 65%.

existing practice, as suggested by commenters.¹³⁷³

2. Liability-Related Rules

In addition to the rules discussed above pertaining to disclosures, we are adopting rules and amendments to clarify and amend the existing liability framework to resolve certain ambiguities and protect investors. In this section, we discuss the potential costs and benefits of requiring that the target company be treated as a co-registrant on a Form S-4, Form F-4, Form S-1, or Form S-4 filed in connection with a de-SPAC transaction. In addition, we discuss the amendment to the definitions of “blank check company” for purposes of the PSLRA to remove the “penny stock” condition.

i. Target Company as Co-Registrant

Currently, a SPAC, the target company, or a holding company may file the registration statement for a de-SPAC transaction depending on the structure of the transaction. When the SPAC or holding company files the registration statement for a de-SPAC transaction, section 11 liability may not apply to the target company. Given that the target company effectively is an “issuer” of securities in a de-SPAC transaction regardless of transaction structure, the final rules will require that the target company and its related section 6(a) signatories sign these registration statements when filed by a SPAC or another shell company.¹³⁷⁴ In addition, in a de-SPAC transaction where the target company consists of a business or assets, the seller of the business or asset is deemed to be a registrant instead of the business or assets.

The primary benefit of this rule will be to align potential section 11 liability applicable to the target company in a de-SPAC transaction with such liability that may apply in a traditional IPO because, given that the transaction is essentially its IPO, it is the target company that, in substance, issues or proposes to issue its securities or, pursuant to new Rule 145a, the securities of the combined company.¹³⁷⁵ Under current rules, when the target company does not file this registration statement, it would not have section 11 liability for any information about its business and operations in the registration statement even though, like a traditional IPO, investors look to the business and prospects of the target company in evaluating an investment in

the combined company. Significant information asymmetries also arise because the filer likely must rely on the target company providing this information for inclusion in the registration statement.¹³⁷⁶ While exposing the target company to section 11 liability may increase costs (such as compliance costs or the target company obtaining directors and officers insurance where it does not already have coverage and perceives a need to have coverage), ensuring that the target company is subject to such liability for a de-SPAC registration statement should give the target company stronger incentives to provide higher quality information about its financial condition and future prospects. Thus, we expect that the final rule will lead to better informed voting and investment decisions and reduce adverse selection with regard to de-SPAC transactions.¹³⁷⁷

A few commenters compared de-SPAC transactions and M&A transactions generally, in which targets typically do not sign a registration statement filed by the acquiror and do not share liability as a signing party. They argued that, if market forces ensure sufficient information about the target reaches investors in traditional M&A transactions, market forces should serve the same function in de-SPAC transactions.¹³⁷⁸ However, as noted elsewhere in this release, while the de-SPAC transaction is a type of M&A transaction, we believe de-SPAC transactions can be distinguished from other M&A transactions due to their hybrid nature. Specifically, the de-SPAC transaction simultaneously: (i) functions as a form of public capital raising for the target company, (ii) transforms a shell company, that is not a business combination related shell company, into an operating company, and (iii) commonly represents the introduction of a formerly private company to the public markets for the first time. Moreover, SPACs sponsors—who often have significant influence over the de-SPAC—may have weaker incentives than acquiring firm managers in traditional M&A transactions to perform detailed due diligence on information supplied by the target company, because

SPAC sponsors benefit from a completed de-SPAC transaction at nearly any price.¹³⁷⁹ In addition, this information may be more important to investors because unlike a traditional M&A transaction, the SPAC has no business operations of its own, and the business and operations of the target company will typically be the sole business and operations of the combined company after the business combination. The final rules would address these misaligned market incentives by assigning strict liability under section 11 to the target company, which is in the best position to ensure the accuracy of the disclosures.

Another reason we expect the final rules will produce a more optimal solution than reliance on existing market incentives is that we do not expect “inherited liability” of target company officials to effectively address the information asymmetry and incentive misalignment issues, as suggested by a few commenters.¹³⁸⁰ To the extent the target company survives and/or the officers and directors of the target company are officers and directors of the surviving company, they would potentially have liability for statements in the de-SPAC registration statement. However, that future assumption of liability does not change the fact that, under current regulations, depending on the transaction structure, the target company and its officers and directors may not have liability at the time of sale for the statements made in any registration statement filed in connection with the de-SPAC transaction. The final rules ensure that target company directors and signing officers have liability for statements made in the de-SPAC registration statement, regardless of whether they remain with the surviving company following the de-SPAC transaction.

The final rules regarding “co-registration” may be associated with additional administrative or other costs. First, in connection with the filing of the registration statement, the co-registrant requirements could increase compliance costs of target companies and introduce the prospect of new potential costs if the target company incurs section 11 liability. Compliance costs compared to the baseline may increase in cases where the target would not otherwise have been a registrant of

¹³⁷⁶ See *supra* note 22 and accompanying text.

¹³⁷⁷ Adverse selection describes a situation in which investors have incomplete information about potential de-SPAC targets and thus have difficulty distinguishing good investments from bad investments. As a result, investors may be less willing to participate in the SPAC market out of fear of choosing a bad investment. Higher quality information about targets mitigates this problem and encourages investor participation and the health of the SPAC market overall.

¹³⁷⁸ See letters from ABA, Skadden.

¹³⁷⁹ See *supra* section VIII.A for discussion of SPAC sponsors’ interests in completing the de-SPAC transaction.

¹³⁸⁰ See letters from ABA, NYC Bar. See discussion of these comments in section III.C (regarding whether current requirements provide sufficient incentives in connection with discussion of the final rules).

¹³⁷³ Letters from ABA, PwC.

¹³⁷⁴ See *supra* section III.C.

¹³⁷⁵ See *supra* section III.C.

a registration statement for the de-SPAC transaction. For example, the target company may elect to employ service providers (such as legal, accounting, or financial advisers) to a greater degree or may elect to have its management spend more time preparing and reviewing the registration statement disclosure, since under the final rules, the target company, its directors, and its section 6(a) signatories will potentially be liable for material misstatements in or material omissions from any effective de-SPAC transaction registration statement pursuant to section 11. Potential target companies may also be deterred from engaging in a de-SPAC transaction due to this potential liability, which could result in fewer public companies.

Second, target companies may elect to spend more money than under the baseline for directors and officers insurance coverage, although this would not be a direct compliance cost of the final rules. A number of commenters raised such concerns.¹³⁸¹ Based on staff experience reviewing filings involving SPACs, most target companies already have directors and officers insurance.¹³⁸² Where a target company expects to enter a de-SPAC transaction, following the adoption of the final rules, we expect that some of these target companies may seek to expand their existing coverage due to the potential added liability from the above filings, resulting in a higher premium. We note costs for additional insurance may help offset or substitute for the potential

increase in liability-related costs discussed earlier.

Third, depending on when the business combination closes, the target company may incur compliance costs in connection with periodic and current reporting, because, as a registrant of a de-SPAC transaction registration statement, once this registration statement is effective, the target company will become an Exchange Act reporting company.¹³⁸³ This would, among other things, require the filing of Exchange Act periodic reports on Forms 10-K, 10-Q, and 20-F where applicable, and current reports on Forms 8-K and 6-K after the effectiveness of any registration statement for the de-SPAC transaction and until the target company is able to terminate/suspend its Exchange Act reporting obligations.¹³⁸⁴ This additional cost to target companies may be mitigated to some degree by the fact that much of the information they will have to disclose under the final rules is information that, under the baseline, either was already compiled and disclosed as part of the de-SPAC transaction or would be required in disclosures of the combined company after the de-SPAC transaction. However, in cases of de-SPAC transactions for which a registration statement becomes effective but the business combination does not close, which based on staff experience is very rare, the final rules will impose a cost upon those target companies that would not be incurred under the baseline, which could affect the cost and benefit calculations of target companies when choosing whether to go public through a de-SPAC transaction.

Finally, we expect audit costs may increase for a minority of target companies as a result of the co-registration requirement. Under the current regulatory regime, filings of U.S. public companies must be audited by PCAOB-registered auditors, including financials of predecessor target companies.¹³⁸⁵ As co-registrants to a de-SPAC transaction, non-predecessor target companies will also need to obtain audits from PCAOB-registered auditors. We expect relatively few targets would need to change auditors as a result of the co-registration requirement for several reasons. First, many target companies may have already decided to work with PCAOB auditors in advance of seeking an acquisition with a public company.

Second, we expect there to be relatively few de-SPAC transactions involving non-predecessor target companies. For example, approximately 97% of de-SPAC transactions from 1990–2022 involved a single predecessor target.¹³⁸⁶ Finally, any cost related to this requirement would be limited because audits of the target company's operations and financials for filings subsequent to the de-SPAC transaction closing would need be conducted by PCAOB-registered auditors under the current regulatory regime. With respect to cost of conducting the audits in accordance with PCAOB standards, for predecessor target companies, and PCAOB or GAAS standards for non-predecessor target companies, we do not anticipate meaningful additional costs.

These costs may be factors that a target company that seeks to become public considers when evaluating the route of a traditional IPO versus a de-SPAC transaction. As such, under the final rules, the additional costs for target companies, balanced against reduced adverse selection faced by investors, potentially drawing more investors to the SPAC market, may tilt the relative attractiveness of seeking a public listing away from a de-SPAC transaction towards a traditional IPO or away from public listing entirely. The extent to which these factors influence such a decision would depend on a variety of factors, such as target company preferences toward the de-SPAC transaction method of going public—based on views of the process such as its level of transaction costs, its timing, and its certainty of closing.

ii. PSLRA Safe Harbor

As discussed in section III.E, we are adopting new Securities Act and Exchange Act rule definitions of “blank check company” under the PSLRA. The effect of the final rules will be that the PSLRA statutory safe harbors will be unavailable for forward-looking statements made in connection with a de-SPAC transaction involving an offering of securities by a SPAC or other issuer meeting the final definitions of “blank check company.”¹³⁸⁷

These provisions of the final rules have two related benefits: (1) an increase in the likelihood that such issuers will take more care in avoiding the use of unreasonable forward-looking statements, and (2) an increase in the likelihood that investors will have

¹³⁸¹ Letters from ABA (“Targets will be forced to substantially enhance their D&O liability insurance coverage to cover potential federal securities law liability substantially earlier in the De-SPAC Transaction process than is currently the case. Moreover, if the De-SPAC Transaction is never completed for some reason, Targets would likely not be able to ‘ratchet down’ their coverage to more typical private company levels until the next policy renewal date.”); Anonymous (Apr. 7, 2022); Skadden (“Given the potential for increased risk of liability to boards, we also expect D&O liability insurance premiums to increase significantly, further diluting the value of the transaction to stockholders.”). See also letters from ABA, Goodwin, White & Case (each discussing directors and officers insurance premium costs in connection proposed Item 1606(a)) and Job Creators Network (noting that costs generally will increase, as “SPACs and target companies should expect extensive diligence requests from financial institutions, advisors, and their counsel in connection with a de-SPAC transaction” (citations omitted)).

¹³⁸² These target companies may have directors and officers coverage for several reasons: (a) to cover the target company in connection with any liability to investors in connection with material misstatements or omissions in the registration statement, (b) to cover the target company in connection with government enforcement actions and investigations, (c) to cover the expense of the company in indemnifying directors and officers for their liability, and (d) to cover the liability of directors and officers where they are not indemnified by the target company.

¹³⁸³ See *supra* note 558 and accompanying text.

¹³⁸⁴ See *supra* section III.C.3 for discussion of reporting obligations. We also note that although these filings will create costs, investors should also benefit from these ongoing disclosures.

¹³⁸⁵ See *supra* note 624 and accompanying text.

¹³⁸⁶ Target counts are from Dealogic’s SPAC M&A data.

¹³⁸⁷ See *supra* section VIII.A.3. See also *supra* section III.E for more information about the regulatory baseline.

confidence in the forward-looking statements made by such issuers.

First, the final rules will benefit investors by incentivizing SPACs and other blank check companies¹³⁸⁸ to take greater care to avoid making forward-looking statements that are unreasonable. There is broad acknowledgement that forward-looking statements can be important for investors to aid their valuation of securities.¹³⁸⁹ As noted above, however, several commenters have raised concerns that forward-looking statements used in de-SPAC transactions are overly optimistic and thus less useful for investors.¹³⁹⁰ Some academic research has found SPAC forward-looking statements to be overly optimistic¹³⁹¹ and suggests, with caveats, that less sophisticated investors are more likely to be swayed by such projections.¹³⁹² One study finds, however, little evidence of “hype” in

SPAC forecasts.¹³⁹³ As a result of the final definitions of “blank check company” for purposes of the PSLRA, we expect SPACs and other affected blank check companies will take greater care to avoid unreasonable forward-looking statements because these issuers will be concerned there may be a higher risk of incurring potential costs or liability in such cases as compared to the baseline.¹³⁹⁴ The reduced likelihood of unreasonable statements should allow investors to make better investment and voting decisions. The potential for improvement in decision-making may be particularly pronounced

in de-SPAC transactions as there is typically no prior public history of filings or financial information for investors to draw upon to help determine the reasonableness of projections.

It is possible the market already discounts to some extent overly optimistic claims in forward-looking statements by SPACs who were operating under the assumption that their disclosures were subject to PSLRA safe harbor protections, reducing the potential harm from such forward-looking statements that this rule is intended to ameliorate.¹³⁹⁵ In this regard, we note that sophisticated investors are more likely to discount overly optimistic forward-looking statements, and thus the final rules may benefit less sophisticated investors more.

By incentivizing SPACs and other blank check companies to avoid unreasonable forward-looking statements, the final rules will also benefit investors and issuers by increasing the likelihood that those investors will have confidence that the forward-looking statements are reliable. If investors are aware that SPACs are taking greater care to avoid unreasonable forward-looking statements, investors may be able to analyze SPAC opportunities with greater precision, resulting in less adverse selection and encouraging investment and capital formation. Similar benefits will accrue to investors in registered securities offerings of non-SPAC registrants that meet the final definitions of “blank check company,” although this is less likely to have a significant impact on the overall market due to the limited number of business combinations involving these issuers, as observed in recent years.¹³⁹⁶

Considering the final rules holistically, we note that Item 1609 of Regulation S–K, amended Item 10(b) of Regulation S–K, and other provisions of the final rules intended to increase investor awareness of potential conflicts of interest¹³⁹⁷ may prompt SPACs to improve their projections because of the reasons discussed above¹³⁹⁸ and/or allow investors to better understand and evaluate projections,¹³⁹⁹ which could

¹³⁸⁸ In this subsection VIII.B.2.ii, where we refer to “blank check companies” in connection with our discussion of the final rules, unless otherwise indicated, we are referring to blank check companies that are not limited by any qualification that the company is an issuer of penny stock.

¹³⁸⁹ See, e.g., letter from CFA Institute (“FLS are regularly used in connection with de-SPAC merger transactions and are considered key information for assessing prospects for the newly merged entity.”); Anne Beyer, Daniel A. Cohen, Thomas Z. Lys & Beverly R. Walther, *The Financial Reporting Environment: Review of the Recent Literature*, 50 J. Acct. & Econ. 296–343 (2010) (Using a sample from 1994 to 2007, this article shows management earnings forecasts contributed over half (55%) of the accounting-based information to the market that explained quarterly stock return variance.); Moonchool Kim & Jay R. Ritter, *Valuing IPOs*, 53 J. Fin. Econ. (1999) (finding that valuing IPOs with comparable firm multiples using analyst forecasts of future accounting performance rather than historical numbers improves accuracy substantially).

¹³⁹⁰ Letters from Americans for Financial Reform Education Fund (“Post-merger investors in SPACs, who are predominantly retail investors, are often lured by ambitious projections of growth—made with the protection of the safe harbor—and unfortunately have already lost significant amounts of money as a result. . . . In some cases, SPACs have lost up to 75% of their value since 2021. Retail investors are estimated to have lost about \$4.8 billion, or 23% of the \$21.3 billion of their total \$21.3 billion in SPACs.”), Better Markets, CFA Institute, CII, Senator Elizabeth Warren (“In 2021, nearly half of all companies with less than \$10 million of annual revenue that went public through a SPAC ‘have failed or are expected to fail to meet the 2021 revenue or earnings targets they provided to investors.’ These companies fell short on revenue projections by an average of 53%.” (Referencing a WSJ analysis)).

¹³⁹¹ Blankespoor, Hendricks, Miller & Stockbridge, *supra* note 1240, finds that combined companies meet or beat 35% of revenue projections. This percentage declined as the forecast period increased; SPACs meet or beat 42% of 1-year forecasts but 0% of four-year forecasts. Note that unbiased forecasts should approximately overshoot as often as undershoot the eventual true value, and thus forecasts should be expected to meet or beat true values approximately 50% of the time.

¹³⁹² See *supra* notes 1240 and 1341.

¹³⁹³ See letter from Cato Institute, which cites Kimball Chapman, Richard Frankel, & Xiumin Martin, *SPACs and Forward-Looking Disclosure: Hype or Information* (Research Paper No. 3920714, last revised Oct. 21, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920714 (retrieved from SSRN Elsevier database). Using a sample of 420 SPACs with IPOs between 2015 and 2020, the authors find “a negative association between the redemption rate and *Forecast Intensity* [the number of performance metrics forecasted times the number of years forecasted] and the forecasted revenue growth rate, which is the opposite of what the opportunistic disclosure hypothesis would predict. In other words, we fail to find evidence of ‘hype’ when analyzing the association between the redemption rate and SPAC disclosures.” The authors caveat that this inference “is based on the assumption that the perceived deal quality as measured by redemption rate is an unbiased estimate of deal quality.” Put another way, the authors argue that since other studies have observed a positive correlation between lower investor redemption levels and higher de-SPAC-period stock performance, the fact that they find an association between lower investor redemption levels and forecast intensity and growth rates suggests high forecasts are associated with better de-SPAC performance in the year following the de-SPAC. Thus, they assert SPAC forecasts do not display “hype.” We find this conclusion problematic. Finding that more intense or higher raw forecasts are associated with better SPAC performance does not mean there is no hype, because both low and high growth rates can be exaggerated. The study also finds “no evidence of a subsequent return reversal in the de-SPAC period” that is more prevalent for the SPACs with the highest raw forecast growth rates, which the authors argue would have been evidence of overly optimistic “hype.” However, the paper’s regressions include four sets of returns as dependent variables in a single specification: the returns before merger announcement, right around announcement, after announcement to the day before closing, and trading day 0 to 1 year after closing. This approach hinders statistical inference since standard errors are not appropriately corrected for heteroskedasticity and the design decision to include multiple return windows simultaneously in a single regression results in biased estimations of the control variables included as regressors, making it difficult to draw firm conclusions from the results.

¹³⁹⁴ While the Commission has brought enforcement actions alleging the use of baseless or unsupported projections about future revenues and the use of materially misleading underlying financial projections involving both SPACs and other reporting companies (see *supra* note 848), removal of the PSLRA safe harbors for SPACs will add liability for forward-looking statements in any private right of action under the Securities Act or Exchange Act.

¹³⁹⁵ Several commenters expressed this view. See, e.g., letters from Cato Institute, Kirkland & Ellis, Paul Swegle.

¹³⁹⁶ See *supra* section VIII.A.

¹³⁹⁷ See *supra* section II.C (discussing rules requiring disclosure of conflicts of interest between public investors and SPAC sponsors).

¹³⁹⁸ See *supra* note 1394.

¹³⁹⁹ For example, Item 1609(b) of Regulation S–K requires disclosure of material assumptions that underlie projections. This additional detail may

reduce the incremental benefit of the removal of the PSLRA safe harbor in isolation.

This provision of the final rules may entail additional costs. First, SPACs and other blank check companies may experience greater legal and related costs in connection with defending actions brought against them under the Federal securities laws, particularly if the combined company that results from a business combination transaction underperforms relative to any forward-looking statements.¹⁴⁰⁰ The clarity the rule provides about the absence of the PSLRA safe harbor may increase the risk of such legal action. This cost would be mitigated by the extent that directors and officers of the SPAC and the target company have relevant directors and officers liability insurance, though the cost of that insurance to cover potentially increased legal risk may also likely be higher relative to the baseline.¹⁴⁰¹

Second, SPACs and other blank check companies may incur additional costs related to efforts by these companies to ensure projections they provide investors are not unreasonable.¹⁴⁰² For example, SPACs and other blank check companies may employ service professionals (such as lawyers, accountants, and financial advisers) to a greater extent, by having them spend more time reviewing projections. Also, SPACs and other blank check companies may decide to devote more management time to prepare and validate projections.

Third, given the potential legal and preparation costs, a SPAC or other blank check company may decide not to provide forward-looking statements it otherwise would have provided in connection with a business combination absent the final rules. In this case, investors may have less information, potentially negatively impacting their ability to accurately value these companies and allocate their investments accordingly to the extent such forward-looking statements would have been informative.¹⁴⁰³ A number of

commenters expressed this concern.¹⁴⁰⁴ This could result in information only being revealed to market participants in de-SPAC transactions to the extent SPACs are able, like IPOs, to provide investors forward-looking information indirectly through securities analysts.¹⁴⁰⁵ Potential loss of information in SPACs may be mitigated in situations where a SPAC or other blank check company may be required to provide forward-looking statements under State law or think investors need such information to fully assess the proposed business combination transaction.¹⁴⁰⁶

Fourth, if potential SPACs (or other blank check companies) or target companies determine forward-looking statement disclosures are necessary but are not willing to provide such statements without PSLRA protections, fewer SPACs could form and/or impacted blank check companies such as SPACs may decide not to enter into a business combination transaction, such as a de-SPAC transaction. In addition, potential target companies may decide not to go public by way of a de-SPAC transaction. In particular, as stated by a commenter, the combination of the increased liability associated with forward-looking statements and any State law fiduciary requirements to provide such disclosure could result in de-SPAC transactions, on net, facing more liability than IPOs, which have the ability to avoid such liability by not providing forward-looking projections.¹⁴⁰⁷ This could lead to fewer public investment opportunities for investors to the extent potential SPAC target companies do not go public another way, *i.e.*, via the IPO market. One commenter provided data showing that the firms SPACs have taken public are smaller in average market capitalization and are not distributed in precisely the same industries as firms taken public through IPOs. This might suggest SPAC and IPO markets do not fully overlap.¹⁴⁰⁸ Relatedly, a target

company's ability to raise capital may also be reduced, although these companies may be able to ameliorate any reduction in capital formation if they receive funding from other capital sources, such as unregistered equity investments.

3. Shell Company-Related Rules

In addition to the rules discussed above, we are also adopting rules and amendments to address further areas of incongruity in requirements that guide the disclosures and liabilities in the context of shell-companies more broadly, excluding those that are business combination related shell companies.

i. Rule 145a

Rule 145a deems any business combination of a reporting shell company (that is not a business combination related shell company) involving an entity that is not a shell company to involve a sale of securities under the Securities Act to the reporting shell company's shareholders. To the extent that an exemption is unavailable for a de-SPAC transaction, the transaction must be registered. Rule 145a is intended to address concerns regarding the use of reporting shell companies generally as a means by which private companies access the U.S. capital markets. One reason for these concerns is that reporting shell company shareholders may not receive the Securities Act protections (including disclosure and liability) they receive in a traditional IPO because of transaction structure. Under the final rule, these deemed sales will need to be registered under the Securities Act unless there is an applicable exemption.¹⁴⁰⁹

Currently, if a reporting shell company buys a target company by issuing its shares as consideration for the interests of the target shareholders, reporting shell company investors are unlikely to receive a Securities Act registration statement in connection with the transaction. In this example, the reporting shell company shareholders would not receive the protections afforded by the Securities Act, including any enhanced disclosure or liability that would be available if the transaction were registered under the Securities Act.

Rule 145a should provide shareholders in a reporting shell company that is not a business combination related shell company,

suggesting SPACs and IPOs could serve different types of firms that wish to go public.

¹⁴⁰⁹ See *supra* section IV.A.2 for more information about the regulatory baseline.

allow investors to better assess the validity of projections and detect over-optimism.

¹⁴⁰⁰ Increased legal costs could also concern other transaction participants such as third-parties hired to prepare projections if they determine the disclosure of the projections would subject them to liability. They may seek compensation for bearing this additional liability. See letter from ABA.

¹⁴⁰¹ See letter from Amanda Rose.

¹⁴⁰² See, *e.g.*, letter from Winston & Strawn.

¹⁴⁰³ We note that the absence of forward-looking statements regarding a de-SPAC transaction will not preclude investors from valuing the business combination, as financial projections supplied by an entity to be valued are not a requirement for deriving its valuation.

¹⁴⁰⁴ See, *e.g.*, letters from Cato Institute, CFA Institute, Managed Funds Association, NYC Bar, SPAC Association, Winston & Strawn.

¹⁴⁰⁵ See, *e.g.*, letters from Bullet Point Network, SPACInsider, Ropes & Gray, SPAC Association, Vinson & Elkins, White & Case.

¹⁴⁰⁶ See, *e.g.*, letters from ABA, Andrew Tuch, Cato Institute, CFA Institute, Goodwin Procter, NYC Bar, Paul Swegle, Vinson & Elkins, Winston & Strawn. See also *supra* note 829.

¹⁴⁰⁷ See letter from Cato Institute.

¹⁴⁰⁸ See letter from Committee on Capital Markets Regulation. We note that no tests for statistical significance of these differences in size and industry distribution were conducted and thus we cannot confirm that SPAC and IPO markets are different. See also letter from Yuchi Yao (Dec. 15, 2023), which provides a theoretical analysis

engaged in a business combination involving a non-shell company, with more consistent Securities Act protections, regardless of the structure used for the business combination. Because of this consistency, we expect the rule will bolster investor protection for reporting shell company shareholders and reduce the information asymmetry between such investors in the reporting shell company and the target company. Specifically, we expect this rule to be of particular benefit to shareholders in reporting shell companies that may not otherwise receive timely information about the intended target company, or potentially even notification that the reporting shell company is entering into a business combination until after the transaction has occurred. Additionally, receipt of registration materials may highlight salient information (e.g., as required by subpart 1600 of Regulation S–K for transactions involving SPACs) for reporting shell company shareholders who might otherwise not receive or overlook it (or those who are vulnerable to inertia¹⁴¹⁰) and call attention to the nature in which their investment will be transformed should they continue to hold their securities. For these reasons, we expect Rule 145a will result in more consistent information (i.e., timing, disclosure, and format) for investors and thereby improve price discovery and capital formation. Even if an exemption were available for the transaction (and, as a result, shareholders do not receive a registration statement in connection with the deemed sale), Rule 145a would still confer informational benefits to affected reporting shell company shareholders as such shareholders would receive whatever information the shell company concludes must be provided to satisfy section 10(b).¹⁴¹¹ Because it is unclear the extent to which reporting shell company shareholders may be able to anticipate whether such an exemption would be available, the

full extent to which Rule 145a will result in these expected price or capital formation benefits is unclear.¹⁴¹²

Under Rule 145a in certain business combination transactions where reporting shell companies, including SPACs, are parties, the combined company will be required to register the deemed sale of its securities to the pre-transaction reporting shell company shareholders at the time of the business combination, unless there is an available exemption. We expect this will increase costs in those cases where the business combination is not structured in a manner that otherwise would need to be registered. These costs could include, in the extreme case, all costs associated with conducting a registered offering of securities, such as preparing a Securities Act registration statement, if no exemption is available. The rule may also introduce opportunity costs in the form of transactions that might otherwise have occurred but would be disincentivized under the new requirements. For example, under current rules, a business combination involving a reporting shell company can be structured to avoid registration entirely, if, for example, any securities issued to the target company's shareholders in exchange for their interests in the target can be issued under an exemption. Because Rule 145a deems such a transaction to involve a sale to reporting shell company shareholders that will need to be registered (unless there is an applicable exemption), affected parties may opt not to pursue such a transaction to avoid the new transaction costs involved.

To the extent that the final rule requires the filing of a Securities Act registration statement, we expect extra costs associated with greater care in preparation and review of the disclosures therein due to the applicability of section 11.¹⁴¹³ Also, there could be some costs associated with timing issues generated by any Commission staff review of any registration statement. Some of these costs may be mitigated to the extent that the reporting shell company or target company is already preparing disclosure documents, particularly Securities Act registration statements, in connection with a business combination that would be covered by Rule 145a. For example, in a de-SPAC transaction, the SPAC and/or target company may already be preparing a Schedule 14A, 14C, or TO, or a Form S–4, F–4, S–1, or F–1. Reporting shell companies and SPACs

also typically prepare Forms 8–K containing Form 10 disclosures that are filed shortly after the business combination.

ii. Financial Statement Requirements in Business Combination Transactions Involving Shell Companies

Article 15 of Regulation S–X and related amendments aim to more closely align the financial statement reporting requirements in business combinations involving a shell company and a private operating company with those in traditional IPOs. These amendments should ensure the appropriate level of investor protections by reducing the potential for regulatory arbitrage by private companies that go public through a business combination with a shell company rather than a traditional IPO. Furthermore, the disclosure and audit requirements (e.g., Rule 15–01(a)) should reduce information asymmetry between financial statement disclosures in business combination transactions involving shell companies, including de-SPAC transactions, and traditional IPOs, which may in turn benefit private operating companies going public by reducing the cost of capital.¹⁴¹⁴ The rules and amendments that clarify applicable definitions and requirements (e.g., Rule 15–01(b), (c), (d), and (e)), are expected to reduce potential ambiguity faced by registrants by codifying certain existing interpretive positions, as discussed above in section IV.B and improve comparability.

The final rules and amendments should allow investors to more readily locate and process relevant information and reduce processing costs, and should increase investor confidence in the reporting provided by entities involved in these business combinations.¹⁴¹⁵ In turn, these improvements should lead to more efficient voting, redemption, and investment decisions. Many of the final rules and amendments codify existing staff guidance or financial reporting practices. Thus, to the extent that registrants are already preparing statements and reports in a manner

¹⁴¹⁰ Investor inertia refers to the tendency to avoid trading. See, e.g., Laurent E. Calvert, John Y. Campbell & Paolo Sodini, *Fight or Flight? Portfolio Rebalancing by Individual Investors*, 124 Q. J. Econ. 301 (2009) (“observing little aggregate rebalancing in the financial portfolio of participants”).

¹⁴¹¹ In registered public offerings, the extent to which disclosure is required is set forth in detail in Commission registration statement forms, Regulation S–K and Regulation S–X. The disclosure that may be required in an exempt offering, on the other hand, is primarily driven by section 10(b) of, and Rule 10b–5 under, the Exchange Act, which enable a buyer to recover against a seller that, among other things, makes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading in connection with a sale of a security.

¹⁴¹² *Id.*

¹⁴¹³ See generally *supra* section VIII.B.2 for a discussion of the costs of increased liability.

¹⁴¹⁴ See Michael Minnis, *The Value of Financial Statement Verification in Debt Financing: Evidence from Private U.S. Firms*, 49 J. Acct. Research 457, 457–506 (2010). Using a large sample of privately held U.S. firms, the author found that audited firms enjoy a lower interest rate than unaudited firms, and that lenders place more weight on audited financial information in setting the interest rate. See also Mathieu Luypaert & Tom Van Caneghem, *Can Auditors Mitigate Information Asymmetry in M&As? An Empirical Analysis of the Method of Payment in Belgian Transactions*, 33 Auditing: A Journal of Practice & Theory 57, 57–91 (2014). This study finds that audits can mitigate information asymmetry about the target's value, reducing the need for a contingent payment.

¹⁴¹⁵ See *supra* note 1351.

consistent with the rules and amendments, the incremental benefits and costs will be limited. Below, we discuss the benefits and costs of each individual item under Rule 15–01 of Regulation S–X and the other amendments.¹⁴¹⁶

a. Rule 15–01(a) Audit Requirements of a Predecessor

Rule 15–01(a), in connection with the amendments to Rule 1–02(d) and related new instructions to Forms S–4 and F–4 aligns the level of audit assurance required in business combination transactions involving a shell company with that for an IPO. The rule requires the financial statements of a business that is or will be a predecessor to a shell company to be audited in accordance with the standards of the PCAOB, which are the same auditing standards required in an IPO registration statement. This amendment will codify existing staff guidance. Rule 15–01(a) permits non-predecessor businesses to be audited under PCAOB standards or U.S. GAAS, aligning with the audit standards that would be applied in an IPO registration statement.

Rule 15–01(a) should benefit investors by clarifying that the financial statements of a business that is or will be a predecessor to a shell company are to be audited in accordance with PCAOB standards consistent with a traditional IPO.¹⁴¹⁷ To the extent that investors use the audited financial statements to project future cash flows, the new rule also may benefit shell companies and target companies by lowering their cost of capital.¹⁴¹⁸ The final rules may, however, increase the compliance costs (e.g., audit costs) of the business combination. To the extent that registrants are, in practice, already including financial statements of target companies audited under PCAOB standards, the above incremental benefits and costs likely would be limited.

¹⁴¹⁶ See *supra* section IV.B for additional regulatory baseline information.

¹⁴¹⁷ See Phillip Lamoreaux, *Does PCAOB Inspection Access Improve Audit Quality? An Examination of Foreign Firms Listed in the United States*, 61 J. Acct. & Econ. 313, 313–337 (2016) (documenting that PCAOB-inspected auditors, compared to auditors not subject to PCAOB inspections, provide higher quality audits, which are reflected by more going concern opinions, more reported material weaknesses, and less earnings management).

¹⁴¹⁸ See Michael Minnis, *The Value of Financial Statement Verification in Debt Financing: Evidence from Private U.S. Firms*, 49 J. Acct. Research 457, 457–506 (2010) (finding that audited financial statements have more predictive power for future cash flows, which may explain lower cost of capital as well as greater reliance by lenders).

b. Rule 15–01(b) Number of Years of Financial Statements

Under Rule 15–01(b), a shell company registrant will be permitted to include in its Form S–4/F–4/proxy or information statement balance sheets as of the end of the two most recent fiscal years and two years of statements of comprehensive income, changes in stockholders' equity, and cash flows for the target company where both the shell company and a target company would qualify as an EGC, and this determination would not be dependent on whether the shell company has filed or was already required to file its annual report. Rule 15–01(b) will align the number of years required to be disclosed in the financial statement between de-SPAC transactions and traditional IPOs.

For those transactions affected by the rule, registrants that qualify for EGC status and are not SRCs should benefit from reduced cost of producing audited financial statements because this rule will reduce the number of years of financial statements required from three years to two years. In those cases, this rule could cause some information loss for investors. However, investors would still have access to two years of financial statements for the target company, the same amount that would be required had the target company gone public via a traditional IPO. In addition, the omitted “third year” of financial statements would be the oldest information and thus may provide less incremental value to investors than the two most recent fiscal years.

c. Rule 15–01(c) Age of Financial Statements of the Predecessor

Rule 15–01(c) provides that the age of financial statements for a business that will be acquired by a shell company in a registration statement or proxy statement will be based on the age requirements in Rule 3–12 or 8–08 of Regulation S–X, rather than the target company provisions in Item 17 of Form S–4. Because this amendment is generally consistent with existing market practice, we do not expect it to have significant economic effects for registrants or investors. This rule will align disclosure requirements across the different routes of going public, which may reduce compliance uncertainty for registrants and their predecessors and increase investor confidence.

d. Rule 15–01(d) Acquisition of a Business or Real Estate Operation by a Predecessor

Rule 15–01(d) requires application of Rule 3–05 or 8–04 (or Rule 3–14 or 8–06, respectively, as relates to a real

estate operation), the Regulation S–X provisions related to financial statements of an acquired business or real estate operation, to an acquisition by a predecessor of a shell company registrant. This amendment is consistent with the current market practice of applying Rule 3–05 (or Rule 8–04) to acquisitions by the business that will be the predecessor, therefore we believe that the incremental benefits and costs should be limited.

Rule 15–01(d)(1) pertains to the calculation of significance tests and refers to Rule 1–02(w) of Regulation S–X, which we are amending as well, to require that the significance of the acquired business be calculated using the predecessor's financial information as the denominator instead of that of the shell company registrant. The use of the shell company registrant, which has nominal activity, for the denominator in materiality tests under current rules results in limited to no sliding scale for business acquisitions, including those made by the target company that will be the predecessor to the shell company because every acquisition would be significant and thus require financial statements. The adopted amendment may alleviate compliance burdens to the extent that it would no longer require inclusion of financial statements of acquired businesses or real estate operations that formerly would have been in excess of a significance test in Rule 1–02(w).

Rule 15–01(d)(2) requires a shell company that omits from a registration statement or proxy statement the financial statements of a recently acquired business or real estate operation that is not or will not be its predecessor pursuant to Rule 3–05(b)(4)(i) or 17 CFR 210.3–14(b)(3)(i) of Regulation S–X to file those financial statements in a Form 8–K by the later of the filing of the Item 2.01(f) Form 8–K or 75 days after consummation of the acquisition.¹⁴¹⁹ This amendment will both harmonize the timing with that in the IPO setting and alleviate ambiguity regarding the timing in which these financial statements are required to be filed, which we expect will facilitate compliance for the registrant. Additionally, this amendment should help ensure that investors receive predictable and timely disclosure about the acquired business, facilitating better informed capital market decision-making.

¹⁴¹⁹ This is a modification from the Proposing Release (Proposing Release, *supra* note 7, at 29492) in response to comments, allowing for the same 75-day grace period as in the IPO setting. See *supra* section IV.B.12.

As a result of these final amendments, we expect registrants' compliance burden will likely be reduced.

Although, the final amendments to the significance test may reduce the information available to investors about business acquisitions by the target company that will be the predecessor to the shell company, it may also reduce investors' information processing costs by focusing on financial statements of acquired businesses that are significant rather than those of all acquired businesses. We also believe any potential costs to investors as a result of decreases in disclosure may be mitigated by the fact that registrants must otherwise disclose material information about the acquisition that is necessary to make the required statements not misleading.¹⁴²⁰ Therefore, we believe that investors will still be presented with all the salient information required to make informed investment decisions.

e. Rule 15–01(e) Financial Statements of a Shell Company Registrant After the Combination With Predecessor

Rule 15–01(e) allows a registrant post combination to exclude the pre-acquisition financial statements of a shell company (including a SPAC) for periods prior to the business combination that results in the combined entity no longer being a shell company once the following conditions have been met: (1) the financial statements of the predecessor, as that term is used in financial reporting, have been filed for all required periods through the acquisition date, and (2) the financial statements of the combined entity registrant include the period in which the acquisition was consummated, which would also include the accounting for the business combination. In the vast majority of cases, the target is a predecessor business, and therefore, in effect, this rule requires historical financial information for the shell and target companies up to and including the acquisition, after which the financial statements of the shell can be omitted, because at that point they are not expected to continue providing investor relevant information (at least not beyond the extent to which they are reflected in the registrant's financials). Rule 15–01(e) has been revised from the proposal to clarify that similar requirements apply in cases where the target acquires the shell company. This will, in effect, apply the same requirement for reporting SPAC

financials post-combination regardless of the structure of the de-SPAC transaction.

It is possible that Exchange Act Rule 12b–20 or Securities Act Rule 408(a), which both require disclosure of additional information “necessary to make the required statements, in the light of the circumstances under which they are made, not misleading,” could prompt firms to include these financials notwithstanding the newly final Rule 15–01(e), as mentioned by several commenters.¹⁴²¹ However, under the baseline, the decision to disclose these financials comes from the SPAC management and could result in fewer disclosures than desired by investors. Thus, requiring the disclosure of SPAC financials as adopted will provide a consistent set of information for investors to use in their decision-making. Further, it will harmonize such disclosures across SPACs, allowing for more meaningful comparison. To the extent that SPAC financials are already known, and relatively less complex than those for the target operating company, we expect the additional cost of providing such financials to be limited (compared to relying on existing materiality discretion on behalf of the SPAC).

Rule 15–01(e) should reduce disclosure requirements for, and associated costs of disclosing, information that may no longer be relevant or meaningful to investors when the pre-business combination financial statements of the shell company are included in previous filings and the historical financial statements of the shell company likely are no longer representative of the combined company. To the extent that this rule is consistent with existing practice, whereby after a reverse recapitalization a registrant may omit historical SPAC financial statements once the financial statements of the combined company were reflected in a periodic filing, we do not expect this rule to result in a significant change in disclosure behavior. In addition, to the extent that the final rule extends the practice to forward acquisitions, we expect the final rule will reduce compliance costs related to continued filing of previous year financial statements of a shell company. Investors may also benefit from the increased efficiency in processing post-business combination filings that exclude uninformative historical SPAC financials.

f. Other Amendments

We are adopting an amendment to Item 2.01(f) of Form 8–K, which will apply to all shell companies, that clarifies that the information required by Item 2.01(f) of Form 8–K should relate to the “acquired business that is its predecessor” and not the “registrant,” as currently stated in the Form 8–K. This amendment is intended to eliminate any potential misunderstanding as to the entity for which Item 2.01(f) disclosure is necessary. The increased clarity may reduce registrants' compliance costs to the extent there is currently any confusion. In turn, investors may also benefit from the timely disclosure of information about an “acquired business that is the predecessor” due to registrants' more consistent application of Item 2.01(f). We are also adopting revisions to Item 2.01(f) to Form 8–K stipulating that when the predecessor meets the conditions of an EGC, the registrant does not need to present audited financial statements of the predecessor for periods prior to the earliest of those presented in the de-SPAC registration, proxy, or information statement of the registrant. This amendment will harmonize the required disclosures of Form 10 information with the requirements of Rule 15–01(b) and should reduce registrants' compliance costs to the extent they were required to produce a greater number of years of audited financial statements under the baseline.

We are also adopting amendments to Rules 3–01, 8–02, and 10–01(a)(1) of Regulation S–X to clarify that the requirement of “balance sheets” would apply to both the registrant and its predecessors. Because these amendments codify existing financial reporting practices necessary for a complete set of financial statements, they should not impact registrants' compliance costs, and should reduce uncertainty regarding regulatory requirements.

4. Enhanced Projections Disclosure (Amendments to Item 10(b) of Regulation S–K)

Item 10(b) of Regulation S–K sets forth the Commission's views on important factors to be considered in formulating and disclosing projections in filings with the Commission. The final amendments update this guidance, broadening the scope of covered projections and adding detail on the formatting of disclosed projections. More specifically, the final amendments state that the guidelines also apply to projections of future economic

¹⁴²⁰ See Securities Act Rule 408(a); Exchange Act Rule 12b–20.

¹⁴²¹ Letters from Freshfields, Vinson & Elkins.

performance of persons other than the registrant, such as the target company in a business combination transaction, that are included in the registrant's filings. The amendments to Item 10(b) also state that projections that are not based on historical financial results or operational history should be clearly distinguished from those that are. In addition, the final amendments state that it generally would be misleading to present projections that are based on historical financial results or operational history without presenting such historical financial results or operational history with equal or greater prominence. Finally, for projections that include non-GAAP financial measures, the amendments to Item 10(b) state that the presentation should include a clear definition or explanation of the non-GAAP financial measures, a description of the most closely related GAAP financial measure, and an explanation why the non-GAAP measure was selected instead of a GAAP measure.

Due to these final amendments, investors should gain additional information and context to help them evaluate the reasonableness of the projections and make more informed investment decisions. For example, the final amendments related to historical financial results or operational history could inform investors about potential biases in the financial projections and help them more efficiently process the underlying assumptions, thereby potentially improving their investment decisions.¹⁴²² Also, the greater consistency in the contextual and supporting historical information for projections should aid comparability across registrants, further benefiting investors. These benefits could be mitigated, however, to the extent that registrants are already providing this information or including projections of future economic performance that do not follow some or all of the revised guidance. A study of management earnings forecasts by public companies from 2000 to 2018 found that management provided earnings forecasts in approximately 31% of the firm-year observations comprising the sample.¹⁴²³

¹⁴²² See Anne Beyer, Daniel A. Cohen, Thomas Z. Lys, & Beverly R. Walther, *The Financial Reporting Environment: Review of the Recent Literature*, 50 J. Acct. & Econ. 296, 296–343 (2010) (employing a sample from 1994 to 2007 to show how management forecasts provide over half of accounting-based information to the market).

¹⁴²³ See Claude Francoeur, Yuntian Li, Zvi Singer, & Jing Zhang, *Earnings Forecasts of Female CEOs: Quality and Consequences*, Rev. Acct. Stud. (2022). The authors of the study obtained the management earnings forecast data from IBES. IBES is a database that includes quantitative (numeric)

In addition, to the extent that registrants have not previously applied the Commission's guidance in Item 10(b) to third-party projections included in the registrant's filings and choose to do so as a result of the final amendments, investors may benefit from improved presentation with respect to any third-party projections in a registrant's filing.

To the extent that registrants follow the guidance in the amendments to Item 10(b), the incremental compliance costs are likely to be limited. Registrants should already have information about historical financial results or operational history and GAAP financial measures and should be able to easily obtain this information in connection with any included third-party estimates.

C. Effects on Efficiency, Competition, and Capital Formation

1. Efficiency

The final rules and amendments should enhance and standardize disclosure about specific aspects inherent to the SPAC structure at both the SPAC IPO stage and the de-SPAC transaction stage. Requiring the SPAC and the target company to provide such disclosure will provide market participants more information that is likely relevant to voting, redemption, and investment decisions. The final rules will also improve the standardization and comparability of disclosures through changes to the disclosure formatting and presentation, which should make it easier for investors to efficiently process information about SPACs and for market prices to reflect such information. Together we expect these changes to result in more efficient prices and deployment of invested capital.

The final rules, by adopting new definitions of “blank check company” under the PSLRA, should incentivize blank check companies that are not

company earnings forecasts collected from press releases and transcripts of corporate events. To the extent that some of the management earnings forecasts in the IBES database are not included in SEC filings, these figures may overstate the activity that would be affected. However, because the study sample is drawn from a period after the adoption of Regulation FD, we believe the likelihood an IBES record would not also be present in an SEC filing is low. It is more likely that these figures may understate the number of affected projections, because the database does not include all public reporting companies and because management may provide financial projections that are not captured by the IBES database. See also Zahn Bozanic, Darren T. Roulstone & Andrew Van Buskirk, *Management Earnings Forecasts and Other Forward-looking Statements*, 65 J. Acct. & Econ. 1 (2018) (indicating that approximately 33% of Form 8-K filings of earnings announcements include at least one quantitative forecast).

penny stock issuers and underwriters to exercise greater care to ensure any forward-looking disclosures are reasonable, increasing efficiency. The final rules regarding shell company business combination transactions (e.g., Rule 145a) would increase the likelihood that the protections of the Securities Act consistent with those applicable to traditional IPOs are made available to investors, such as liability under the Securities Act and receipt of a Securities Act registration statement. Overall, we expect that the effects of the new definitions of “blank check company” and the requirements regarding shell company business transactions will provide investors with more consistent access to more reliable information when making their investing decisions, which should lead to an increase in price discovery and market efficiency. It is possible a SPAC or other blank check company that is not a penny stock issuer may be dissuaded from providing forward-looking disclosures due to increased costs and heightened liability concerns, leaving investors with less information, offsetting some efficiency gains.¹⁴²⁴

2. Competition

By improving the informational environment at the SPAC IPO and the de-SPAC transaction stages through changes in disclosure requirements, we expect the final rules will allow investors to make better informed investment decisions which should encourage greater competition among SPAC sponsors, which would further benefit SPAC investors. For example, by increasing comparability through standardization of the disclosures provided regarding SPAC IPOs and de-SPAC transactions, the final rules should lead to improved investor awareness, greater transparency, and lower search costs. These improvements to the information available to investors should allow them to better differentiate between SPACs based on factors the investors deem important (such as costs or fees), and in response SPAC sponsors may be forced to compete for those better informed investors by offering better terms such as lower costs.¹⁴²⁵

¹⁴²⁴ While, in the extreme case, the interaction between the adopted definitions of “blank check company” under the PSLRA and jurisdictional requirements for certain forward-looking disclosures may disincentivize companies from engaging in de-SPAC transactions which, as discussed below, could affect capital formation, it is not expected to affect the efficiency of those transactions that do occur.

¹⁴²⁵ For example, SPAC sponsors could set up structures that are more or less dilutive to investors

These improvements to the informational environment could also improve competition between SPACs and other investment avenues generally, further improving overall capital formation. For example, to the extent that the final rules lead to shell company mergers (including de-SPAC transactions) being more attractive to investors, other capital raising avenues that target companies may consider (e.g., traditional IPOs) may experience greater competitive pressure.

A reduction in shell company business combinations or activity in the SPAC market could reduce competition between SPAC sponsors or for investment opportunities in target companies.¹⁴²⁶ Such a reduction could result in higher costs for SPAC investors, depending on the elasticity of those costs. For example, SPAC promoters may offer less attractive terms to SPAC investors. Fewer SPACs might also lower competitiveness in the traditional IPO market, as companies that wish to go public may see diminished alternatives to IPOs.

3. Capital Formation

Enhanced disclosure at both the SPAC IPO and the de-SPAC stages, combined with a stronger incentive to perform better due diligence at the de-SPAC transaction stage, should improve investor protection at both stages, as should the rules and amendments for shell company mergers. For example, Rule 145a will help shareholders of reporting shell companies more consistently receive the protections of the Securities Act in business combinations involving reporting shell companies, regardless of the transaction structure, which should reduce adverse selection and improve the availability and reliability of information for investors, incentivizing more investors to invest in reporting shell companies, including SPACs, thus enhancing capital formation.

If the final rules and amendments create significant costs for shell companies, including SPACs, this may reduce the number of private companies that go public through shell companies, including through de-SPAC

transactions, and may reduce the overall number of companies that choose to go public. For example, one commenter asserted that the proposed rules would “overregulate SPACs to such a degree that they will no longer be viable vehicles for companies to access the public markets.”¹⁴²⁷ Other commenters, expressing similar concerns, noted that SPACs have been an important way for younger and more “innovative” companies to access public capital markets.¹⁴²⁸ Further, the new definitions of “blank check company” under the PSLRA may interact with existing jurisdictional requirements (such as any requirements to provide projections) which could impose significant additional costs on de-SPAC transactions. As a result, SPACs may adopt practices they believe will minimize their liability or other costs, which could result in them providing less information to investors, or, in the extreme, forgoing de-SPAC transactions they otherwise believe would be beneficial, which could harm capital formation.

In response to these comments and concerns, and as previously discussed, the final rules include provisions that reduce expected compliance costs relative to the proposal. However, given the potential increase in the cost of going public through a shell company merger, such as a de-SPAC transaction, compared to the current baseline, it is possible that some private companies could consider using the traditional IPO channel or a merger with a non-shell company as a more cost-effective alternative. We are not able to estimate how many companies would consider these alternatives if the cost of the overall SPAC transaction structure increases. It is possible, however, that a significant increase in the cost of shell company mergers and de-SPAC transactions could deter some private companies from going public and, thus, potentially reduce overall public offering activity and capital formation.¹⁴²⁹ Any reduction in public

offering activity, however, could be offset by an increase in investor trust in capital markets.

D. Reasonable Alternatives

1. Disclosure-Related Rules

i. Require Disclosure of Policies and Procedures That Address Conflicts of Interest

As an alternative to Item 1603, we considered whether to adopt a complementary requirement to describe or to file as an exhibit any policies and procedures used or to be used by a SPAC or by a target company to minimize potential or actual conflicts of interest related to disclosures provided in response to Items 1603(b) or to describe any SPAC policies and procedures related to duties of SPAC officers or directors owed to other companies in connection with disclosure required under Item 1603(c). We considered that such information could assist investors in gauging the economic significance, or lack thereof, of the various conflicts of interest given the presence, absence, and likely degree of effectiveness of the policies and procedures designed to address or ameliorate them. We also considered, on the other hand, that requiring this information would increase compliance costs for SPACs and target companies and could cause some of these companies to adopt policies and procedures that would not be efficient or cost-effective given their particular organizational structure and determined not to require this information in part for those reasons. Further, our determination not to adopt such a requirement was also based on our view that there are incentives to provide such disclosure voluntarily, as these disclosures would indicate to investors the degree to which conflicts of interest may be ameliorated.

ii. Certain Reports, Opinions, or Appraisals

We are requiring, in connection with de-SPAC transactions, the filing of certain reports, opinions (other than an opinion of counsel), or appraisals provided to the SPAC or a SPAC sponsor materially relating to any determination described in Item 1606(a), the approval of the de-SPAC transaction, the consideration or the fairness of the consideration to be offered to security holders of the target company in the de-SPAC transaction, or the fairness of the de-SPAC transaction to the SPAC, its security holders or SPAC sponsor (Item 1607) as exhibits to registration statements and schedules (or as part of the schedule if the

¹⁴²⁷ See letter from Virtu.

¹⁴²⁸ See, e.g., letters from National Venture Capital Association (June 13, 2022); Managed Funds Association; I-Bankers Securities, Inc. (June 24, 2022).

¹⁴²⁹ To provide a sense of magnitude, see letter from Committee on Capital Markets Regulation which presents data suggesting that from 2017 to 2021, there were roughly 3 de-SPAC transactions for every 10 traditional IPOs. See also letter from Committee on Capital Markets Regulation, suggesting differences between SPACs and traditional IPOs on dimensions of size and industry of firms taken public. To the extent that the SPAC and IPO markets appeal to different firms, it is possible some firms deterred from going public via de-SPAC transaction will not substitute to an alternative form of accessing the public market.

or adjust any forfeiture of their promote used to induce investors not to redeem.

¹⁴²⁶ Reductions in SPAC formation and de-SPAC mergers could result from increased costs to de-SPAC transactions due to differential liability and disclosure requirements compared to non-SPAC acquirers or other methods of accessing public markets. For example, the new definitions of “blank check company” under the PSLRA may interact with existing jurisdictional requirements (such as any requirements to provide projections) which could impose significant additional liability costs on de-SPAC transactions.

schedule does not have exhibit filing requirements) filed in connection with a de-SPAC transaction. We are also requiring disclosures summarizing such report, opinion, or appraisal or any negotiation or report by an unaffiliated representative on behalf of unaffiliated security holders. We are also requiring certain additional disclosures, such as for example, information about who prepared the report, opinion, or appraisal and how they were selected.

As an alternative, we considered requiring disclosure of only a summary of the reports, opinions, appraisals, and negotiations (without the requirement that the reports, opinions, and appraisals be filed). We considered that this could avoid costs of additional compensation third parties may require for providing reports that are suitable for public disclosure. At the same time, this alternative would reduce the benefits of the disclosure, as investors and market participants would have less information available to assess the quality and robustness of the analysis underlying such report, opinion, or appraisal.

iii. Re-Determine Smaller Reporting Company (SRC) Status of a Post-Business Combination Company Without a Public Float Test

As another alternative, we considered whether the re-determination for SRC status of the combined company following a de-SPAC transaction should require only a re-measurement of the revenue component of the SRC test and not its public float component. Generally, SRC status is re-determined on an annual basis at the end of the second fiscal quarter based on the issuer's public float on the last day of the second fiscal quarter, and, if there is no public float or there is a public float of between \$250 million or more and \$700 million, based as well on a determination of whether the annual revenues as of the most recently completed fiscal year for which audited financial statements are available are less than \$100 million (where greater annual revenues than \$100 million causes loss of SRC status). Revenues of the combined company may be more relevant to SRC status than public float because, generally, the target company has generated revenue while the SPAC has not done so.¹⁴³⁰

Accordingly, the revenue test may be the more determinative factor than the public float test in determining whether

the combined company following a de-SPAC transaction remains an SRC because, based on staff experience, the public float of most SPACs and subsequent combined companies typically is between \$250 and \$700 million, which exceeds the public float threshold for SRC status, unless the company's revenue is under \$100 million. Also, the public float component of this test is measured as of the last business day of the issuer's most recently completed second fiscal quarter. Given that the public float re-measurement likely would not occur at the end of the second fiscal quarter when the annual public float measurement occurs, under the final rule the combined company may have to measure its public float more than one time during the same fiscal year, which may impose additional burdens for the company as compared to an alternative of using only revenue as the basis for determining SRC status following the de-SPAC, in which case public float would only need to be measured once during the annual re-determination period.

We considered, however, that compared to joint determination with the public float, revenue, if used as a sole basis of the significance test, may be subject to a greater degree of managerial discretion or manipulation.¹⁴³¹ Further, it could result in, for example, firms with revenue below the threshold but public float above the maximum threshold qualifying for SRC status and the resultant lower disclosure requirements. Because companies with greater public float have greater potential impacts on markets, such an allowance for large public float companies to qualify for SRC status due solely to their revenues being below the threshold value could have commensurately large economic costs. Thus, we determined it is appropriate that these companies should take both the public float and total revenue into account in re-determining SRC status following the consummation of a de-SPAC transaction and determined not to adopt this alternative.

iv. Structured Data Requirement

As another alternative, we considered whether to change the scope of the Inline XBRL tagging requirements for the SPAC disclosures, such as by

excluding certain subsets of registrants or disclosures. For example, the tagging requirements could have excluded the SPAC IPO disclosures. Under such an alternative, SPACs would have submitted IPO disclosures in unstructured HTML or ASCII and would not incur Inline XBRL compliance costs until their first periodic filing on Form 10-Q, 20-F, or 40-F.¹⁴³² This would have made it incrementally easier for SPACs to consummate an IPO. However, narrowing the scope of the tagging requirements, whether based on filing, offering size, or other criteria, would have diminished the extent of any informational benefits that would accrue as a result of the adopted disclosure requirements by making the excluded disclosures comparatively costlier to process and analyze. Thus, we believe it is appropriate to require Inline XBRL for all SPAC disclosures, rather than exclude particular subsets of registrants or disclosures.

We also considered requiring only the quantitative SPAC-related disclosures to be tagged in Inline XBRL. Excluding qualitative disclosures from the tagging requirements could have provided some incremental cost savings for registrants compared to the rule as adopted, because incrementally less time would have been required to select and review the particular tags to apply to quantitative disclosures. However, we expect these incremental cost savings would have been low because SPACs are subject to similar Inline XBRL requirements, including requirements to tag quantitative and qualitative disclosures, in other Commission filings.¹⁴³³ The alternative would not impact the fixed startup costs associated with Inline XBRL tagging and would instead only remove the modest variable cost associated with applying additional tags to text blocks within an already tagged filing.

Moreover, narrowing the scope of tagging requirements to exclude qualitative information would have diminished the extent of informational benefits that would accrue to investors by inhibiting the efficient extraction and searching of narrative SPAC-related disclosures (e.g., disclosures regarding conflicts of interest, fairness determinations, and financial

¹⁴³⁰ See *supra* note 665 (income statement items such as "Interest earned on marketable securities held in trust account" and "Unrealized gain on marketable securities held in trust account" are generally not revenue for SPACs).

¹⁴³¹ See Jenny Zha Giedt, *Modelling Receivables and Deferred Revenues to Detect Revenue Management*, 54 *Abacus* 181 (2018) (focusing on the SEC Accounting and Auditing Enforcement Releases, i.e., AAER, from 1982 to 2016, and documenting that 47% of all financial misstatements are related to revenue).

¹⁴³² The Commission's EDGAR electronic filing system generally requires filers to use ASCII or HTML for their document submissions, subject to certain exceptions. See EDGAR Filer Manual (Volume II) version 67 (Sept. 2023), at 5-1; 17 CFR 232.301 (incorporating EDGAR Filer Manual into Regulation S-T). See also 17 CFR 232.101 (setting forth the obligation to file electronically on EDGAR).

¹⁴³³ See *supra* section VIII.B.1.ii.d.

projections), thus creating the need to manually review search results drawn from entire documents to find these disclosures.¹⁴³⁴ Such an alternative would have also inhibited the automatic comparison of narrative disclosures against prior periods. It also may have been harder for investors to perform a targeted assessment of a filing for particular types of narrative SPAC-related disclosures because they would have needed to assess the entire filing for relevant information. Thus, we believe it is appropriate to include qualitative disclosures within the scope of the tagging requirement.

With respect to the compliance date for tagging requirements, we could have added a separate phase-in period for SRCs and FPIs, as one commenter suggested.¹⁴³⁵ However, both SRCs and FPIs are subject to Inline XBRL tagging requirements for other disclosures, so we believe any burden reduction for SRCs and FPIs arising from a separate phased-in compliance date would therefore likely be minimal. Thus, we do not believe it is necessary to provide a separate phased-in compliance date for SRCs and FPIs to comply with the tagging requirements. We note, however, that both SRCs and FPIs (along with other filers) will be subject to a one year phased-in compliance date under the final rules.

v. Dilution Disclosure Measurement Alternatives

As an alternative to disclosure of net tangible book value, as adjusted, to capture dilution incurred by non-redeeming shareholders, various commenters suggested a measure based on the net cash per share held by the SPAC prior to the de-SPAC transaction.¹⁴³⁶ These comments generally reflect the desire for dilution disclosures to capture a measure of how much liquidity financing (in the form of cash) is transferred to the target at the de-SPAC transaction.¹⁴³⁷ To this end,

the net cash measure suggested by commenters would be calculated as: ¹⁴³⁸ total cash (from SPAC public shareholders, forward purchase agreements (FPA), and PIPE investments) less cash expenses, less the fair value of outstanding warrants and other equity derivatives. This measure would be scaled to be a per share value by dividing the former quantity by the sum of public shares, founder shares, PIPE and FPA shares, shares issuable under rights according to terms and agreements, and any other shares issued up to the point of the merger. Notably, this measure does not include shares issued to target shareholders as part of the merger agreement.

We believe that the net tangible book value as adjusted measure that we are adopting and the net cash per share alternative both generally capture expectations of the remaining amount of financing to be provided by the SPAC in the merger transaction, or, according to one commenter, “of the \$10 that I am paying per share, how much will actually be invested in the post-merger company?” ¹⁴³⁹ The material difference between the two measures is in their treatment of equity-classified awards and shares issuable by rights. While some comment letters highlighted that prior dilution disclosures (e.g., those required by Item 506) omitted certain components (such as warrants and other derivative securities), we note that the dilution measure as adopted accounts for them when classified as liabilities, and generally to the same extent as the suggested alternative measure, although we acknowledge that excluding from net tangible book value the value of warrants classified as equity may result in net tangible book value showing less cash dilution than a net cash per share measure. Further, the net tangible book value as adjusted measure that we are adopting relies on the specified adjustments in Item 1602(c) or 1604(c) to derive the value of the firm as if the redemptions had occurred, which avoids the issue of temporary equity being excluded.¹⁴⁴⁰ Therefore, we believe that the approach we are

adopting using the net tangible book value as adjusted measure instead of the alternative net cash measure sufficiently captures the desired idea of cash dilution intended by the comments.

Another alternative to the dilution table columns would be to require a fixed range of redemption levels, rather than the fixed range of *feasible* redemption levels as adopted. Some commenters supported such an alternative, suggesting the maximum redemption column be 100%.¹⁴⁴¹ The advantage of a fixed range, as those commenters argued, would be to remove the effects of differences in SPAC governing documents and agreements, because those are liable to change. For example, many SPACs put in place a maximum redemption limit to maintain a minimum net tangible asset reserve, but shareholders could vote to waive those limits which would change the maximum redemption threshold in the table as adopted. However, because a fixed range would not take into account the governing documents and agreements specific to that particular SPAC, it may omit information that could be informative to prospective investors from those documents or agreements, such as the waiver in this example. Further, a fixed range requires additional assumptions about future outcomes, for example a successful proxy vote or breaking non-redemption contracts. The threshold in the final rule of maximum redemptions rather than 100% redemptions does not require these additional assumptions and does include the SPAC specific redemption details; thus, it is likely more descriptive of possible and expected outcomes. To the extent SPAC specific features are important to compare across SPACs, we expect the tables as adopted will provide information that will benefit investors more than the alternative.

2. PSLRA Safe Harbor Guidance

As an alternative to addressing the use of forward-looking statements in de-SPAC transactions and other business combinations involving blank check companies that are not penny stock issuers by adopting a “blank check company” definitions under the PSLRA, we could have issued interpretive guidance stating that the PSLRA safe harbor for forward-looking statements is not available because business combinations with shell companies that are not penny stock issuers are “initial public offerings” by target private operating companies for purposes of the PSLRA. This alternative would avoid

¹⁴³⁴ To illustrate, without Inline XBRL, using a search string such as “dilution” to search through the text of all de-SPAC filings, so as to determine the extent to which dilutive effects are among the material factors being considered by SPACs at arriving at fairness determinations, could return many narrative disclosures outside of the fairness determination disclosure required by Item 1606(b) of Regulation S-K, such as disclosures in the risk factors section or in the description of stock incentive plans. However, when Inline XBRL is used, it enables a user to search for the term “dilution” exclusively within the fairness determination disclosure, thereby likely reducing the number of irrelevant results.

¹⁴³⁵ See letter from XBRL US.

¹⁴³⁶ See letters from NASAA; Vinson & Elkins; CII; Michael Klasuner, Michael Ohlrogge, and Harald Halbhuber.

¹⁴³⁷ See Klausner, Ohlrogge & Ruan, *supra* note 18.

¹⁴³⁸ See Michael Klausner, Michael Ohlrogge & Harald Halbhuber, *Net Cash Per Share: The Key to Disclosing SPAC Dilution*, 40 Yale J. on Reg. 18, 28 (2022).

¹⁴³⁹ Letter from Michael Klausner, Michael Ohlrogge, and Harald Halbhuber.

¹⁴⁴⁰ See letter from White & Case (“the calculation of pro forma net tangible book value per share in accordance with U.S. GAAP inevitably produces a deficit and remains the same constant figure across any assumed redemption thresholds because the metric solely takes into account the non-redeemable [“founder shares”], which are classified as permanent equity, and none of the public shares, which are classified as temporary equity.”).

¹⁴⁴¹ Letters from Vinson & Elkins, White & Case.

some of the complexity associated with defining blank check companies for purposes of the PSLRA, but issuing guidance rather than a rule may result in weaker incentives for SPACs or target companies to take greater care in preparing forward-looking statements, such as projections, in de-SPAC transactions and thus result in fewer investor protection benefits than the rule as adopted.

3. Expanding Disclosure in Reporting Shell Company Business Combinations

Rule 145a specifies that a sale occurs between the shareholders of a reporting shell company and the post-transaction company in situations where a reporting shell company that is not a business combination related shell company enters into a business combination transaction involving another entity that is not a shell company. As an alternative, instead of deeming all such transactions to be a sale that would need to be registered under the Securities Act, absent an applicable exemption, we could expand the disclosure requirements applicable to reporting shell company business combinations such that the disclosure requirements would be comparable to that which would have been required if the transaction was registered under the Securities Act. Under this alternative, regardless of the document that is filed with the Commission (*e.g.*, proxy or information statement, Schedule TO, or Form 8-K), the set of disclosures investors receive would be comparable to that which they would receive had a registration statement been filed for the transaction. This would ensure that the reporting shell company's shareholders receive largely the same information regardless of how the transaction is structured and would reduce regulatory arbitrage opportunities stemming from different disclosure requirements in different documents that may be filed with the Commission to report a shell company business combination. As a registration statement would not necessarily be required in all transaction structures, the costs of such an alternative would also be less than the costs of liability associated with the purchase and sale of securities and potential Securities Act registration of shell company business combinations under final Rule 145a, to the extent no exemption is available for the transaction.

However, merely expanding the set of disclosures investors receive regardless of transaction structure does not provide investors with the same level of protection because the liability standards differ based on the type of

filing, if any, that is required. Only by specifying that a sale occurs would investors necessarily receive all of the protections that apply in connection with all purchases and sales of securities under the Federal securities laws, such as the availability of private actions under section 10(b) and Rule 10b-5. In addition, to the extent there is not an available exemption for the reporting shell company business combination, only with Securities Act registration do investors receive the full panoply of available protections under that Act that they would receive in a traditional IPO, such as a private right of action under section 11.

4. Enhanced Projections Disclosure

The amendments to Item 10(b) of Regulation S-K present the Commission's updated views on projected performance measures and include a statement that projections based on a non-GAAP financial measure should include a clear definition or explanation of the non-GAAP measure, and a description of the GAAP financial measure to which it is most closely related. As an alternative to this guidance, we could have adopted a rule requiring firms, when providing projections, to present a reconciliation of projections based on a non-GAAP measure to those based on the nearest GAAP measure. While the reconciliation would further help investors understand the bases of projections involving non-GAAP measures, it would likely also increase compliance costs and in turn might reduce the provision of otherwise useful projections.

IX. Paperwork Reduction Act

A. Summary of the Collections of Information

Certain provisions of our rules and forms that will be affected by the final rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").¹⁴⁴² The Commission published a notice requesting comment on changes to these collections of information in the Proposing Release and submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.¹⁴⁴³

The hours and costs associated with preparing, filing, and sending the forms constitute reporting and cost burdens imposed by each collection of

information.¹⁴⁴⁴ An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the affected collections of information are:

- Regulation 14A (Commission Rules 14a-1 through 14a-21 and Schedule 14A) (OMB Control No. 3235-0059);
- Regulation 14C (Commission Rules 14c-1 through 14c-7 and Schedule 14C) (OMB Control No. 3235-0057);
- Schedule TO (OMB Control No. 3235-0515);
- Form S-1 (OMB Control No. 3235-0065);
- Form S-4 (OMB Control No. 3235-0324);
- Form F-1 (OMB Control No. 3235-0258);
- Form F-4 (OMB Control No. 3235-0325);
- Form 8-K (OMB Control No. 3235-0060);
- Form 10-K (OMB Control No. 3235-0063); and
- Form 10-Q (OMB Control No. 3235-0070).

The forms, schedules, and regulations listed above were adopted under the Securities Act or the Exchange Act. These regulations, schedules, and forms set forth the disclosure requirements for registration statements, annual and quarterly reports, proxy and information statements, and tender offer statements filed by registrants to provide investors with information to make informed investment and voting decisions. Compliance with these information collections is mandatory to the extent applicable to each registrant. A description of the final rules, including the need for the information and its use, as well as a description of the likely respondents, may be found in sections II through V above, and a discussion of the economic effects of the final rules may be found in section VIII above.

B. Estimates of the Effects of the Final Rules on the Collections of Information

The following PRA Table 1 summarizes the estimated effects of the final rules on the paperwork burdens associated with the affected forms and schedules.

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¹⁴⁴⁴ The paperwork burdens for Regulation S-X, Regulation S-K, 17 CFR 230.400 through 230.494 (Regulation C), 17 CFR 240.12b-1 through 240.12b-37 (Regulation 12B), and Regulation S-T are imposed through the forms, schedules, and reports that are subject to the requirements in these regulations and are reflected in the analysis of those documents.

¹⁴⁴² See 44 U.S.C. 3501 *et seq.*

¹⁴⁴³ See 44 U.S.C. 3507(d), 5 CFR 1320.11.

PRA Table 1. Estimated Paperwork Burden Effects of the Final Rules

Final Requirement and Effects	Affected Forms and Schedules	Estimated Effect Per Affected Response*
Item 1602: Registered offerings by SPACs - Require certain information on the prospectus cover page and in the prospectus summary of registration statements for offerings by SPACs other than de-SPAC transactions. - Require enhanced dilution disclosure in these registration statements.	Forms S-1 and F-1	1 hour increase in compliance burden per Form S-1 or F-1

Final Requirement and Effects	Affected Forms and Schedules	Estimated Effect Per Affected Response*
Item 1603: SPAC sponsor; conflicts of interest - Require certain disclosures regarding a SPAC sponsor, its affiliates, and any promoters of the SPAC. - Require disclosure regarding conflicts of interest between: (1) a SPAC sponsor; its affiliates; officers, directors, or promoters of a SPAC; or target company officers or directors; and (2) unaffiliated security holders of the SPAC.	- Forms S-1, F-1, S-4, and F-4 - Schedules 14A and 14C - Schedule TO	2 hour increase in compliance burden per Form S-1, F-1, S-4, or F-4 2 hour increase in compliance burden per Schedule 14A or 14C 2 hour increase in compliance burden per Schedule TO
Item 1604: De-SPAC transactions - Require certain information on the prospectus cover page and in the prospectus summary of registration statements for de-SPAC transactions. - Require enhanced dilution disclosure in these registration statements.	- Forms S-4 and F-4 - Schedules 14A and 14C - Schedule TO	1 hour increase in compliance burden per Form S-4 or F-4 1 hour increase in compliance burden per Schedule 14A or 14C 1 hour increase in compliance burden per Schedule TO
Item 1605: Background of and reasons for the de-SPAC transaction; terms of the de-SPAC transaction; effects Require disclosure on the background, material terms, and effects of the de-SPAC transaction.	- Forms S-4 and F-4 - Schedules 14A and 14C - Schedule TO	1 hour increase in compliance burden per Form S-4 or F-4 1 hour increase in compliance burden per Schedule 14A or 14C 1 hour increase in compliance burden per Schedule TO
Item 1606: Board determination about the de-SPAC transaction - Require disclosure if the law of the jurisdiction in which the SPAC is organized requires its board of directors (or similar governing body) to determine whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its security holders or otherwise make any comparable determination. - Require a discussion of the material factors the board of directors (or similar governing body) considered in making the determination. - Require certain disclosures as to the approval of security holders, the approval of directors, and the retention of unaffiliated representatives.	- Forms S-4 and F-4 - Schedules 14A and 14C - Schedule TO	4 hour increase in compliance burden per Form S-4 or F-4 4 hour increase in compliance burden per Schedule 14A or 14C 4 hour increase in compliance burden per Schedule TO

Final Requirement and Effects	Affected Forms and Schedules	Estimated Effect Per Affected Response*
Item 1607: Reports, opinions, appraisals, and negotiations - Require disclosure regarding any report, opinion (other than an opinion of counsel), or appraisal received by a SPAC or a SPAC sponsor from an outside party or an unaffiliated representative acting on behalf of unaffiliated security holders relating to any determination described in response to Item 1606(a), approval of the de-SPAC transaction, consideration to be offered in the de-SPAC transaction, or fairness of the de-SPAC transaction to the SPAC, its security holders, or SPAC sponsor. - Require disclosure of the qualifications of the outside party or unaffiliated representative, method of selection, and certain material relationships that existed during the past two years.	- Forms S-4 and F-4 - Schedules 14A and 14C - Schedule TO	1 hour increase in compliance burden per Form S-4 or F-4 1 hour increase in compliance burden per Schedule 14A or 14C 1 hour increase in compliance burden per Schedule TO
Item 1608: Tender offer filing obligations Require additional disclosures in a Schedule TO filed in connection with a de-SPAC transaction.	Schedule TO	3 hour increase in compliance burden per Schedule TO
Item 1609: Projections in de-SPAC transactions Require additional disclosures regarding projections disclosed in a disclosure document for a de-SPAC transaction.	- Forms S-4 and F-4 - Schedules 14A and 14C - Schedule TO - Form 8-K	2 hour increase in compliance burden per Form S-4 or F-4 2 hour increase in compliance burden per Schedule 14A or 14C 2 hour increase in compliance burden per Schedule TO 2 hour increase in compliance burden per Form 8-K
Item 1610: Structured data requirement Require information disclosed pursuant to subpart 1600 to be tagged in a structured, machine-readable data language.	- Forms S-1, F-1, S-4, and F-4 - Schedules 14A and 14C - Schedule TO	1 hour increase in compliance burden per Form S-1, F-1, S-4, or F-4 1 hour increase in compliance burden per Schedule 14A or 14C 1 hour increase in compliance burden per Schedule TO

Final Requirement and Effects	Affected Forms and Schedules	Estimated Effect Per Affected Response*
Amendments to Regulation S-X** Amend financial statement requirements and the forms and schedules filed in connection with business combination transactions involving shell companies (other than business combination related shell companies), including de-SPAC transactions, to align more closely required disclosures about the target company with those required in a Form S-1 or F-1 for an IPO, including: • Expanding the circumstances in which target companies may report two years, instead of three years, of audited financial statements (resulting in a decrease in burden) (Rule 15-01(b)); and • Further aligning the requirements for audited financial statements in these transactions with those required in a registered IPO (resulting in an increase in burden) (Rule 15-01(c), (d) and (e)).	• Forms S-4 and F-4 • Schedules 14A and 14C • Schedule TO	• 50 hour net decrease in compliance burden per affected Form S-4 or F-4*** • 50 hour net decrease in compliance burden per affected Schedule 14A or 14C*** • 50 hour net decrease in compliance burden per affected Schedule TO***
Amendments to Align Non-Financial Statement Disclosures in De-SPAC Transactions • Amend the forms and schedules filed in connection with de-SPAC transactions to align more closely required non-financial statement disclosures about the target company with those required in a Form S-1 or F-1 for an IPO.	• Forms S-4 and F-4 • Schedules 14A and 14C • Schedule TO	• 8 hour increase in compliance burden per Form S-4 or F-4 • 8 hour increase in compliance burden per Schedule 14A or 14C • 8 hour increase in compliance burden per Schedule TO
Amendment to Forms S-4 and F-4 • Amend Form S-4 and Form F-4 to require that if the securities to be registered on the form will be issued by a SPAC or another shell company in connection with a de-SPAC transaction, the registrants also include the target company.	• Forms S-4 and F-4	• 100 hour increase in compliance burden per Form S-4 or F-4****

Final Requirement and Effects	Affected Forms and Schedules	Estimated Effect Per Affected Response*
Notes: * Estimated effect expressed as increase or decrease of burden hours on average and, as applicable, derived from Commission staff review of samples of relevant sections of the affected forms. ** We estimate that there will be a negligible or no change in burden to Form 20-F and Form 8-K as a result of the final amendments to Regulation S-X, in that these final amendments codify how existing rules are applied in practice. *** We arrive at an estimate for these amendments to Regulation S-X on the assumption that approximately 30% of affected responses would require one fewer year of audited financial statements under Rule 15-01(b) than under the current rules from registrants that would otherwise have prepared financial statements for such year. Coupled with an incremental increase in burden for the amendments to Regulation S-X other than proposed Rule 15-01(b), when this decrease is spread across all affected responses, we arrive at a net burden decrease of 50 hours. **** The estimated 100 hour increase in burden is based on an estimate of the additional time that a target company, as a co-registrant, would spend on preparing disclosures in a Form S-4 or F-4 filed by a SPAC for a de-SPAC transaction.		

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In addition, we are adopting requirements that a post-business combination company re-determine whether it is an SRC following a de-SPAC transaction. Under the final rules, a post-business combination company is required to reflect this re-determination in its filings beginning 45 days after

consummation of the de-SPAC transaction. We estimate that the re-determination of SRC status will result in increased burdens in filing Forms 10-K, Forms 10-Q, Schedules 14A, Schedules 14C, and Forms S-1 for those post-business combination companies that will lose SRC status, which takes

into account the increased incremental burden in providing disclosures pursuant to non-SRC disclosure requirements. The following PRA Table 2 sets forth our estimates regarding the increase in compliance burden per filing when a post-business combination company loses SRC status:

PRA Table 2. Increase in Compliance Burden After Losing SRC Status¹⁴⁴⁵

Form / Schedule	Estimated Increase in Internal Hours per Filing (A)	Estimated Increase in Outside Professional Hours per Filing (B)	Estimated Increase in Outside Professional Costs per Filing (C) = (B) x \$600	Estimated Increase in Total Hours per Filing (D) = (A) + (B)
Form 10-K*	439.00	147.00	\$88,200	586.00
Form 10-Q*	36.57	11.88	\$7,128	48.45
Schedule 14A**	0.75	0.25	\$150	1.00
Schedule 14C***	0.75	0.25	\$150	1.00
Form S-1*	5.75	17.25	\$10,350	23.00

Notes:

* The estimated increases in compliance burdens for Forms 10-K, 10-Q, and S-1 are based on the difference between the current estimates for the applicable form for non-SRCs and the estimated burden for SRCs in filing the form. We estimate the compliance burden for an SRC in filing these forms using the same methodology as in 2018 when the Commission amended the “smaller reporting company” definition. *See Smaller Reporting Company Definition*, Release No. 33-10513 (June 28, 2018) [83 FR 31992 (July 10, 2018)], at section V.

** In regard to Schedule 14A, we estimate that a company that loses SRC status would experience an increased compliance burden of 0.75 internal burden hours and a cost of \$150 (0.25 professional hours x \$600/hour) per schedule, based on our estimate of the compliance burden for 17 CFR 229.407(d)(5) and (e)(4) and (5) (Item 407(d)(5) and (e)(4) and (5) of Regulation S-K), with which SRCs are not required to comply.

*** Similar to Schedule 14A, we estimate that, in regard to Schedule 14C, a company that loses SRC status would experience an increased compliance burden of 0.75 burden hours and a cost of \$150 (0.25 professional hours x \$600/hour) per filing, based on our estimate of the compliance burden for Item 407(d)(5) and (e)(4) and (5) of Regulation S-K, with which SRCs are not required to comply.

C. Incremental and Aggregate Burden and Cost Estimates**1. Current Inventory Update To Reflect \$600 per Hour Rather Than \$400 per Hour Outside Professional Costs Rate**

At the outset, we note that the current OMB inventory for the above-referenced collections of information reflects an average rate of \$400 per burden hour borne by outside professionals. Similarly, in the Proposing Release, the Commission used an estimated cost of

\$400 per hour, recognizing that the costs of retaining outside professionals may vary depending on the nature of the professional services.¹⁴⁴⁶ The Commission recently determined to increase the estimated hourly rate to \$600 per hour¹⁴⁴⁷ to adjust the estimate for inflation from August 2006.¹⁴⁴⁸ In order to more accurately present the burden changes as a result of the final amendments in the context of the current burden inventory, in this section

IX.C.1 we present updated numbers for the current inventory for professional cost burden for each of the affected collections of information to reflect the updated \$600 per hour rate where it has not yet been reflected in the current burden inventory. This update is solely derived from the change in the hourly rate; it is not a new burden imposed by the final amendments. The updated cost estimates using the \$600 per hour rate are set out in PRA Table 3 below.

¹⁴⁴⁵ See discussion preceding PRA Table 4 below for a brief discussion on the allocation of compliance burdens between internal burden hours and outside professional costs.

¹⁴⁴⁶ See Proposing Release, section X.C.

¹⁴⁴⁷ We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of \$600 per hour. This is the

rate we typically estimate for outside legal services used in connection with public company reporting.

¹⁴⁴⁸ See Listing Standards for Recovery of Erroneously Awarded Compensation, Rel. No. 33-11126 (Oct. 26, 2022) [87 FR 73076 (Nov. 28, 2022)].

PRA Table 3: Change in PRA Burden Due to Updated Outside Professional Cost Estimate

Collection of Information	Current Inventory Professional Cost Burden (@ \$400/hr.)	Updated Professional Cost Burden (@ \$600/hr.)	Increased Burden Due to Update
	(A)	(B)	(C) = (B) – (A)
Schedule 14A	\$113,410,112	\$170,115,168	\$56,705,056
Schedule 14C	\$8,407,344	\$12,611,016	\$4,203,672
Schedule TO	\$12,333,000	\$18,499,500	\$6,166,500
Form S-1	\$174,015,643	\$261,023,465	\$87,007,822
Form S-4	\$675,605,379	\$1,013,408,069	\$337,802,690
Form F-1	\$32,130,375	\$48,195,563	\$16,065,188
Form F-4	\$17,013,425	\$25,520,138	\$8,506,713
Form 8-K	\$99,204,430	\$148,806,645	\$49,602,215
Form 10-K	\$1,835,594,519	\$2,753,391,779	\$917,797,260
Form 10-Q	\$410,257,154	\$615,385,731	\$205,128,577

2. PRA Burden and Cost Estimates Resulting From the Final Rules

Next, we estimate the incremental and aggregate increase in paperwork burden as a result of the final amendments. These estimates represent the average burden for all respondents, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual respondents based on a number of factors, including the size and complexity of their business. These estimates include the time and the cost of preparing and reviewing disclosure and filing documents. We believe that some registrants will experience costs in excess of this average and some registrants will experience lower than the average costs. Our methodologies for deriving these estimates are discussed below.

Our estimates represent the burden for all SPACs that file registration statements with the Commission for registered offerings and all registrants that file disclosure documents in connection with a de-SPAC transaction or a business combination involving a shell company or a reporting shell company.¹⁴⁴⁹ Additionally, our

estimates take into account an expected increase in the number of Securities Act registration statements as a result of final Rule 145a. Based on a review of Commission filings during the period 2012–2022 and an analysis of the effects of the final new rules and amendments,¹⁴⁵⁰ the staff estimates that:

- SPACs will file an average of 90 registration statements each year for registered offerings on Form S–1 and eight registration statements on Form F–1, other than for de-SPAC transactions;
- Regarding filings made per year in connection with de-SPAC transactions, we estimate there will be an average of: 50 registration statements on Form S–4 and eight registration statements on Form F–4;¹⁴⁵¹ four definitive proxy

other than a business combination related shell company” and “reporting shell company, other than a business combination related shell company.”

¹⁴⁵⁰ We based our estimates, in part, on a review of Commission filings over a 10-year period because we believe that this longer timeframe would more accurately reflect the average number of registration statements filed by SPACs and disclosure documents for de-SPAC transactions in a given year.

¹⁴⁵¹ Of the estimated 50 Form S–4 filings, we expect 30 filings would have been made irrespective of Rule 145a and an additional 20 filings will be made as a result of Rule 145a (whereas in the absence of Rule 145a, these latter 20 filings potentially may have been made on other

statements on Schedule 14A; two definitive information statements on Schedule 14C;¹⁴⁵² two tender offer statements on Schedule TO; and 58 Current Reports on Form 8–K;¹⁴⁵³ and

forms, such as Schedule 14A, Schedule 14C, or Schedule TO). Similarly, our estimate of eight Form F–4 filings is based on four Form F–4 filings that we expect would have been made irrespective of Rule 145a and four additional filings as a result of Rule 145a.

¹⁴⁵² Our estimates of proxy statements (4) and information statements (2) do not include any combined registration/proxy statements or combined registration/information statements, which are included in the estimates of registration statements on Forms S–4 (50) and F–4 (8). Additionally, we have changed our estimate of the number of proxy statement filings on Schedule 14A from the 30 estimated in the Proposing Release to four because we expect fewer proxy statements as a result of Rule 145a. We have also changed our estimate of the number of information statement filings on Schedule 14C from four to two because we expect fewer information statements as a result of Rule 145a. Our estimates of proxy statements and information statements are greater than zero because, as we discuss in section IV.A, notwithstanding Rule 145a, depending on the facts and circumstances, an exemption from registration could potentially apply, and, because, even where a registration statement has been filed, we expect some SPACs may still file a stand-alone proxy or information statement that is not combined with the registration statement.

¹⁴⁵³ While the final rules apply Item 1609 to projections in a Form 8–K filed pursuant to Item 1.01, we are unable to estimate the number of such filings that may include projections. We are estimating as an upward bound that every domestic registrant that engages in a de-SPAC transaction

¹⁴⁴⁹ Throughout this release and as stated earlier, we use “shell company” and “reporting shell company” in lieu of the phrases “shell company,

• An average of 20 registration statements on Form S-4 and two registration statements on Form F-4 will be filed each year for business combination transactions involving a reporting shell company that is not a business combination related shell company and a non-shell company, other than de-SPAC transactions.¹⁴⁵⁴

For purposes of the PRA, the burden is allocated between internal burden hours and outside professional costs. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours. The following PRA Table 4 sets forth the percentage

estimates we use for the burden allocation for each form and schedule, consistent with current OMB estimates and recent Commission rulemakings. We estimate that the average cost of retaining outside professionals is \$600 per hour.

PRA Table 4. Standard Estimated Burden Allocation for Specified Collections of Information

Form / Schedule	Internal	Outside Professionals
Forms S-1, F-1, S-4, and F-4	25%	75%
Schedules 14A and 14C	75%	25%
Schedule TO	50%	50%
Form 8-K, Form 10-K, and Form 10-Q	75%	25%

The following PRA Table 5 summarizes the estimated effects of the final new rules and amendments on the

paperwork burdens associated with the affected forms, schedules, and records, including those effects related to Rule

145a, which have been broken out to demonstrate the impact of that rule on certain forms:

may include such disclosure. Accordingly, our estimate of 58 Forms 8-K is the sum of the number of estimated Form S-4, Schedule 14A, Schedule 14C, and Schedule TO filings in connection with a de-SPAC. We note that, to the extent that a registrant prepares responsive disclosure that is

included in a Form 8-K and is later included in one of these filings, the total burden assumed by the registrant would be mitigated, which our estimates do not reflect.

¹⁴⁵⁴ This estimate represents the upper bound of the estimated number of Forms S-4 and F-4 filed

for these transactions as a result of Rule 145a. *See supra* note 78 (discussing data on non-SPAC reverse mergers, including limitations on data for more recent years).

PRA Table 5. Calculation of the Incremental Change in Burden Estimates of Current Responses Resulting from the Final New Rules and Amendments, Including Certain Effects of Rule 145a

Form / Schedule	Number of Estimated Affected Responses	Estimated Burden Hour Increase or (Decrease) per Affected Response	Total Estimated Incremental Increase or (Decrease) in Burden Hours	Estimated Increase or (Decrease) in Internal Burden Hours	Estimated Increase or (Decrease) in Outside Professional Hours	Total Estimated Increase or (Decrease) in Outside Professional Costs
	(A)	(B)	(C) = (A) x (B)	(D) = (C) x (Allocation % from PRA Table 4, Internal)	(E) = (C) x (Allocation % from PRA Table 4, Outside Professionals)	(F) = (E) x \$600
Schedule 14A	4	(30)	(120)	(90)	(30)	(\$18,000)
Schedule 14C	2	(30)	(60)	(45)	(15)	(\$9,000)
Schedule TO	2	(27)	(54)	(27)	(27)	(\$16,200)
Form S-1	90	4	360	90	270	\$162,000
Form S-4 (other than 145a)	30	70	2,100	525	1,575	\$945,000
Form S-4 (from Rule 145a)	40	70	2,800	700	2,100	\$1,260,000
Form F-1	8	4	32	8	24	\$14,400
Form F-4 (other than 145a)	4	70	280	70	210	\$126,000
Form F-4 (from Rule 145a)	6	70	420	105	315	\$189,000
Form 8-K	58	2	116	87	29	\$17,400
Total	244	203	5,874	1,423	4,451	\$2,670,600

In addition, we estimate that an average of 50 fewer post-business combination companies following a de-SPAC transaction will qualify as SRCs than under the current rules until the next annual re-determination date.¹⁴⁵⁵ While we cannot predict with certainty the number of these post-business combination companies, we estimate for purposes of our PRA calculations that

currently all post-business combination companies qualify as SRCs following de-SPAC transactions in which the SPAC is the legal acquirer and that 80% of these companies that are eligible to use the scaled SRC disclosure provisions do so.¹⁴⁵⁶ We estimate that these registrants would file, on average, one Form 10-K, 1.5 Forms 10-Q, one Schedule 14A, 0.1 Schedule 14C, and

one registration statement on Form S-1 prior to the next re-determination of SRC status.

The following PRA Table 6 summarizes the estimated effects of the re-determination of SRC status on the paperwork burdens associated with the affected forms and schedules:

¹⁴⁵⁵ This estimate is based, in part, on our estimate of the number of de-SPAC transactions in which the SPAC is the legal acquirer.

¹⁴⁵⁶ This estimated realization rate is based on the same methodology and data set forth in Release No.

33-10513, section V.D. Though the estimated realization rate in Release No. 33-10513 preceded the effective date of the amendments to the “smaller reporting company” definition in 2018, we expect that the current realization rate for eligible

companies using the scaled SRC disclosure provisions to be generally consistent with the estimated realization rate in 2018.

PRA Table 6. Calculation of the Incremental Change in Burden Estimates of Current Responses Resulting from the Re-Determination of SRC Status

Form / Schedule	Number of Estimated Affected Responses *	Estimated Burden Hour Increase per Affected Response**	Total Estimated Incremental Increase in Burden Hours	Estimated Increase in Internal Burden Hours	Estimated Increase in Outside Professional Hours	Total Estimated Increase in Outside Professional Costs
	(A)	(B)	(C) = (A) x (B)	(D) = (C) x (Internal % PRA Table 4)	(E) = (C) x (Outside Professionals % PRA Table 4)	(F) = (E) x \$600
Schedule 14A	40	1	40	30	10	\$6,000
Schedule 14C	4	1	4	3	1	\$600
Form S-1	40	23	920	230	690	\$414,000
Form 10-K	40	586	23,440	17,580	5,860	\$3,516,000
Form 10-Q	60	48.45	2,907	2,180.25	726.75	\$436,050
Total	184	659.45	27,311	20,023.25	7,287.75	\$4,372,650
Notes: *Estimated Number of Affected Responses is calculated as: (50 companies) x (.8 usage of scaled disclosure) x (applicable incidence of filing relevant form as discussed above, e.g., one for Form 10-K). ** The figures in Column B (Estimated Burden Hour Increase per Affected Response) are taken from PRA Table 2, Column D (Estimated Increase in Total Hours per Filing).						

The following PRA Table 7 summarizes the requested paperwork burden changes to existing information

collections, including the estimated

total reporting burdens and costs, under the final rules.

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PRA Table 7. Requested Paperwork Burden under the Final Rules⁺

Form / Schedule	Current Burden, as adjusted*			Program Change			Requested Change in Burden		
	Current Annual Responses	Current Burden Hours	Current Cost Burden, as adjusted*	Number of Estimated Affected Responses **	Estimated Increase or (Decrease) in Internal Burden Hours***	Estimated Increase or (Decrease) in Outside Professional Costs****	Annual Responses	Burden Hours	Cost Burden
	(A)	(B)	(C)	(D)	(E)	(F)	(G) = (A)	(H) = (B) + (E)	(I) = (C) + (F)
Schedule 14A	6,369	850,836	\$170,115,168	44	(60)	(\$12,000)	6,369	850,776	\$170,103,168
Schedule 14C	569	63,048	\$12,611,016	6	(42)	(\$8,400)	569	63,006	\$12,602,616
Schedule TO	1,378	30,834	\$18,499,500	2	(27)	(\$16,200)	1,378	30,807	\$18,483,300
Form S-1	898	141,978	\$261,023,465	130	320	\$576,000	898	142,298	\$261,599,465
Form S-4	588	560,988	\$1,013,408,069	70	1,225	\$2,205,000	588	562,213	\$1,015,613,069
Form F-1	66	26,571	\$48,195,563	8	8	\$14,400	66	26,579	\$48,209,963
Form F-4	39	13,999	\$25,520,138	10	175	\$315,000	39	14,174	\$25,835,138
Form 8-K	118,387	99,204,430	\$148,806,645	58	87	\$17,400	118,387	99,204,517	\$148,824,045
Form 10-K	8,292	13,988,811	\$2,753,391,779	40	17,580	\$3,516,000	8,292	14,006,391	\$2,756,907,779
Form 10-Q	22,925	3,098,084	\$615,385,731	60	2,180	\$436,050	22,925	3,100,264	\$615,821,781
Total	159,511	117,979,579	\$5,066,957,074	428	21,446	\$7,043,250	159,511	118,001,025	\$5,074,000,324

+ Figures in this table have been rounded to the nearest whole number.

Notes:

* Current cost burden updated to reflect change in hourly rate of the costs of outside professionals to \$600, as reflected in PRA Table 3.

** Number of Estimated Affected Responses (Column D in this PRA Table 7) is the sum of affected responses from PRA Tables 5 and 6, as applicable.

*** Estimated Increase or (Decrease) in Internal Burden Hours (Column E in this PRA Table 7) is calculated as the sum of the following, as applicable: PRA Table 5, Column D (Estimated Increase or (Decrease) in Internal Burden Hours) plus PRA Table 6, Column D (Estimated Increase in Internal Burden Hours).

**** Estimated Increase or (Decrease) in Outside Professional Costs (Column F in this PRA Table 7) is calculated as the sum of the following, as applicable: PRA Table 5, Column F (Total Estimated Increase or (Decrease) in Outside Professional Costs) plus PRA Table 6, Column F (Total Estimated Increase in Outside Professional Costs).

X. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (“RFA”) ¹⁴⁵⁷ requires the Commission, in promulgating rules under section 553 of the Administrative Procedure Act of 1946, to consider the impact of those rules on small entities. We have prepared this Final Regulatory Flexibility Analysis (“FRFA”) in accordance with section 604 of the RFA. An Initial Regulatory Flexibility Analysis (“IRFA”) was prepared in accordance with the RFA and was included in the Proposing Release. ¹⁴⁵⁸

A. Need for, and Objectives of, the Final Rules

We are adopting new subpart 1600 of Regulation S–K and amendments to existing forms and schedules to require certain disclosures in registered offerings by SPACs, including IPOs, and in disclosure documents for de-SPAC transactions with respect to, among other things, compensation paid to SPAC sponsors, conflicts of interest, and dilution. For de-SPAC transactions, we are also adopting final rules that require disclosure of a determination of the board of directors (or similar governing body) of the SPAC whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its security holders if such a determination is required by the law of the jurisdiction in which the SPAC is organized or disclosure of any comparable determination that is required under such law, additional disclosures about the target company, a re-determination of SRC status following the completion of a de-SPAC transaction, and a minimum dissemination period for certain disclosure documents in these transactions. The final rules apply to, depending on the circumstances, registration statements on Forms S–1, F–1, S–4, and F–4 filed under the Securities Act and Schedules 14A, 14C, and TO under the Exchange Act. In addition, the first filing in which re-determination of SRC status following a de-SPAC transaction is reflected may be in a Form 10–K or Form 10–Q filing under the Exchange Act. The final rules also provide that if securities to be registered on Form S–4 or F–4 will be issued by a SPAC or another shell company in connection with a de-SPAC transaction, the registrants must also include the target company, except that in a de-SPAC transaction where the target company consists of a business or assets, the seller of the business or assets is deemed to be a registrant

instead of the business or assets. Further, we are adopting: new definitions of “blank check company” under the PSLRA such that the safe harbor under the PSLRA for forward-looking information would not be available to SPACs and certain other blank check companies; updated and expanded guidance in Item 10(b) of Regulation S–K regarding the use of projections in Commission filings; ¹⁴⁵⁹ and requirements to provide additional disclosure when projections are disclosed in connection with de-SPAC transactions.

In regard to business combination transactions involving a reporting shell company, ¹⁴⁶⁰ we are adopting Securities Act Rule 145a that provides, with respect to a reporting shell company’s shareholders, any direct or indirect business combination of a reporting shell company involving another entity that is not a shell company, is deemed to involve an offer, offer to sell, offer for sale, or sale within the meaning of Securities Act section 2(a)(3). In addition, we are adopting amendments to the financial statement reporting requirements in Regulation S–X for transactions involving shell companies.

The need for and objectives of the final rules are discussed in more detail in sections II through V above. We discuss the economic impact, including the estimated costs and burdens, of the final rules on all registrants, including small entities, in sections VIII and IX above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on all aspects of the IRFA, including the number of small entities that would be affected by the proposed rules, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, how the proposed rules could further lower the burden on small entities, and how to quantify the impact of the proposed rules. While we did not receive any comments specifically addressing the IRFA, as discussed above, one commenter suggested that the Commission consider a phased-in compliance period for smaller reporting

companies for the tagging requirements. ¹⁴⁶¹ We also received a number of comments on the proposed rules generally ¹⁴⁶² and have considered these comments in developing the FRFA.

C. Small Entities Subject to the Final Rules

The final rules will affect registrants that are small entities. The RFA defines “small entity” to mean “small business,” “small organization,” or “small governmental jurisdiction.” ¹⁴⁶³ The regulation at 17 CFR 230.157 defines an issuer, other than an investment company, to be a “small business” or “small organization” for purposes of the RFA if it had total assets of \$5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities not exceeding \$5 million. The regulation at 17 CFR 240.0–10(a) defines an issuer, other than an investment company, to be a “small business” or “small organization” if it had total assets of \$5 million or less on the last day of its most recent fiscal year.

The final disclosure and other requirements applicable to SPACs would not apply to issuers that raise less than \$5 million at the time of their IPOs. ¹⁴⁶⁴ However, we acknowledge that there may be instances where a small entity may be affected by the final rules, including at the time of a subsequent registered offering or at the time of a de-SPAC transaction. ¹⁴⁶⁵ While the Commission solicited comment on the number of SPACs that were small entities in such instances, we did not receive any feedback on this point. We remain unaware of any such instances to date. The Commission also solicited comment on the number of target private operating companies in de-SPAC transactions that may be small entities, and likewise did not receive feedback on this point. As noted in the Proposing Release, due to data limitations, we are unable to estimate the number of potential target private operating companies in de-SPAC transactions that may be small entities,

¹⁴⁶¹ See *supra* section II.I.

¹⁴⁶² See *supra* sections II through VI.

¹⁴⁶³ 5 U.S.C. 601(6).

¹⁴⁶⁴ See discussion of the definition of “special purpose acquisition company” in section II.A.

¹⁴⁶⁵ According to data from Dealogic, the vast majority of IPOs by SPACs in 2020 and 2021 raised more than \$50 million and in 2022 all SPAC IPOs raised \$50 million or more. In 2020, the smallest amount raised in a SPAC IPO was \$40 million. In 2021, the smallest amount raised in a SPAC IPO was \$44 million. In 2022, the smallest amount raised in a SPAC IPO was \$50 million.

¹⁴⁵⁷ 5 U.S.C. 601 *et seq.*

¹⁴⁵⁸ Proposing Release, *supra* note 7, at 29558–29560.

¹⁴⁵⁹ Item 10(b) sets forth guidelines representing the Commission’s views on important factors to be considered in formulating and disclosing management’s projections of future economic performance in Commission filings.

¹⁴⁶⁰ Throughout this release and as stated earlier, we use “shell company” and “reporting shell company” in lieu of the phrases “shell company, other than a business combination related shell company” and “reporting shell company, other than a business combination related shell company.”

however, we expect this number to be relatively low.¹⁴⁶⁶

In regard to final Rule 145a and the final amendments to Regulation S–X, we estimate that there are 136 non-SPAC reporting shell companies that are small entities.¹⁴⁶⁷ The Commission requested comment in the Proposing Release regarding the number of private operating companies and private shell companies that are small entities and may engage in a business combination transaction but did not receive any information on this point. Due to data limitations, we remain unable to estimate this number.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

We expect that the final disclosure and other requirements applicable to registrants, including target companies, will have an incremental effect on reporting, recordkeeping, and other compliance burdens for registrants (including target companies), including small entities. These requirements will increase compliance costs for registrants (including target companies), and compliance with these requirements will require the use of professional skills, including accounting, legal, and technical skills. We generally expect that the nature of any benefits and costs associated with the final rules to be similar for large and small entities. We also anticipate that the economic benefits and costs likely could vary among small entities based on a number of factors, such as the nature and conduct of their businesses, which makes it difficult to project the economic impact on small entities with precision. The final rules are discussed in detail in sections II through V above. We discuss the economic effects, including the estimated costs and burdens, of the final rules on all registrants (including target companies), including small entities, in sections VIII and IX above.

Final Rule 145a may impose reporting or compliance requirements and related costs on a small entity to the extent it would require such a small entity to register the transaction under the

Securities Act or comply with an exemption from registration.

E. Duplicative, Overlapping or Conflicting Federal Rules

The final disclosure requirements in subpart 1600 of Regulation S–K partially duplicate and overlap with a number of existing disclosure requirements under Regulation S–K that are currently applicable to SPAC registered offerings and in de-SPAC transactions.¹⁴⁶⁸ To the extent that the disclosure requirements in final subpart 1600 overlap with these existing disclosure requirements, a registrant would not be required to duplicate the resulting disclosure, and as such there should not be a duplicative or increased burden. As discussed in section II.C, if there are facts and circumstances that may result in required disclosure under a current rule being the same as under any of the rules we are adopting, then registrants could cross-reference rather than repeat disclosures.

Other than these disclosure requirements, we believe that the final rules and amendments would not duplicate, overlap, or conflict with other Federal rules.

F. Agency Action To Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. Accordingly, we considered several alternatives, including the following:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The final rules will enhance and clarify information provided to investors, including by enabling investors to make better informed decisions as to whether to purchase securities in SPAC registered offerings or to purchase or sell SPAC securities in secondary trading markets and as to voting, investment, redemption, and tender decisions in connection with de-SPAC transactions. Further, with respect to Rule 145a and co-registration requirements, as discussed above in sections III.C and IV.A, the final rules

will help ensure that a private operating company's method of becoming a public company does not negatively impact the protection of investors. Due to the nature of SPAC transactions and the investor protection concerns discussed above, we believe that the final rules are equally appropriate for SPACs of all sizes that are engaged in a registered offering and for SPACs and target companies of all sizes that are engaged in a de-SPAC transaction because we believe investors should receive the enhanced protections of the final rules regardless of the size of the entity engaged in the SPAC transaction. For the same reason, we believe that the final rules that apply to shell companies and/or blank check companies, including SPACs, are equally appropriate for such shell companies and/or blank check companies of all sizes.¹⁴⁶⁹ As a result, we do not believe that it is appropriate to adopt different compliance or reporting requirements for small entities; to clarify, consolidate or simplify small entity compliance and reporting requirements;¹⁴⁷⁰ or to provide for small entity exemptions. As noted above, in our view, a private operating company's method of becoming a public company should not negatively impact investor protection. We believe that exempting certain entities based on size from the requirements of the final rules would mean the benefits discussed above would be inappropriately unavailable to investors in those registrants. With respect to using performance rather than design standards, the final rules use primarily design standards in order to promote uniform compliance requirements for all registrants. Further, we believe that the requirements would be more beneficial to investors if there are specific disclosure requirements that apply to all registrants, regardless of size, for the reasons discussed above.

As discussed in section IV.A above, Rule 145a is designed to ensure that shareholders more consistently receive the full protections of Securities Act disclosure and liability provisions, as applicable, and that such investor protections will apply more consistently regardless of transaction structure. As a result, with respect to Rule 145a, we do not believe that it is appropriate to adopt different compliance or reporting requirements for small entities, to

¹⁴⁶⁶ In this regard, we note that exchange listing requirements and provisions in the governing instruments of many SPACs, along with how SPACs are structured to avoid the application of Rule 419, make it less likely that SPACs would merge with or acquire a small entity. See *supra* note 1203 (regarding exchange requirements that the SPAC complete a business combination(s) having an aggregate fair market value of at least 80% of the value of the net assets in the trust account excluding certain costs).

¹⁴⁶⁷ This estimate does not include business combination related shell companies.

¹⁴⁶⁸ See *supra* sections II through V.

¹⁴⁶⁹ The final definitions, for purposes of the PSLRA, of “blank check company,” final Rule 145a, and the final amendments to Regulation S–X are not limited to SPACs. See discussion in sections III.E, IV.A, and IV.B.

¹⁴⁷⁰ Certain rules we are adopting may provide benefits of clarity and simplicity for entities of all sizes, as we discuss in sections II through V.

clarify, consolidate, or simplify small entity compliance and reporting requirements, or to provide for small entity exemptions.

The amendments to Regulation S-X that we are adopting would generally codify existing staff guidance on financial statement requirements for certain business combinations involving shell companies, and, based on staff analysis of disclosures in these transactions, we believe that most companies, including small entities, already report consistently with this staff guidance. The amendments are not expected to have any significant adverse effect on small entities (and are expected to reduce compliance burdens as discussed in sections VIII and IX). Accordingly, we do not believe that it is necessary: to exempt small entities from all or part of the amendments to Regulation S-X; to establish different compliance or reporting requirements for such entities; or to clarify, consolidate, or simplify compliance and reporting requirements for small entities. Furthermore, the final amendments to Regulation S-X regarding financial statement requirements use design standards to a greater degree than performance standards in order to promote consistency in financial reporting which benefits investors who use financial data in making investment decisions, including by comparing financial data across companies.

Statutory Authority

We are adopting the rule and form amendments contained in this document under the authority set forth in sections 6, 7, 10, 19(a), and 28 of the Securities Act; and sections 3, 12, 13, 14, 15, 23(a), and 36 of the Exchange Act.

List of Subjects

17 CFR Part 210

Accountants, Accounting, Banks, Banking, Employee benefit plans, Holding companies, Insurance companies, Investment companies, Oil and gas exploration, Reporting and recordkeeping requirements, Securities, Utilities.

17 CFR Parts 229, 230, 232, 239, 240, and 249

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

Text of Rule and Form Amendments

For the reasons set out in the preamble, to the Commission is adopting amendments to title 17,

chapter II of the Code of Federal Regulations as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j-1, 78l, 78m, 78n, 78o(d), 78q, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202 and 7262, and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012), unless otherwise noted.

■ 2. Amend § 210.1-02 by revising paragraphs (d) and (w)(1) to read as follows:

§ 210.1-02 Definitions of terms used in Regulation S-X (17 CFR part 210).

* * * * *

(d) *Audit (or examination)*. The term *audit (or examination)*, when used in regard to financial statements of issuers as defined by section 2(a)(7) of the Sarbanes-Oxley Act of 2002, means an examination of the financial statements by an independent accountant in accordance with the standards of the Public Company Accounting Oversight Board (United States) ("PCAOB") for the purpose of expressing an opinion thereon. See § 210.15-01(a) for definition of an audit when used in regard to financial statements of an entity that will combine with an entity that is a shell company (other than a business combination related shell company). When used in regard to financial statements of entities that are not issuers as defined by section 2(a)(7) of the Sarbanes-Oxley Act of 2002, other than in transactions where § 210.15-01(a) applies, the term means an examination of the financial statements by an independent accountant in accordance with either the standards of the PCAOB or U.S. generally accepted auditing standards ("U.S. GAAS") as specified or permitted in this part and forms applicable to those entities for the purpose of expressing an opinion thereon. The standards of the PCAOB and U.S. GAAS may be modified or supplemented by the Commission.

* * * * *

(w) * * *

(1) The term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the conditions in paragraph (w)(1)(i), (ii), or

(iii) of this section; however if the registrant is a registered investment company or a business development company, the tested subsidiary meets any of the conditions in paragraph (w)(2) of this section instead of any of the conditions in this paragraph (w)(1). In an acquisition by a predecessor to a shell company, use the predecessor's consolidated financial statements instead of those of the shell company registrant in applying the significance tests in paragraphs (w)(1)(i), (ii), and (iii) of this section. A registrant that files its financial statements in accordance with or provides a reconciliation to U.S. Generally Accepted Accounting Principles (U.S. GAAP) must use amounts determined under U.S. GAAP. A foreign private issuer that files its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS-IASB) must use amounts determined under IFRS-IASB.

* * * * *

■ 3. Amend § 210.3-01 by revising paragraph (a) to read as follows:

§ 210.3-01 Consolidated balance sheets.

(a) There must be filed, for the registrant and its subsidiaries consolidated and for its predecessors, audited balance sheets as of the end of each of the two most recent fiscal years. If the registrant has been in existence for less than one fiscal year, there must be filed an audited balance sheet as of a date within 135 days of the date of filing the registration statement.

* * * * *

■ 4. Amend § 210.3-05 by revising paragraph (b)(4)(ii) to read as follows:

§ 210.3-05 Financial statements of businesses acquired or to be acquired.

* * * * *

(b) * * *

(4) * * *

(ii) A registrant, other than a foreign private issuer required to file reports on Form 6-K (§ 249.306 of this chapter) or a shell company (other than a business combination related shell company), that omits from its initial registration statement financial statements of a recently consummated business acquisition pursuant to paragraph (b)(4)(i) of this section must file those financial statements and any pro forma information specified by §§ 210.11-01 through 210.11-03 (Article 11) under cover of Form 8-K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition. When a predecessor to a shell company (other than a business combination related

shell company) acquires a business and the financial statements of that recently consummated business are omitted from a registration statement or proxy statement pursuant to paragraph (b)(4)(i) of this section, refer to § 210.15–01(d)(2).

* * * * *

■ 5. Amend § 210.3–14 by revising paragraph (b)(3)(ii) to read as follows:

§ 210.3–14 Special instructions for financial statements of real estate operations acquired or to be acquired.

* * * * *

(b) * * *

(3) * * *

(ii) A registrant, other than a foreign private issuer required to file reports on Form 6–K (§ 249.306 of this chapter) or shell company (other than a business combination related shell company), that omits from its initial registration statement financial statements of a recently consummated acquisition of a real estate operation pursuant to paragraph (b)(3)(i) of this section must file those financial statements and any pro forma information specified by §§ 210.11–01 through 210.11–03 (Article 11) under cover of Form 8–K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition. When a predecessor to a shell company (other than a business combination related shell company) acquires a real estate operation and the financial statements of that recently consummated acquisition of a real estate operation are omitted from a registration statement or proxy statement pursuant to paragraph (b)(3)(i) of this section, refer to § 210.15–01(d)(2).

* * * * *

■ 6. Revise § 210.8–02 to read as follows:

§ 210.8–02 Annual financial statements.

Smaller reporting companies must file an audited balance sheet for the registrant and its subsidiaries consolidated and for its predecessors as of the end of each of the most recent two fiscal years, or as of a date within 135 days if the issuer has existed for a period of less than one fiscal year, and audited statements of comprehensive income, cash flows and changes in stockholders' equity for each of the two fiscal years preceding the date of the most recent audited balance sheet (or such shorter period as the registrant has been in business).

■ 7. Amend § 210.10–01 by revising paragraph (a)(1) to read as follows:

§ 210.10–01 Interim financial statements.

(a) * * *

(1) Interim financial statements required by this section need only be provided as to the registrant and its subsidiaries consolidated and its predecessors and may be unaudited. Separate statements of other entities which may otherwise be required by this part may be omitted.

* * * * *

■ 8. Add an undesignated center heading and § 210.15–01 to read as follows:

Acquisitions of Businesses by a Shell Company (Other Than a Business Combination Related Shell Company)

§ 210.15–01 Acquisitions of businesses by a shell company (other than a business combination related shell company).

(a) *Audit requirements.* The term *audit* (or *examination*), when used in regard to financial statements of an entity that is or will be a predecessor to a shell company (other than a business combination related shell company), means an examination of the financial statements by an independent accountant in accordance with the standards of the Public Company Accounting Oversight Board (“PCAOB”) for the purpose of expressing an opinion thereon. When used in regard to financial statements of an entity that is not a predecessor that are included in a registration statement or proxy statement filed for a combination with an issuer that is a shell company (other than a business combination related shell company), the term means an examination of the financial statements by an independent accountant in accordance with either the standards of the PCAOB or U.S. generally accepted auditing standards (“U.S. GAAS”) as specified or permitted in this part and forms applicable to those entities for the purpose of expressing an opinion thereon. In transactions involving a shell company that is not a SPAC (as defined in § 229.1601(b) of this chapter), the predecessor must be audited by an independent accountant registered with the PCAOB.

(b) *Financial statements.* When a registrant is a shell company (other than a business combination related shell company) and the financial statements of a business that will be combining with such registrant are required in a registration statement or proxy statement, such registrant must file financial statements of the business in accordance with §§ 210.3–01 through 210.3–12 and 210.10–01 (Articles 3 and 10 of Regulation S–X) as if the filing were a Securities Act registration statement for the initial public offering of the business's equity securities. The

financial statements of the business may be filed pursuant to §§ 210.8–01 through 210.8–08 (Article 8) when that business would qualify to be a smaller reporting company based on its annual revenues as of the most recently completed fiscal year for which audited financial statements are available, if it were filing a registration statement alone.

(c) *Age of financial statements.* The financial statements of a business that will be acquired by a shell company (other than a business combination related shell company) must comply with the requirements in § 210.3–12 (§ 210.8–08 when that business would qualify to be a smaller reporting company based on its annual revenues as of the most recently completed fiscal year for which audited financial statements are available, if it were filing a registration statement alone) as if the financial statements were included in an initial registration statement in determining the age of financial statements of the business in the registration statement or proxy statement of the registrant.

(d) *Acquisition of a business or real estate operation by a predecessor.* Registrants must apply § 210.3–05 (§ 210.8–04 when the predecessor would qualify to be a smaller reporting company based on its annual revenues as of the most recently completed fiscal year for which audited financial statements are available if it were filing a registration statement alone) or § 210.3–14 (§ 210.8–06 when the predecessor would qualify to be a smaller reporting company based on its annual revenues as of the most recently completed fiscal year for which audited financial statements are available if it were filing a registration statement alone) to acquisitions of a business or real estate operation, respectively, by a predecessor.

(1) See § 210.1–02(w)(1) for rules on applying the significance tests to acquisitions of a business or real estate operation that is not or will not be the predecessor.

(2) When the financial statements of a recently acquired business or real estate operation that is not or will not be the predecessor are omitted from a registration statement or proxy statement pursuant to § 210.3–05(b)(4)(i) (Rule 3–05(b)(4)(i) of Regulation S–X) or § 210.3–14(b)(3)(i) (Rule 3–14(b)(3)(i) of Regulation S–X), those financial statements must be filed in a Form 8–K by the later of the filing of the Form 8–K filed pursuant to Item 2.01(f) of Form 8–K or 75 days after consummation of the acquisition.

(e) *Financial statements of shell company.* After a shell company

registrant (other than a business combination related shell company) acquires a business that is its predecessor, the financial statements of the shell company for periods prior to consummation of the acquisition are not required to be included in any filing once the financial statements of the predecessor have been filed for all required periods through the acquisition date and the financial statements of the registrant include the period in which the acquisition was consummated. If a registrant is to acquire or has acquired a shell company (other than a business combination related shell company), the financial statements of the shell company are required to be included in any filing that requires the registrant's financial statements, as if the shell company were the registrant for the filing, unless the financial statements of the registrant include the period in which the acquisition of the shell company was consummated.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S-K

■ 9. The authority citation for part 229 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11 and 7201 *et seq.*; 18 U.S.C. 1350; sec. 953(b), Pub. L. 111-203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012).

■ 10. Amend § 229.10 by:

- a. Revising paragraph (b); and
- b. Adding paragraph (f)(2)(iv).

The revision and addition read as follows:

§ 229.10 (Item 10) General.

* * * * *

(b) *Commission policy on projections.* The Commission encourages the use in documents specified in §§ 230.175 (Rule 175 under the Securities Act) and 240.3b-6 (Rule 3b-6 under the Exchange Act) of this chapter of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format. The guidelines set forth in this paragraph (b) represent the Commission's views on important factors to be considered in formulating and disclosing such projections. These guidelines also apply to projections of

future economic performance of persons other than the registrant, such as the target company in a business combination transaction, that are included in the registrant's Commission filings.

(1) *Basis for projections.* The Commission believes that management must have the option to present in Commission filings its good faith assessment of a registrant's future performance. Management, however, must have a reasonable basis for such an assessment. Although a history of operations or experience in projecting may be among the factors providing a basis for management's assessment, the Commission does not believe that a registrant always must have had such a history or experience in order to formulate projections with a reasonable basis. An outside review of management's projections may furnish additional support for having a reasonable basis for a projection. If management decides to include a report of such a review in a Commission filing, there also should be disclosure of the qualifications of the reviewer, the extent of the review, the relationship between the reviewer and the registrant, and other material factors concerning the process by which any outside review was sought or obtained. Moreover, in the case of a registration statement under the Securities Act, the reviewer would be deemed an expert and an appropriate consent must be filed with the registration statement.

(2) *Format for projections.* (i) In determining the appropriate format for projections included in Commission filings, consideration must be given to, among other things, the financial items to be projected, the period to be covered, and the manner of presentation to be used. Although traditionally projections have been given for three financial items generally considered to be of primary importance to investors (revenues, net income (loss), and earnings (loss) per share), projection information need not necessarily be limited to these three items. However, management should take care to assure that the choice of items projected is not susceptible of misleading inferences through selective projection of only favorable items. Revenues, net income (loss), and earnings (loss) per share usually are presented together in order to avoid any misleading inferences that may arise when the individual items reflect contradictory trends. There may be instances, however, when it is appropriate to present earnings (loss) from continuing operations in addition to or in lieu of net income (loss). It generally would be misleading to

present sales or revenue projections without one of the foregoing measures of income (loss). The period that appropriately may be covered by a projection depends to a large extent on the particular circumstances of the company involved. For certain companies in certain industries, a projection covering a two- or three-year period may be entirely reasonable. Other companies may not have a reasonable basis for projections beyond the current year. Accordingly, management should select the period most appropriate in the circumstances. In addition, management, in making a projection, should disclose what, in its opinion, is the most probable specific amount or the most reasonable range for each financial item projected based on the selected assumptions. Ranges, however, should not be so wide as to make the disclosures meaningless. Moreover, several projections based on varying assumptions may be judged by management to be more meaningful than a single number or range and would be permitted.

(ii) The presentation of projected measures that are not based on historical financial results or operational history should be clearly distinguished from projected measures that are based on historical financial results or operational history.

(iii) It generally would be misleading to present projections that are based on historical financial results or operational history without presenting such historical financial results or operational history with equal or greater prominence.

(iv) The presentation of projections that include non-GAAP financial measures should include a clear definition or explanation of those financial measures, a description of the Generally Accepted Accounting Principles (GAAP) financial measure to which it is most directly comparable, and an explanation why the non-GAAP measure was selected instead of a GAAP measure.

* * * * *

(f) * * *

(2) * * *

(iv) Upon the consummation of a de-SPAC transaction, as defined in § 229.1601(a) (Item 1601(a) of Regulation S-K), an issuer must re-determine its status as a smaller reporting company pursuant to the thresholds set forth in paragraph (f)(1) of this section prior to its first filing, other than pursuant to Items 2.01(f), 5.01(a)(8), and/or 9.01(c) of Form 8-K, following the de-SPAC transaction and reflect this re-determination in its

filings, beginning 45 days after consummation of the de-SPAC transaction.

(A) Public float is measured as of a date within four business days after the consummation of the de-SPAC transaction and is computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates as of that date by the price at which the common equity was last sold, or the average of the bid and asked

prices of common equity, in the principal market for the common equity; and

(B) Annual revenues are the annual revenues of the target company, as defined in § 229.1601(d) (Item 1601(d) of Regulation S-K), as of the most recently completed fiscal year reported in the Form 8-K filed pursuant to Items 2.01(f), 5.01(a)(8), and/or 9.01(c) of Form 8-K.

* * * * *

■ 11. Amend § 229.601 by:

EXHIBIT TABLE

	Securities act forms										Exchange act forms					
	S-1	S-3	SF-1	SF-3	S-4 ¹	S-8	S-11	F-1	F-3	F-4 ¹	10	8-K ²	10-D	10-Q	10-K	ABS-EE
(98) Reports, opinions, or appraisals in de-SPAC transactions ⁸	*	*		*		*		*		*		*		*		
	X				X			X		X						
	*	*		*		*		*		*		*		*		

¹ An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Form S-4 or F-4 to provide information about such company at a level prescribed by Form S-3 or F-3; and (2) the form, the level of which has been elected under Form S-4 or F-4, would not require such company to provide such exhibit if it were registering a primary offering.

² A Form 8-K exhibit is required only if relevant to the subject matter reported on the Form 8-K report. For example, if the Form 8-K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

⁸ If required pursuant to § 229.1607(c) (Item 1607(c) of Regulation S-K).

(b) * * *

(98) *Reports, opinions, or appraisals in de-SPAC transactions.* If the securities to be registered on the form will be issued in a de-SPAC transaction, as defined in § 229.1601(a) (Item 1601(a) of Regulation S-K), all reports, opinions, or appraisals required to be filed or included by § 229.1607(c) (Item 1607(c) of Regulation S-K).

* * * * *

(101) * * *

(i) * * *

(D) Is required in any filing that is excluded by paragraphs (b)(101)(i)(A), (B), or (C) of this section, that contains any disclosure required by subpart 229.1600 of this part but only as to such disclosure.

* * * * *

■ 12. Add subpart 229.1600 to read as follows:

Subpart 229.1600—Special Purpose Acquisition Companies

Sec.

229.1601 (Item 1601) Definitions.

229.1602 (Item 1602) Registered offerings by special purpose acquisition companies.

229.1603 (Item 1603) SPAC sponsor; conflicts of interest.

229.1604 (Item 1604) De-SPAC transactions.

229.1605 (Item 1605) Background of and reasons for the de-SPAC transaction; terms of the de-SPAC transaction; effects.

229.1606 (Item 1606) Board determination about the de-SPAC transaction.

229.1607 (Item 1607) Reports, opinions, appraisals, and negotiations.

229.1608 (Item 1608) Tender offer filing obligations.

229.1609 (Item 1609) Projections in de-SPAC transactions.

229.1610 (Item 1610) Structured data requirement.

Subpart 229.1600—Special Purpose Acquisition Companies

§ 229.1601 (Item 1601) Definitions.

For the purposes of this subpart:

(a) *De-SPAC transaction.* The term *de-SPAC transaction* means a business combination, such as a merger, consolidation, exchange of securities, acquisition of assets, reorganization, or similar transaction, involving a special purpose acquisition company and one or more target companies (contemporaneously, in the case of more than one target company).

(b) *Special purpose acquisition company (SPAC).* The term *special purpose acquisition company (SPAC)* means a company that has:

(1) Indicated that its business plan is to:

(i) Conduct a primary offering of securities that is not subject to the requirements of § 230.419 of this chapter (Rule 419 under the Securities Act);

(ii) Complete a business combination, such as a merger, consolidation, exchange of securities, acquisition of

■ a. In the exhibit table in paragraph (a), adding entry 98 and footnote 8;

■ b. Adding paragraph (b)(98);

■ c. Removing the word “and” at the end of paragraph (b)(101)(i)(B);

■ d. Removing the period at the end of paragraph (b)(101)(i)(C)(2) and adding “; and” in its place; and

■ e. Adding paragraph (b)(101)(i)(D).

The additions read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

assets, reorganization, or similar transaction, with one or more target companies within a specified time frame; and

(iii) Return proceeds from the offering and any concurrent offering (if such offering or concurrent offering intends to raise proceeds) to its security holders if the company does not complete a business combination, such as a merger, consolidation, exchange of securities, acquisition of assets, reorganization, or similar transaction, with one or more target companies within the specified time frame; or

(2) Represented that it pursues or will pursue a special purpose acquisition company strategy.

(c) *SPAC sponsor.* The term *SPAC sponsor* means any entity and/or person primarily responsible for organizing, directing, or managing the business and affairs of a special purpose acquisition company, excluding, if an entity is a SPAC sponsor, officers and directors of the special purpose acquisition company who are not affiliates of any such entity that is a SPAC sponsor.

(d) *Target company.* The term *target company* means an operating company, business or assets.

§ 229.1602 (Item 1602) Registered offerings by special purpose acquisition companies.

(a) *Forepart of registration statement and outside cover page of the*

prospectus. In addition to the information required by § 229.501 (Item 501 of Regulation S–K), provide the following information on the outside front cover page of the prospectus in plain English as required by § 230.421(d) of this chapter:

(1) State the time frame for the special purpose acquisition company to consummate a de-SPAC transaction and whether this time frame may be extended.

(2) State whether security holders will have the opportunity to redeem the securities offered and whether the redemptions will be subject to any limitations.

(3) State the amount of the compensation received or to be received by the SPAC sponsor, its affiliates, and promoters, the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates, and promoters and the price paid or to be paid for such securities, and whether this compensation and securities issuance may result in a material dilution of the purchasers' equity interests. Provide a cross-reference, highlighted by prominent type or in another manner, to the locations of related disclosures in the prospectus.

(4) Disclose in the tabular format specified below at quartile intervals

based on percentages of the maximum redemption threshold: the offering price; as of the most recent balance sheet date filed, the net tangible book value per share, as adjusted, as if the offering and assumed redemption levels have occurred and to give effect to material probable or consummated transactions (other than the completion of a de-SPAC transaction); and the difference between the offering price and such net tangible book value per share, as adjusted. Provide a cross-reference, highlighted by prominent type or in another manner, to the locations of related disclosures in the prospectus:

TABLE 1 TO PARAGRAPH (a)(4)
NET TANGIBLE BOOK VALUE PER SHARE, AS ADJUSTED

Offering Price of ____	25% of Maximum redemption	50% of Maximum redemption	75% of Maximum redemption	Maximum redemption

Instruction 1 to paragraph (a)(4). If the offering includes an over-allotment option, include separate rows in the tabular disclosure showing the information required by this paragraph (a)(4) with and without the exercise of the over-allotment option.

(5) State whether there may be actual or potential material conflicts of interest between the SPAC sponsor, its affiliates, or promoters; and purchasers in the offering. Provide a cross-reference, highlighted by prominent type or in another manner, to the locations of related disclosures in the prospectus.

(b) *Prospectus summary.* The information required by § 229.503(a) (Item 503(a) of Regulation S–K) must include a brief description of the following in plain English as required by § 230.421(d) of this chapter:

(1) The manner in which the special purpose acquisition company will identify and evaluate potential business combination candidates and whether it will solicit shareholder approval for the de-SPAC transaction;

(2) The material terms of the trust or escrow account and the amount or percentage of the gross offering proceeds that the special purpose acquisition company will place in the trust or escrow account;

(3) The material terms of the securities being offered, including redemption rights, and whether the securities are the same class as those held by the SPAC sponsor and its affiliates;

(4) The period of time in which the special purpose acquisition company intends to consummate a de-SPAC

transaction and its plans in the event that it does not consummate a de-SPAC transaction within this time period, including whether, and if so, how, it may extend the time period; any limitations on extensions, including the number of times; the consequences to the SPAC sponsor of not completing an extension of this time period; and whether security holders will have voting or redemption rights with respect to such an extension;

(5) Any plans to seek additional financings and how the terms of additional financings may impact unaffiliated security holders;

(6) In a tabular format, the nature and amount of the compensation received or to be received by the SPAC sponsor, its affiliates, and promoters, the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates, and promoters and the price paid or to be paid for such securities, and, outside of the table, the extent to which this compensation and securities issuance may result in a material dilution of the purchasers' equity interests; and

(7) Any actual or potential material conflict of interest between the SPAC sponsor, its affiliates, or promoters; and purchasers in the offering, including those that may arise in determining whether to pursue a de-SPAC transaction.

(c) *Dilution.* Disclose in a tabular format for the same quartile intervals as in paragraph (a)(4) of this section: the offering price; net tangible book value per share, as adjusted, determined in the same manner as in paragraph (a)(4); and the difference between the offering price

and such net tangible book value per share, as adjusted. The tabular disclosure must show: the nature and amounts of each source of dilution used to determine net tangible book value per share, as adjusted; the number of shares used to determine net tangible book value per share, as adjusted; and any adjustments to the number of shares used to determine the per share component of net tangible book value per share, as adjusted. Outside of the table, describe each material potential source of future dilution following the registered offering by the special purpose acquisition company, including sources not included in the table with respect to the determination of net tangible book value per share, as adjusted. Provide a description of the model, methods, assumptions, estimates, and parameters necessary to understand the tabular disclosure.

§ 229.1603 (Item 1603) SPAC sponsor; conflicts of interest.

(a) *SPAC sponsor, its affiliates, and promoters.* Provide the following information about the SPAC sponsor, its affiliates, and promoters of the special purpose acquisition company:

(1) State the SPAC sponsor's name and describe the SPAC sponsor's form of organization.

(2) Describe the general character of the SPAC sponsor's business.

(3) Describe the experience of the SPAC sponsor, its affiliates, and any promoters in organizing special purpose acquisition companies and the extent to which the SPAC sponsor, its affiliates,

and the promoters are involved in other special purpose acquisition companies.

(4) Describe the material roles and responsibilities of the SPAC sponsor, its affiliates, and any promoters in directing and managing the special purpose acquisition company's activities.

(5) Describe any agreement, arrangement, or understanding between the SPAC sponsor and the special purpose acquisition company, its officers, directors, or affiliates with respect to determining whether to proceed with a de-SPAC transaction.

(6) Disclose the nature (e.g., cash, shares of stock, warrants and rights) and amounts of all compensation that has been or will be awarded to, earned by, or paid to the SPAC sponsor, its affiliates, and any promoters for all services rendered or to be rendered in all capacities to the special purpose acquisition company and its affiliates and the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates, and any promoters and the price paid or to be paid for such securities. Disclose any circumstances or arrangements under which the SPAC sponsor, its affiliates, and promoters, directly or indirectly, have transferred or could transfer ownership of securities of the SPAC, or that have resulted or could result in the surrender or cancellation of such securities. In addition, disclose the nature and amounts of any reimbursements to be paid to the SPAC sponsor, its affiliates, and any promoters upon the completion of a de-SPAC transaction.

(7) Identify the controlling persons of the SPAC sponsor. Disclose, as of the most recent practicable date, the persons who have direct and indirect material interests in the SPAC sponsor, as well as the nature and amount of their interests.

(8) Describe any agreement, arrangement, or understanding, including any payments, between the SPAC sponsor and unaffiliated security holders of the special purpose acquisition company regarding the redemption of outstanding securities of the special purpose acquisition company.

(9) Disclose, in a tabular format to the extent practicable, the material terms of any agreement, arrangement, or understanding regarding restrictions on whether and when the SPAC sponsor and its affiliates may sell securities of the special purpose acquisition company, including the date(s) on which the agreement, arrangement, or understanding may expire; the natural persons and entities subject to such an agreement, arrangement, or

understanding; any exceptions under such an agreement, arrangement, or understanding; and any terms that would result in an earlier expiration of such an agreement, arrangement, or understanding.

(b) *Conflicts of interest.* Describe any actual or potential material conflict of interest that may arise in determining whether to proceed with a de-SPAC transaction and any material conflict of interest arising from the manner in which the special purpose acquisition company compensates a SPAC sponsor, officers, or directors or the manner in which a SPAC sponsor compensates its officers and directors, between:

(1) The SPAC sponsor or its affiliates; the special purpose acquisition company's officers, directors, or promoters; or the target company's officers or directors; and

(2) Unaffiliated security holders of the SPAC.

(c) *SPAC officer and director fiduciary duties.* Briefly describe the fiduciary duties of each officer and director of the special purpose acquisition company to other companies to which they have fiduciary duties.

§ 229.1604 (Item 1604) De-SPAC transactions.

(a) *Forepart of registration statement and outside cover page of the prospectus.* In addition to the information required by § 229.501 (Item 501 of Regulation S-K), provide the following information on the outside front cover page of the prospectus in plain English as required by § 230.421(d) of this chapter:

(1) State the determination, if any, of the board of directors (or similar governing body) of the special purpose acquisition company disclosed in response to § 229.1606(a) (Item 1606(a) of Regulation S-K) and, if applicable, that the special purpose acquisition company or the SPAC sponsor has received a report, opinion, or appraisal referred to in § 229.1607(a) (Item 1607(a) of Regulation S-K).

(2) Describe briefly any material financing transactions that have occurred since the initial public offering of the special purpose acquisition company or will occur in connection with the consummation of the de-SPAC transaction.

(3) State the amount of the compensation received or to be received by the SPAC sponsor, its affiliates, and promoters in connection with the de-SPAC transaction or any related financing transaction; the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates,

and promoters and the price paid or to be paid for such securities in connection with the de-SPAC transaction or any related financing transaction; and whether this compensation and securities issuance may result in a material dilution of the equity interests of non-redeeming shareholders who hold the securities until the consummation of the de-SPAC transaction. Provide a cross-reference, highlighted by prominent type or in another manner, to the locations of related disclosures in the prospectus.

(4) State whether, in connection with the de-SPAC transaction, there may be any actual or potential material conflict of interest, including any material conflict of interest that may arise in determining whether to proceed with a de-SPAC transaction and any material conflict of interest arising from the manner in which the special purpose acquisition company compensates a SPAC sponsor, officers, and directors or the manner in which a SPAC sponsor compensates its officers and directors, between: on one hand, the SPAC sponsors, their affiliates, SPAC officers, SPAC directors, or promoters, target company officers or target company directors; and, on the other hand, unaffiliated security holders of the SPAC. Provide a cross-reference, highlighted by prominent type or in another manner, to the locations of related disclosures in the prospectus.

(b) *Prospectus summary.* The information required by § 229.503(a) (Item 503(a) of Regulation S-K) must include a brief description of the following in plain English as required by § 230.421(d) of this chapter:

(1) The background and material terms of the de-SPAC transaction;

(2) The determination, if any, of the board of directors (or similar governing body) of the special purpose acquisition company disclosed in response to § 229.1606(a) (Item 1606(a) of Regulation S-K), the material factors that the board of directors (or similar governing body) of the special purpose acquisition company considered in making such determination, and any report, opinion, or appraisal referred to in § 229.1607(a) (Item 1607(a) of Regulation S-K);

(3) In connection with the de-SPAC transaction, any actual or potential material conflict of interest between:

(i) The SPAC sponsor, SPAC officers, SPAC directors, SPAC affiliates or promoters, target company officers, or target company directors; and

(ii) Unaffiliated security holders of the SPAC;

(4) In a tabular format, the terms and amount of the compensation received or

to be received by the SPAC sponsor, its affiliates, and promoters in connection with the de-SPAC transaction or any related financing transaction, the amount of securities issued or to be issued by the SPAC to the SPAC sponsor, its affiliates, and promoters and the price paid or to be paid for such securities in connection with the de-SPAC transaction or any related financing transaction; and, outside of the table, the extent to which that compensation and securities issuance has resulted or may result in a material dilution of the equity interests of non-redeeming shareholders of the special purpose acquisition company;

(5) The material terms of any material financing transactions that have occurred or will occur in connection with the consummation of the de-SPAC transaction, the anticipated use of proceeds from these financing transactions and the dilutive impact, if any, of these financing transactions on non-redeeming shareholders; and

(6) The rights of security holders to redeem the outstanding securities of the special purpose acquisition company and the potential dilutive impact of redemptions on non-redeeming shareholders.

(c) *Dilution.* Disclose in a tabular format that includes intervals representing selected potential redemption levels that may occur across a reasonably likely range of outcomes: the offering price disclosed pursuant to § 229.1602(a)(4) (Item 1602(a)(4)) in the initial registered offering by the SPAC; as of the most recent balance sheet date filed, the net tangible book value per share, as adjusted, as if the selected redemption levels have occurred, and to give effect to, while excluding the de-SPAC transaction itself, material probable or consummated transactions and other material effects on the SPAC's net tangible book value per share from the de-SPAC transaction; and the difference between such offering price and such net tangible book value per share, as adjusted. The tabular disclosure must show: the nature and amounts of each source of dilution used to determine net tangible book value per share, as adjusted; the number of shares used to determine net tangible book value per share, as adjusted; and any adjustments to the number of shares used to determine the per share component of net tangible book value per share, as adjusted. Outside of the table, describe each material potential source of future dilution that non-redeeming shareholders may experience by electing not to tender their shares in connection with the de-SPAC transaction, including sources not

included in the table with respect to the determination of net tangible book value per share, as adjusted.

(1) With respect to each redemption level, state the company valuation at or above which the potential dilution results in the amount of the non-redeeming shareholders' interest per share being at least the initial public offering price per share of common stock.

(2) Provide a description of the model, methods, assumptions, estimates, and parameters necessary to understand the tabular disclosure.

§ 229.1605 (Item 1605) Background of and reasons for the de-SPAC transaction; terms of the de-SPAC transaction; effects.

(a) Provide a summary of the background of the de-SPAC transaction. Such summary must include a description of any contacts, negotiations, or transactions that have occurred concerning the de-SPAC transaction.

(b) State the material terms of the de-SPAC transaction, including but not limited to:

(1) A brief description of the de-SPAC transaction;

(2) A brief description of any related financing transaction, including any payments from the SPAC sponsor to investors in connection with the financing transaction;

(3) A reasonably detailed discussion of the reasons of the SPAC and the target company for engaging in the de-SPAC transaction and reasons of the SPAC for the structure and timing of the de-SPAC transaction and any related financing transaction;

(4) An explanation of any material differences in the rights of SPAC and target company security holders as compared with security holders of the combined company as a result of the de-SPAC transaction;

(5) A brief statement as to the accounting treatment of the de-SPAC transaction; and

(6) The Federal income tax consequences of the de-SPAC transaction to the SPAC, the target company, and their respective security holders.

(c) Describe the effects of the de-SPAC transaction and any related financing transaction on the special purpose acquisition company and its affiliates, the SPAC sponsor and its affiliates, the target company and its affiliates, and unaffiliated security holders of the special purpose acquisition company. The description must include a reasonably detailed discussion of both the benefits and detriments of the de-SPAC transaction and any related

financing transaction to the special purpose acquisition company and its affiliates, the SPAC sponsor and its affiliates, the target company and its affiliates, and unaffiliated security holders of the special purpose acquisition company. The benefits and detriments of the de-SPAC transaction and any related financing transaction must be quantified to the extent practicable.

(d) Disclose any material interests in the de-SPAC transaction or any related financing transaction: held by the SPAC sponsor or the special purpose acquisition company's officers or directors, including fiduciary or contractual obligations to other entities as well as any interest in, or affiliation with, the target company; or held by the target company's officers or directors that consist of any interest in, or affiliation with, the SPAC sponsor or the special purpose acquisition company.

(e) State whether or not security holders are entitled to any redemption or appraisal rights. If so, summarize the redemption or appraisal rights. If there are no redemption or appraisal rights available for security holders who object to the de-SPAC transaction, briefly outline any other rights that may be available to security holders.

§ 229.1606 (Item 1606) Board determination about the de-SPAC transaction.

(a) *Board determination.* If the law of the jurisdiction in which the special purpose acquisition company is organized requires its board of directors (or similar governing body) to determine whether the de-SPAC transaction is advisable and in the best interests of the special purpose acquisition company and its security holders, or otherwise make any comparable determination, disclose that determination.

(b) *Factors considered in board determination.* Discuss the material factors the board of directors (or similar governing body) of the special purpose acquisition company considered in making any determination disclosed in response to paragraph (a) of this section. To the extent considered, such factors must include, but need not be limited to, the valuation of the target company, financial projections relied upon by the board of directors (or similar governing body), the terms of financing materially related to the de-SPAC transaction, any report, opinion, or appraisal referred to in § 229.1607(a) (Item 1607(a) of Regulation S-K), and the dilution described in § 229.1604(c) (Item 1604(c) of Regulation S-K).

(c) *Approval of security holders.* State whether or not the de-SPAC transaction

is structured so that approval of at least a majority of unaffiliated security holders of the special purpose acquisition company is required.

(d) *Unaffiliated representative.* State whether or not a majority of the directors (or members of similar governing body) who are not employees of the special purpose acquisition company has retained an unaffiliated representative to act solely on behalf of unaffiliated security holders for purposes of negotiating the terms of the de-SPAC transaction and/or preparing a report concerning the approval of the de-SPAC transaction.

(e) *Approval of directors.* State whether or not the de-SPAC transaction was approved by a majority of the directors (or members of similar governing body) of the special purpose acquisition company who are not employees of the special purpose acquisition company. If any director (or member of a similar governing body) of the special purpose acquisition company voted against, or abstained from voting on, approval of the de-SPAC transaction, identify such persons, and indicate, if known after making reasonable inquiry, the reasons for the vote against the transaction or abstention.

§ 229.1607 (Item 1607) Reports, opinions, appraisals, and negotiations.

(a) *Report, opinion, or appraisal.* Disclose the information required by paragraph (b) of this section if the special purpose acquisition company or SPAC sponsor has received any report, opinion (other than an opinion of counsel) or appraisal from an outside party or an unaffiliated representative referred to in § 229.1606(d) (Item 1606(d) of Regulation S–K) materially relating to:

(1) Any determination disclosed in response to § 229.1606(a) (Item 1606(a) of Regulation S–K);

(2) The approval of the de-SPAC transaction;

(3) The consideration or the fairness of the consideration to be offered to security holders of the target company in the de-SPAC transaction; or

(4) The fairness of the de-SPAC transaction to the special purpose acquisition company, its security holders, or SPAC sponsor.

(b) *Preparer and summary of the report, opinion, appraisal, or negotiation.* For each report, opinion, or appraisal referred to in paragraph (a) of this section or any negotiation or report described in response to § 229.1606(d) (Item 1606(d) of Regulation S–K) concerning the terms of the transaction:

(1) Identify the outside party and/or unaffiliated representative;

(2) Briefly describe the qualifications of the outside party and/or unaffiliated representative;

(3) Describe the method of selection of the outside party and/or unaffiliated representative;

(4) Describe any material relationship that existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of the relationship between:

(i) The outside party, its affiliates, and/or unaffiliated representative; and

(ii) The special purpose acquisition company, the SPAC sponsor and/or their respective affiliates;

(5) If the report, opinion, or appraisal relates to the fairness of the consideration to be offered to security holders of the target company in the de-SPAC transaction, state whether the special purpose acquisition company or SPAC sponsor determined the amount of consideration to be paid to the target company or its security holders, or the valuation of the target company, or whether the outside party and/or unaffiliated representative recommended the amount of consideration to be paid or the valuation of the target company; and

(6) Furnish a summary concerning the negotiation, report, opinion, or appraisal. The summary must include but need not be limited to: the procedures followed; the findings and recommendations; the bases for and methods of arriving at such findings and recommendations; instructions received from the special purpose acquisition company or SPAC sponsor; and any limitation imposed by the special purpose acquisition company or SPAC sponsor on the scope of the investigation.

Instruction 1 to paragraph (b): The information called for by paragraphs (b)(1) through (3) of this section must be given with respect to the firm that provides the report, opinion, or appraisal or participates in the negotiation rather than the employees of the firm that prepared the report, opinion, or appraisal or participated in the negotiation.

(c) *Exhibits.* All reports, opinions, or appraisals referred to in paragraphs (a) and (b) of this section must be, as applicable, filed as exhibits to the registration statement or schedule or included in the schedule if the schedule does not have exhibit filing requirements.

§ 229.1608 (Item 1608) Tender offer filing obligations.

If the special purpose acquisition company files a Schedule TO (§ 240.14d–100 of this chapter) pursuant to § 240.13e–4(c)(2) of this chapter (Rule 13e–4(c)(2)) for any redemption of securities offered to security holders, such Schedule TO must provide the information required by General Instruction L.2. to Form S–4, General Instruction I.2. to Form F–4, and Item 14(f)(2) of Schedule 14A (§ 240.14a–101 of this chapter), as applicable, in addition to the information otherwise required by Schedule TO. Such redemption must be conducted in compliance with all other provisions of §§ 240.13e–4 (Rule 13e–4) and 240.14e–1 through 240.14e–8 (Regulation 14E) of this chapter.

§ 229.1609 (Item 1609) Projections in de-SPAC transactions.

(a) With respect to any projections disclosed in the filing (or any exhibit thereto), disclose the purpose for which the projections were prepared and the party that prepared the projections.

(b) Disclose all material bases of the disclosed projections and all material assumptions underlying the projections, and any material factors that may affect such assumptions. The disclosure referred to in this section should include a discussion of any material growth or reduction rates or discount rates used in preparing the projections, and the reasons for selecting such growth or reduction rates or discount rates.

(c) If the projections relate to the performance of the special purpose acquisition company, state whether or not the projections reflect the view of the special purpose acquisition company's management or board of directors (or similar governing body) about its future performance as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to security holders. If the projections relate to the target company, disclose whether or not the target company has affirmed to the special purpose acquisition company that its projections reflect the view of the target company's management or board of directors (or similar governing body) about its future performance as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to security holders. If the projections no longer reflect the views of the special purpose acquisition company's or the target company's management or board of directors (or similar governing body) regarding the future performance of

their respective companies as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to security holders, state the purpose of disclosing the projections and the reasons for any continued reliance by the management or board of directors (or similar governing body) on the projections.

§ 229.1610 (Item 1610) Structured data requirement.

Provide the disclosure required by this subpart in an Interactive Data File in accordance with §§ 232.405 (Rule 405 of Regulation S–T) and 232.301 (the EDGAR Filer Manual) of this chapter.

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 13. The general authority citation for part 230 continues to read as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o–7 note, 78t, 78w, 78ll(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. 112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

■ 14. Add § 230.145a to read as follows:

§ 230.145a Business combinations with reporting shell companies.

With respect to a reporting shell company's shareholders, any direct or indirect business combination of a reporting shell company that is not a business combination related shell company involving another entity that is not a shell company, as those terms are defined in § 230.405, is deemed to involve an offer, offer to sell, offer for sale, or sale within the meaning of section 2(a)(3) of the Act. For purposes of this section, a reporting shell company is a company other than an asset-backed issuer as defined in § 229.1101(b) of this chapter (Item 1101(b) of Regulation AB), that has:

- (a) No or nominal operations;
- (b) Either:
 - (1) No or nominal assets;
 - (2) Assets consisting solely of cash and cash equivalents; or
 - (3) Assets consisting of any amount of cash and cash equivalents and nominal other assets; and
- (c) An obligation to file reports under section 13 (15 U.S.C. 78m) or section 15(d) (15 U.S.C. 78o(d)) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

■ 15. Amend § 230.405 by:

■ a. Adding in alphabetical order the definition for “Blank check company”; and

■ b. Adding paragraph (3)(iv) to the definition for “Smaller reporting company”.

The additions read as follows:

§ 230.405 Definitions of terms.

* * * * *

Blank check company. For purposes of section 27A of the Securities Act of 1933 (15 U.S.C. 77z–2), the term *blank check company* means a company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person.

* * * * *

Smaller reporting company. * * *

(3) * * *

(iv) Upon the consummation of a de-SPAC transaction, as defined in § 229.1601(a) of this chapter (Item 1601(a) of Regulation S–K), an issuer must re-determine its status as a smaller reporting company pursuant to the thresholds set forth in paragraphs (1) and (2) of this definition prior to its first filing, other than pursuant to Items 2.01(f), 5.01(a)(8), and/or 9.01(c) of Form 8–K, following the de-SPAC transaction and reflect this re-determination in its filings beginning 45 days after consummation of the de-SPAC transaction.

(A) Public float is measured as of a date within four business days after the consummation of the de-SPAC transaction and is computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates as of that date by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity; and

(B) Annual revenues are the annual revenues of the target company, as defined in § 229.1601(d) of this chapter (Item 1601(d) of Regulation S–K), as of the most recently completed fiscal year reported in the Form 8–K filed pursuant to Items 2.01(f), 5.01(a)(8), and/or 9.01(c) of Form 8–K.

* * * * *

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 16. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 80b–4, 80b–6a, 80b–

10, 80b–11, 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 17. Amend § 232.405 by:

■ a. Revising the introductory text and paragraphs (a)(2) and (4);

■ b. Removing “; and” from the end of the paragraph (b)(4)(i) and adding a period in its place;

■ c. Adding paragraph (b)(4)(vi); and

■ d. Revising note 1 to the section.

The revisions and addition read as follows:

§ 232.405 Interactive Data File submissions.

This section applies to electronic filers that submit Interactive Data Files. Section 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S–K), General Instruction F of § 249.311 of this chapter (Form 11–K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F–10), § 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act), paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20–F), paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40–F), paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6–K), § 240.17Ad–27(d) of this chapter (Rule 17Ad–27(d) under the Exchange Act), Note D.5 of § 240.14a–101 of this chapter (Rule 14a–101 under the Exchange Act), Item 1 of § 240.14c–101 of this chapter (Rule 14c–101 under the Exchange Act), General Instruction L of § 240.14d–100 of this chapter (Rule 14d–100 under the Exchange Act), General Instruction I of § 249.333 of this chapter (Form F–SR), General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N–1A), General Instruction I of §§ 239.14 and 274.11a–1 of this chapter (Form N–2), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N–3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N–4), General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N–6), General Instruction 2.(I) of § 274.12 of this chapter (Form N–8B–2), General Instruction 5 of § 239.16 of this chapter (Form S–6), and General Instruction C.4 of §§ 249.331 and 274.128 of this chapter (Form N–CSR) specify when electronic filers are required or permitted to submit an Interactive Data File (§ 232.11), as further described in note 1 to this section. This section imposes content, format, and submission requirements for an Interactive Data File, but does not change the substantive content

requirements for the financial and other disclosures in the Related Official Filing (§ 232.11).

(a) * * *

(2) Be submitted only by an electronic filer either required or permitted to submit an Interactive Data File as specified by § 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S-K), General Instruction F of § 249.311 (Form 11-K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F-10), § 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act), paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20-F), paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40-F), paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6-K), Rule 17Ad–27(d) under the Exchange Act, Note D.5 of Rule 14a–101 under the Exchange Act, Item 1 of Rule 14c–101 under the Exchange Act, General Instruction L of § 240.14d–100 of this chapter (Rule 14d–100 under the Exchange Act), General Instruction I to § 249.333 of this chapter (Form F-SR), General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N-1A), General Instruction I of §§ 239.14 and 274.11a-1 of this chapter (Form N-2), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N-3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N-4), General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N-6), General Instruction 2.(I) of § 274.12 of this chapter (Form N-8B-2), General Instruction 5 of § 239.16 of this chapter (Form S-6), or General Instruction C.4 of §§ 249.331 and 274.128 of this chapter (Form N-CSR), as applicable;

* * * * *

(4) Be submitted in accordance with the EDGAR Filer Manual and, as applicable, § 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S-K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F-10), § 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act), paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20-F), paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40-F), paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6-K), § 240.17Ad–27(d) of this chapter (Rule 17Ad–27(d) under the Exchange Act), Note D.5 of § 240.14a–101 of this chapter (Rule 14a–

101 under the Exchange Act), Item 1 of § 240.14c–101 of this chapter (Rule 14c–101 under the Exchange Act), General Instruction L of § 240.14d–100 of this chapter (Rule 14d–100 under the Exchange Act), General Instruction I to § 249.333 of this chapter (Form F-SR), General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N-1A), General Instruction I of §§ 239.14 and 274.11a-1 of this chapter (Form N-2), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N-3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N-4), General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N-6); General Instruction 2.(I) of § 274.12 of this chapter (Form N-8B-2); General Instruction 5 of § 239.16 of this chapter (Form S-6); or General Instruction C.4 of §§ 249.331 and 274.128 of this chapter (Form N-CSR).

* * * * *

(b) * * *

(4) * * *

(vi) The information required by §§ 229.1601 through 229.1610 of this chapter (subpart 1600 of Regulation S-K).

* * * * *

Note 1 to § 232.405: Section 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S-K) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to §§ 239.11 (Form S-1), 239.13 (Form S-3), 239.25 (Form S-4), 239.18 (Form S-11), 239.31 (Form F-1), 239.33 (Form F-3), 239.34 (Form F-4), 249.310 (Form 10-K), 249.308a (Form 10-Q), and 249.308 (Form 8-K) of this chapter. General Instruction F of § 249.311 of this chapter (Form 11-K) specifies the circumstances under which an Interactive Data File must be submitted, and the circumstances under which it is permitted to be submitted, with respect to Form 11-K. Paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F-10) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to Form F-10. Paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20-F) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to Form 20-F. Paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40-F) and Paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6-K) specify the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to §§ 249.240f (Form 40-F) and 249.306 (Form 6-K) of this

chapter. Section 240.17Ad–27(d) of this chapter (Rule 17Ad–27(d) under the Exchange Act) specifies the circumstances under which an Interactive Data File must be submitted with respect to the reports required under Rule 17Ad–27. Note D.5 of § 240.14a–101 of this chapter (Schedule 14A) and Item 1 of § 240.14c–101 of this chapter (Schedule 14C) specify the circumstances under which an Interactive Data File must be submitted with respect to Schedules 14A and 14C. General Instruction L of § 240.14d–100 of this chapter (Schedule TO) specifies the circumstances under which an Interactive Data File must be submitted with respect to Schedule TO. Section 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act) and General Instruction I to § 249.333 of this chapter (Form F-SR) specify the circumstances under which an Interactive Data File must be submitted, with respect to Form F-SR. §§ 242.829 and 242.831 of this chapter (Rules 829 and 831 of Regulation SE) and the Registration Instructions to § 249.1701 of this chapter (Form SBSEF), as applicable, specify the circumstances under which an Interactive Data File must be submitted with respect to filings made under Regulation SE. Item 601(b)(101) of Regulation S-K, paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of Form F-10, paragraph 101 of the Instructions as to Exhibits of Form 20-F, paragraph B.(15) of the General Instructions to Form 40-F, and paragraph C.(6) of the General Instructions to Form 6-K all prohibit submission of an Interactive Data File by an issuer that prepares its financial statements in accordance with §§ 210.6–01 through 210.6–10 of this chapter (Article 6 of Regulation S-X). For an issuer that is a management investment company or separate account registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), General Instruction C.3.(g) of Form N-1A (§§ 239.15A and 274.11A of this chapter), General Instruction I of Form N-2 (§§ 239.14 and 274.11a–1 of this chapter), General Instruction C.3.(h) of Form N-3 (§§ 239.17a and 274.11b of this chapter), General Instruction C.3.(h) of Form N-4 (§§ 239.17b and 274.11c of this chapter), General Instruction C.3.(h) of Form N-6 (§§ 239.17c and 274.11d of this chapter), General Instruction 2.(I) of § 274.12 of this chapter (Form N-8B-2), General Instruction 5 of § 239.16 of this chapter (Form S-6), and General Instruction C.4 of §§ 249.331 and 274.128 of this chapter (Form N-CSR) specify when electronic filers are required or permitted to submit an Interactive Data File (§ 232.11), as further described in note 1 to this section and General Instruction C.4 of Form N-CSR (§§ 249.331 and 274.128 of this chapter), as applicable, specifies the circumstances under which an Interactive Data File must be submitted.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 18. The authority citation for part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78o-7 note, 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, 80a-37, and sec. 71003 and sec. 84001, Pub. L. 114-94, 129 Stat. 1321, unless otherwise noted.

Sections 239.31, 239.32 and 239.33 are also issued under 15 U.S.C. 78l, 78m, 78o, 78w, 80a-8, 80a-29, 80a-30, 80a-37 and 12 U.S.C. 241.

* * * * *

■ 19. Amend Form S-1 (referenced in § 239.11) by:

■ a. Adding General Instruction VIII; and

■ b. Revising Item 6. Dilution.

Note: Form S-1 is attached as appendix A to this document. Form S-1 will not appear in the Code of Federal Regulations.

■ 20. Amend Form S-4 (referenced in § 239.25) by:

■ a. Adding General Instruction L;

■ b. Revising paragraph (b)(7) introductory text of Item 17 and Instruction 1 of paragraph (b)(7) of Item 17; and

■ c. Revising Instruction 1 to the signature block.

Note: Form S-4 is attached as appendix B to this document. Form S-4 will not appear in the Code of Federal Regulations.

■ 21. Amend Form F-1 (referenced in § 239.31) by adding General Instruction VII.

Note: Form F-1 is attached as appendix C to this document. Form F-1 will not appear in the Code of Federal Regulations.

■ 22. Amend Form F-4 (referenced in § 239.34) by:

■ a. Adding General Instruction I;

■ b. Revising Instruction 1 to paragraph (b)(5) of Item 17;

■ c. Revising the Instructions to paragraph (b)(5) and (b)(6) of Item 17; and

■ d. Revising Instruction 1 to the signature block.

Note: Form F-4 is attached as appendix D to this document. Form F-4 will not appear in the Code of Federal Regulations.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 23. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78j-4, 78k, 78k-1, 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, 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18

U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Sections 240.12b-1 to 240.12b-36 also issued under secs. 3, 12, 13, 15, 48 Stat. 892, as amended, 894, 895, as amended; 15 U.S.C. 78c, 78l, 78m, 78o;

* * * * *

Sections 240.14c-1 to 240.14c-101 also issued under sec. 14, 48 Stat. 895; 15 U.S.C. 78n;

* * * * *

■ 24. Amend § 240.12b-2 by:

■ a. Adding in alphabetical order the definition for “Blank check company”; and

■ b. Adding paragraph (3)(iv) to the definition of “Smaller reporting company”.

The additions read as follows:

§ 240.12b-2 Definitions.

* * * * *

Blank check company. For purposes of section 21E of the Securities and Exchange Act of 1934 (15 U.S.C. 78u-5), the term *blank check company* means a company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person.

* * * * *

Smaller reporting company. * * *

(3) * * *

(iv) Upon the consummation of a de-SPAC transaction, as defined in § 229.1601(a) of this chapter (Item 1601(a) of Regulation S-K), an issuer must re-determine its status as a smaller reporting company pursuant to the thresholds set forth in paragraphs (1) and (2) of this definition prior to its first filing, other than pursuant to Items 2.01(f), 5.01(a)(8), and/or 9.01(c) of Form 8-K, following the de-SPAC transaction and reflect this re-determination in its filings, beginning 45 days after consummation of the de-SPAC transaction.

(A) Public float is measured as of a date within four business days after the consummation of the de-SPAC transaction and is computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates as of that date by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity; and

(B) Annual revenues are the annual revenues of the target company, as defined in § 229.1601(d) of this chapter

(Item 1601(d) of Regulation S-K), as of the most recently completed fiscal year reported in the Form 8-K filed pursuant to Items 2.01(f), 5.01(a)(8), and/or 9.01(c) of Form 8-K.

* * * * *

■ 25. Amend § 240.14a-6 by adding paragraph (q) to read as follows:

§ 240.14a-6 Filing requirements.

* * * * *

(q) *De-SPAC transactions.* If a transaction is a de-SPAC transaction, as defined in § 229.1601(a) of this chapter (Item 1601(a) of Regulation S-K), the proxy statement of the special purpose acquisition company, as defined in § 229.1601(b) of this chapter (Item 1601(b) of Regulation S-K), must be distributed to security holders no later than the lesser of 20 calendar days prior to the date on which the meeting of security holders is to be held or action is to be taken in connection with the de-SPAC transaction or the maximum number of days permitted for disseminating the proxy statement under the applicable laws of the jurisdiction of incorporation or organization.

■ 26. Amend § 240.14a-101 by:

■ a. Adding paragraph (f) to Item 14; and

■ b. In Item 25:

■ i. Removing “and” from the end of paragraph (a);

■ ii. Redesignating paragraph (b) as paragraph (c); and

■ iii. Adding new paragraph (b).

The additions read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 14. * * *

* * * * *

(f) *De-SPAC transactions.* (1) If the transaction is a de-SPAC transaction, as defined in § 229.1601(a) (Item 1601(a) of Regulation S-K), then the disclosure provisions of §§ 229.1603, 229.1604(b)(1) through (6) and (c), 229.1605 through 229.1607, and 229.1609 (Items 1603, 1604(b)(1) through (6) and (c), 1605 through 1607, and 1609 of Regulation S-K) apply in addition to the provisions of this schedule and disclosure thereunder must be provided in the proxy statement, and the structured data provisions of § 229.1610 (Item 1610 of Regulation S-K) apply to those disclosures. The information required by § 229.1604(b)(1) through (6) must be briefly described in the front of the disclosure document. To the extent that the applicable disclosure requirements of subpart 229.1600 of Regulation S-K

are inconsistent with the disclosure requirements of this schedule, the requirements of subpart 229.1600 are controlling.

(2) Provide the following additional information for the target company:

(i) Information required by § 229.101 (Item 101 of Regulation S-K, description of business);

(ii) Information required by § 229.102 (Item 102 of Regulation S-K, description of property);

(iii) Information required by § 229.103 (Item 103 of Regulation S-K, legal proceedings);

(iv) Information required by § 229.304 (Item 304 of Regulation S-K, changes in and disagreements with accountants on accounting and financial disclosure);

(v) Information required by § 229.403 (Item 403 of Regulation S-K, security ownership of certain beneficial owners and management), assuming the completion of the de-SPAC transaction and any related financing transaction; and

(vi) Information required by § 229.701 (Item 701 of Regulation S-K, recent sales of unregistered securities).

* * * * *

Item 25. * * *

* * * * *

(b) If the transaction is a de-SPAC transaction, as defined in § 229.1601(a) (Item 1601(a) of Regulation S-K), all reports, opinions, or appraisals required to be filed or included by § 229.1607(c) (Item 1607(c) of Regulation S-K); and

* * * * *

■ 27. Amend § 240.14c-2 by adding paragraph (e) to read as follows:

§ 240.14c-2 Distribution of information statement.

* * * * *

(e) If a transaction is a de-SPAC transaction, as defined in § 229.1601(a) of this chapter (Item 1601(a) of Regulation S-K), the information statement of the special purpose acquisition company, as defined in § 229.1601(b) (Item 1601(b) of Regulation S-K), must be distributed to security holders no later than the lesser of 20 calendar days prior to the date on which the meeting of security holders is to be held or action is to be taken in connection with the de-SPAC transaction or the maximum number of days permitted for disseminating the information statement under the applicable laws of the jurisdiction of incorporation or organization.

■ 28. Amend § 240.14d-100 by:

■ a. Redesignating General Instruction K as General Instruction M;

■ b. Adding new General Instructions K and L; and

■ c. In Item 12:

■ i. Removing “and” from the end of paragraph (a);

■ ii. Redesignating paragraph (b) as paragraph (c); and

■ iii. Adding new paragraph (b).

The additions read as follows:

§ 240.14d-100 Schedule TO. Tender offer statement under section 14(d)(1) or 13(e)(1) of the Securities Exchange Act of 1934.

* * * * *

General Instructions:

* * * * *

K. If the filing relates to a de-SPAC transaction, as defined in § 229.1601(a) (Item 1601(a) of Regulation S-K), then the provisions of §§ 229.1603, 229.1604(b)(1) through (6) and (c) and 229.1605 through 229.1609 (Items 1603, 1604(b)(1) through (6) and (c) and 1605 through 1609 of Regulation S-K) apply in addition to the provisions of this schedule and disclosure thereunder must be provided in this schedule, and the structured data provisions of § 229.1610 (Item 1610 of Regulation S-K) apply to those disclosures. The information required by § 229.1604(b)(1) through (6) must be briefly described in the front of the disclosure document. If the filing by a special purpose acquisition company, as defined in § 229.1601(b) (Item 1601(b) of Regulation S-K), relates to any other redemption of securities offered to security holders, then the provisions of § 229.1608 (Item 1608 of Regulation S-K) apply in addition to the provisions of this schedule and disclosure thereunder, if applicable, must be provided in this schedule and the structured data provisions of § 229.1610 (Item 1610 of Regulation S-K) apply to those disclosures. To the extent that the applicable disclosure requirements of subpart 229.1600 of Regulation S-K are inconsistent with the disclosure requirements of this filing, the requirements of subpart 229.1600 of this chapter are controlling.

L. An Interactive Data File must be included in accordance with § 232.405 (Rule 405 of Regulation S-T) and the EDGAR Filer Manual where applicable pursuant to General Instruction K and § 232.405(b).

* * * * *

Item 12. * * *

* * * * *

(b) If the filing relates to a de-SPAC transaction, as defined in § 229.1601(a) (Item 1601(a) of Regulation S-K), all reports, opinions, or appraisals required to be filed or included by § 229.1607(c) (Item 1607(c) of Regulation S-K); and

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 29. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; 12 U.S.C. 5461 *et seq.*; 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111-203, 124 Stat. 1904; Sec. 102(a)(3) Pub. L. 112-106, 126 Stat. 309 (2012), Sec. 107 Pub. L. 112-106, 126 Stat. 313 (2012), Sec. 72001 Pub. L. 114-94, 129 Stat. 1312 (2015), and secs. 2 and 3 Pub. L. 116-222, 134 Stat. 1063 (2020), unless otherwise noted.

Section 249.220f is also issued under secs. 3(a), 202, 208, 302, 306(a), 401(a), 401(b), 406 and 407, Pub. L. 107-204, 116 Stat. 745, and secs. 2 and 3, Pub. L. 116-222, 134 Stat. 1063.

* * * * *

Section 249.308 is also issued under 15 U.S.C. 80a-29 and 80a-37.

* * * * *

■ 30. Amend Form 20-F (referenced in § 249.220f) by adding Instruction 4 to Item 8.

Note: Form 20-F is attached as appendix E to this document. Form 20-F will not appear in the Code of Federal Regulations.

■ 31. Amend Form 8-K (referenced in § 249.308) by:

■ a. Adding General Instruction B.7; and

■ b. Revising paragraph (f) of Item 2.01.

Note: Form 8-K is attached as appendix F to this document. Form 8-K will not appear in the Code of Federal Regulations.

By the Commission.

Dated: January 24, 2024.

J. Matthew DeLesDernier,
Deputy Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A—Form S-1

Form S-1

* * * * *

General Instructions

* * * * *

VIII. Offering by a Special Purpose Acquisition Company

If a registration statement on this Form S-1 is being used to register an offering of securities of a special purpose acquisition company, as defined in Item 1601(b) of Regulation S-K (17 CFR 229.1601(b)), other than in connection with a de-SPAC transaction, as defined in Item 1601(a) of Regulation S-K (17 CFR 229.1601(a)), the registrant must furnish in the prospectus the information required by Items 1602 and 1603 of Regulation S-K (17 CFR 229.1602 and 229.1603), in the manner set forth by the structured data provision of Item 1610 of Regulation S-K (17 CFR 229.1610), in addition to the Items that are otherwise required by this Form. If the securities to be registered on this Form will be issued in a

de-SPAC transaction, the requirements of Form S-4 applicable to de-SPAC transactions apply to this Form, including, but not limited to, Item 17 and General Instruction L.

* * * * *

Item 6. Dilution

Provide the information required by Item 506 of Regulation S-K (§ 229.506 of this chapter), unless the registrant is a special purpose acquisition company (as defined in Item 1601 of Regulation S-K).

* * * * *

Signatures

* * * * *

Instructions

1. The registration statement shall be signed by the registrant, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer and by at least a majority of the board of directors or persons performing similar functions. If the registrant is a foreign person, the registration statement shall also be signed by its authorized representative in the United States. Where the registrant is a limited partnership, the registration statement shall be signed by a majority of the board of directors of any corporate general partner signing the registration statement. If the securities to be registered on this Form will be issued by a special purpose acquisition company, as such term is defined in Item 1601 of Regulation S-K, or another shell company in connection with a de-SPAC transaction, as such term is defined in Item 1601 of Regulation S-K, the term “registrant” for purposes of this instruction and the Signatures section of this form also includes the target company, as such term is defined in Item 1601 of Regulation S-K, except that in connection with any de-SPAC transaction involving the purchase of assets or a business, with respect to the purchase of assets or a business, the term “registrant” also includes the seller of the business or assets.

* * * * *

Appendix B—Form S-4

Form S-4

* * * * *

General Instructions

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L. De-SPAC Transactions

1. If securities to be registered on this Form will be issued in a de-SPAC transaction, as defined in Item 1601(a) of Regulation S-K (17 CFR 229.1601(a)), then the disclosure provisions of Items 1603 through 1607 and 1609 of Regulation S-K (17 CFR 229.1603 through 229.1607 and 229.1609) apply in addition to the provisions of this Form and disclosure thereunder must be provided in the prospectus, and the structured data provisions of Item 1610 of Regulation S-K (17 CFR 229.1610) apply to those disclosures. To the extent that the applicable disclosure requirements of Subpart 229.1600 are inconsistent with the disclosure

requirements of this Form, the requirements of Subpart 229.1600 are controlling. If the securities to be registered on this Form will be issued by a special purpose acquisition company (as such term is defined in Item 1601 of Regulation S-K) or another shell company in connection with a de-SPAC transaction, the registrants also include the target company (as such term is defined in Item 1601 of Regulation S-K), and it must be so designated on the cover page of this Form. In such a de-SPAC transaction, where the target company consists of a business or assets, the seller of the business or assets is deemed to be a registrant instead of the business or assets and must be so designated on the cover page of this Form. Further, in such a de-SPAC transaction, the term “registrant” for purposes of the disclosure requirements of this Form means the special purpose acquisition company, and the term “company being acquired” for the purposes of the disclosure requirements of this Form means the target company.

2. If the target company, as defined in Item 1601(d) of Regulation S-K (17 CFR 229.1601(d)), in a de-SPAC transaction, as defined in Item 1601 of Regulation S-K (17 CFR 229.1601), is not subject to the reporting requirements of either Section 13(a) or 15(d) of the Exchange Act, provide the following additional information with respect to the target company:

- Item 101 of Regulation S-K (§ 229.101 of this chapter, description of business);
- Item 102 of Regulation S-K (§ 229.102 of this chapter, description of property);
- Item 103 of Regulation S-K (§ 229.103 of this chapter, legal proceedings);
- Item 304 of Regulation S-K (§ 229.304 of this chapter, changes in and disagreements with accountants on accounting and financial disclosure);
- Item 403 of Regulation S-K (§ 229.403 of this chapter, security ownership of certain beneficial owners and management), assuming the completion of the de-SPAC transaction and any related financing transaction; and
- Item 701 of Regulation S-K (§ 229.701 of this chapter, recent sales of unregistered securities).

If the target company is a foreign private issuer, as defined in Rule 405 (§ 230.405 of this chapter), information with respect to the target company may be provided in accordance with Items 4, 6.E, 7.A, 8.A.7, and 16F of Form 20-F, in lieu of the information specified above.

3. If securities to be registered on this Form will be issued in a de-SPAC transaction, as defined in Item 1601(a) of Regulation S-K (17 CFR 229.1601(a)), the prospectus must be distributed to security holders no later than the lesser of 20 calendar days prior to the date on which the meeting of security holders is to be held or action is to be taken in connection with the de-SPAC transaction or the maximum number of days permitted for disseminating the prospectus under the applicable laws of the jurisdiction of incorporation or organization.

* * * * *

Item 17. Information With Respect to Companies Other Than S-3 Companies

* * * * *

(7) Financial statements that would be required in an annual report sent to security holders under Rules 14a-3(b)(1) and (b)(2) (§ 240.14b-3 of this chapter), if an annual report was required. In a de-SPAC transaction, see § 240.15-01 (Rule 15-01 of Regulation S-X). If the registrant's security holders are not voting, the transaction is not a roll-up transaction (as described by Item 901 of Regulation S-K (§ 229.901 of this chapter)), and:

* * * * *

Instructions

1. The financial statements required by this paragraph for the latest fiscal year need be audited only to the extent practicable. The financial statements for the fiscal years before the latest fiscal year need not be audited if they were not previously audited. For a company combining with a registrant that is a shell company, see § 210.15-01(a).

* * * * *

Signatures

* * * * *

Instructions

1. The registration statement must be signed by the registrant, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, and by at least a majority of the board of directors or persons performing similar functions. If the registrant is a foreign person, the registration statement must also be signed by its authorized representative in the United States. Where the registrant is a limited partnership, the registration statement must be signed by a majority of the board of directors of any corporate general partner signing the registration statement. If the securities to be registered on this Form will be issued by a special purpose acquisition company, as such term is defined in Item 1601 of Regulation S-K, or another shell company in connection with a de-SPAC transaction, as such term is defined in Item 1601 of Regulation S-K, the term “registrant” for purposes of this instruction and the Signatures section of this form also includes the target company, as such term is defined in Item 1601 of Regulation S-K, except that in connection with any de-SPAC transaction involving the purchase of assets or a business, with respect to the purchase of assets or a business, the term “registrant” also includes the seller of the business or assets.

* * * * *

Appendix C—Form F-1

Form F-1

* * * * *

General Instructions

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VII. Offering by a Special Purpose Acquisition Company

If a registration statement on this Form F-1 is being used to register an offering of securities of a special purpose acquisition company, as defined in Item 1601(b) of

Regulation S-K (17 CFR 229.1601(b)), other than in connection with a de-SPAC transaction, as defined in Item 1601(a) of Regulation S-K (17 CFR 229.1601(a)), the registrant must furnish in the prospectus the information required by Items 1602 and 1603 of Regulation S-K (17 CFR 229.1602 and 229.1603), in the manner set forth by the structured data provision of Item 1610 of Regulation S-K (17 CFR 229.1610), in addition to the Items that are otherwise required by this Form. If the securities to be registered on this Form will be issued in a de-SPAC transaction the requirements of Form F-4 applicable to de-SPAC transactions apply to this Form, including, but not limited to, Item 17 and General Instruction I.

* * * * *

Item 9. The Offer and Listing

* * * * *

E. Dilution. The following information shall be provided:

* * * * *

4. Where the registrant is a special purpose acquisition company (as defined in Item 1601 of Regulation S-K), in lieu of providing the information required under Item 9.E.1 and Item 9.E.2, provide the disclosure required pursuant to Items 1602(a)(4) and 1602(c) of Regulation S-K in an offering other than a de-SPAC transaction (as defined in Item 1601 of Regulation S-K) and provide the disclosure required under Item 1604(c) of Regulation S-K in connection with a de-SPAC transaction.

* * * * *

Signatures

* * * * *

Instructions

1. The registration statement shall be signed by the registrant, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, at least a majority of the board of directors or persons performing similar functions, and its authorized representative in the United States. Where the registrant is a limited partnership, the registration statement shall be signed by a majority of the board of directors of any corporate general partner signing the registration statement. If the securities to be registered on this Form will be issued by a special purpose acquisition company, as such term is defined in Item 1601 of Regulation S-K, or another shell company in connection with a de-SPAC transaction, as such term is defined in Item 1601 of Regulation S-K, the term "registrant" for purposes of this instruction and the Signatures section of this form also includes the target company, as such term is defined in Item 1601 of Regulation S-K, except that in connection with any de-SPAC transaction involving the purchase of assets or a business, with respect to the purchase of assets or a business, the term "registrant" also includes the seller of the business or assets.

* * * * *

Appendix D—Form F-4

Form F-4

* * * * *

General Instructions

* * * * *

I. De-SPAC Transactions

1. If securities to be registered on this Form will be issued in a de-SPAC transaction, as defined in Item 1601(a) of Regulation S-K (17 CFR 229.1601(a)), then the disclosure provisions of Items 1603 through 1607 and 1609 of Regulation S-K (17 CFR 229.1603 through 229.1607 and 1609) apply in addition to the provisions of this Form and disclosure thereunder must be provided in the prospectus, and the structured data provisions of Item 1610 of Regulation S-K (17 CFR 229.1610) apply to those disclosures. To the extent that the applicable disclosure requirements of Subpart 229.1600 are inconsistent with the disclosure requirements of this Form, the requirements of Subpart 229.1600 are controlling. If the securities to be registered on this Form will be issued by a special purpose acquisition company (as such term is defined in Item 1601 of Regulation S-K), or another shell company in connection with a de-SPAC transaction, the registrants also include the target company (as such term is defined in Item 1601 of Regulation S-K), and it must be so designated on the cover page of this Form. In such a de-SPAC transaction, where the target company consists of a business or assets, the seller of the business or assets is deemed to be a registrant instead of the business or assets and must be so designated on the cover page of this Form. Further, in such a de-SPAC transaction, the term "registrant" for purposes of the disclosure requirements of this Form means the special purpose acquisition company, and the term "company being acquired" for the purposes of the disclosure requirements of this Form means the target company.

2. If the target company, as defined in Item 1601(d) of Regulation S-K (17 CFR 229.1601(d)), in a de-SPAC transaction, as such term is defined in Item 1601 of Regulation S-K, is not subject to the reporting requirements of either Section 13(a) or 15(d) of the Exchange Act, provide the following additional information with respect to the company:

a. Item 101 of Regulation S-K (§ 229.101 of this chapter, description of business);

b. Item 102 of Regulation S-K (§ 229.102 of this chapter, description of property);

c. Item 103 of Regulation S-K (§ 229.103 of this chapter, legal proceedings);

d. Item 304 of Regulation S-K (§ 229.304 of this chapter, changes in and disagreements with accountants on accounting and financial disclosure);

e. Item 403 of Regulation S-K (§ 229.403 of this chapter, security ownership of certain beneficial owners and management), assuming the completion of the de-SPAC transaction and any related financing transaction; and

f. Item 701 of Regulation S-K (§ 229.701 of this chapter, recent sales of unregistered securities)

If the target company is a foreign private issuer, as defined in Rule 405 (§ 230.405 of this chapter), information with respect to the target company may be provided in accordance with Items 4, 6.E, 7.A, 8.A.7, and 16F of Form 20-F, in lieu of the information specified above.

3. If securities to be registered on this Form will be issued in a de-SPAC transaction, as defined in Item 1601(a) of Regulation S-K (17 CFR 229.1601(a)), the prospectus must be distributed to security holders no later than the lesser of 20 calendar days prior to the date on which the meeting of security holders is to be held or action is to be taken in connection with the de-SPAC transaction or the maximum number of days permitted for disseminating the prospectus under the applicable laws of the jurisdiction of incorporation or organization.

* * * * *

Part I

* * * * *

Item 17. Information With Respect to Foreign Companies Other Than F-3 Companies

* * * * *

Instructions

1. The financial statements required by this paragraph for the latest fiscal year need be audited only to the extent practicable. The financial statements for the fiscal years before the latest fiscal year need not be audited if they were not previously audited. For a company combining with a registrant that is a shell company, see § 210.15-01(a).

* * * * *

Instructions to Paragraph (b)(5) and (b)(6)

If the financial statements required by paragraphs (b)(5) and (b)(6) are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 18 of Form 20-F (§ 249.220f of this chapter) if the foreign business being acquired will be a predecessor to the issuer that is a shell company or, in all other circumstances, with Item 17 of Form 20-F (§ 249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. when the financial statements are prepared on a basis other than U.S. GAAP.

Signatures

* * * * *

Instructions

1. The registration statement must be signed by the registrant, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, at least a majority of the board of directors or persons performing similar functions and its authorized representative in the United States. Where the registrant is a limited partnership, the

registration statement must be signed by a majority of the board of directors of any corporate general partner signing the registration statement. If the securities to be registered on this Form will be issued by a special purpose acquisition company (as such term is defined in Item 1601 of Regulation S-K) or another shell company in connection with a de-SPAC transaction, as such term is defined in Items 1601 of Regulation S-K, the term “registrant” for purposes of this instruction and the Signatures section of this form also includes the target company (as such term is defined in Item 1601 of Regulation S-K), except that in connection with any de-SPAC transaction involving the purchase of assets or a business, with respect to the purchase of assets or a business, the term “registrant” also includes the seller of the business or assets.

* * * * *

Appendix E—Form 20-F

Form 20-F

* * * * *

Item 8. Financial Information

* * * * *

Instructions to Item 8

* * * * *

4. For filings on Form 20-F filed pursuant to General Instruction A.(d) of this form and

for registration statements, when the issuer is a shell company that is combining with a business, see § 240.15-01 (Rule 15-01 of Regulation S-X).

* * * * *

Appendix F—Form 8-K

Form 8-K

* * * * *

B. Events To Be Reported and Time for Filing of Reports

* * * * *

7. If a registrant's report or exhibit to such report relates to a de-SPAC transaction (as defined in Item 1601(a) of Regulation S-K (17 CFR 229.1601(a)) and includes projections that relate to the performance of the special purpose acquisition company or the target company, the report or exhibit, as applicable, must include the information required by paragraphs (a) and (b) of Item 1609 of Regulation S-K (17 CFR 229.1609(a), (b)).

* * * * *

Item 2.01 Completion of Acquisition or Disposition of Assets

* * * * *

(f) if the registrant was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before the transaction in which the registrant acquired

a business that is its predecessor, disclose the information that would be required if the acquired business or real estate operation that is its predecessor were filing a general form for registration of securities on Form 10 under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the transaction. However, when, at the time of filing, the predecessor meets the conditions of an emerging growth company, as defined in § 230.405 of this chapter (Rule 405 of the Securities Act) or § 240.12b-2 of this chapter (Rule 12b-2 of the Exchange Act), the registrant need not present audited financial statements for the predecessor for any period prior to the earliest audited period presented in its financial statements included in a previously filed registration or proxy statement for the transaction resulting in the loss of shell company status. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 2.01(f) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

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Part III

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46 CFR Part 541

Demurrage and Detention Billing Requirements; Final Rule

FEDERAL MARITIME COMMISSION**46 CFR Part 541****[Docket No. FMC–2022–0066]****RIN 3072–AC90****Demurrage and Detention Billing Requirements****AGENCY:** Federal Maritime Commission.**ACTION:** Final rule.

SUMMARY: In accordance with the Ocean Shipping Reform Act of 2022, the Federal Maritime Commission (the Commission or FMC) is issuing regulations governing demurrage and detention billing requirements. This final rule requires common carriers and marine terminal operators to include specific minimum information on demurrage and detention invoices, outlines certain detention and demurrage billing practices, such as determination of which parties may appropriately be billed for demurrage or detention charges, and sets timeframes for issuing invoices, disputing charges with the billing party, and resolving such disputes. It adopts with changes the notice of proposed rulemaking published on October 14, 2022. Substantive changes allow consignees to be billed and clarify the timeframe for non-vessel-operating common carriers passing through demurrage and detention charges to issue their own invoices. Non-substantive changes improve clarity and remove drafting errors.

DATES: This final rule is effective on May 28, 2024, except for instruction 2 adding § 541.6, and instruction 3 adding § 541.99, which are delayed. The Commission will publish a document in the **Federal Register** announcing the effective date of these amendments.

ADDRESSES: To view background documents or comments received, you may use the Federal eRulemaking Portal at www.regulations.gov under Docket No. FMC–2022–0066.

FOR FURTHER INFORMATION CONTACT: David Eng, Secretary; Phone: (202) 523–5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:**I. Background**

As rising cargo volumes have increasingly put pressure on common carriers, port and terminal performance, demurrage and detention charges have for a variety of reasons substantially increased. For example, over a two-year period between 2020 and 2022, nine of the largest carriers serving the U.S. liner trades individually charged a total of

approximately \$8.9 billion in demurrage and detention charges and collected roughly \$6.9 billion.¹ On July 28, 2021, Commissioner Rebecca F. Dye, the Fact Finding Officer for Fact Finding Investigation No. 29, International Ocean Transportation Supply Chain Engagement (Fact Finding No. 29), recommended, among other things, that the Commission “[i]ssue an [Advance Notice of Proposed Rulemaking (ANPRM)] seeking industry input on whether the Commission should require common carriers² and marine terminal operators³ to include certain minimum information on or with demurrage and detention billings and adhere to certain practices regarding the timing of demurrage and detention billings.”⁴ The Fact Finding Officer expressed concern about certain demurrage and detention billing practices and a need to ensure that it is clear to shippers “what is being billed by whom” so that they can understand the charges.⁵ The Commission voted to move forward with this Fact Finding 29 recommendation on September 15, 2021.⁶

On February 15, 2022, the Commission issued an ANPRM to request industry views on potential demurrage and detention billing requirements.⁷ Specifically, the Commission requested comments on:

- Whether a proposed regulation on demurrage and detention billing practices should apply to non-vessel-operating common carriers (NVOCCs) as well as vessel-operating common carriers (VOCCs);
- Whether the regulations should differ based on whether the billing party is an NVOCC or a VOCC;⁸

¹ Federal Maritime Commission, *Detention and Demurrage*, <https://www.fmc.gov/detention-and-demurrage/#:-:text=In%20dollar%20terms%2C%20the%20nine,over%20the%20two%2Dyear%20period> (last visited Oct. 11, 2023).

² There are two types of common carriers: (1) vessel-operating common carriers (VOCCs), also called ocean common carriers, and (2) non-vessel-operating common carriers (NVOCCs). 46 U.S.C. 40102(7), (17), (18).

³ “Marine terminal operator” (MTO) is defined at 46 U.S.C. 40102(15).

⁴ See *Fact Finding Investigation No. 29, Interim Recommendations* at 6 (July 28, 2021) (Fact Finding 29 Interim Recommendations), available at: <https://www2.fmc.gov/ReadingRoom/docs/FFno29/FF29%20Interim%20Recommendations.pdf/>.

⁵ Fact Finding 29 Interim Recommendations at 7.

⁶ Fed. Mar. Comm’n, Press Release, FMC to Issue Guidance on Complaint Proceedings and Seek Comments on Demurrage and Detention Billings (Sept. 15, 2021), <https://www.fmc.gov/fmc-to-issue-guidance-on-complaint-proceedings-and-seek-comments-on-demurrage-and-detention-billings/>.

⁷ Advance Notice of Proposed Rulemaking on Demurrage and Detention Billing Requirements, 87 FR 8506 (Feb. 15, 2022). See Docket No. 22–04, Demurrage and Detention Billing Requirements.

⁸ 87 FR at 8507, 8508–8509 (Questions 1 and 7).

- Whether the proposed regulations on demurrage and detention billings should apply to marine terminal operators (MTOs);⁹

- What information should be required in demurrage and detention invoices;¹⁰

- Whether bills should include information on how the billing party calculated demurrage and detention charges.¹¹ For example, the Commission requested comments on whether it should require the billing party to include the following information:

- Identifying clear and concise container availability dates in addition to vessel arrival dates for import shipments; and,
- For export shipments, the earliest return dates (and any modifications to those dates) as well as the availability of return locations and appointments, where applicable;¹² and

- Whether the bills should include information on any events (*e.g.*, container unavailability, lack of return locations, appointments, or other force-majeure reasons) that would justify stopping the clock on charges.¹³

In the ANPRM, the Commission stated that it was considering whether it should require common carriers and MTOs to adhere to certain practices regarding the timing of demurrage and detention billings. The Commission sought comments on whether it should require billing parties to issue demurrage or detention invoices within 60 days after the charges stopped accruing.¹⁴ The Commission stated that the Uniform Intermodal Interchange Agreement (UIIA)¹⁵ currently stipulates that invoices be issued within 60 days and asked whether the 60-day timeframe was effective in addressing concerns raised by billed parties, or whether a longer or shorter time period would be more appropriate.¹⁶ In addition, the Commission requested comments on whether it should regulate the timeframe for refunds and, if so, what would be an appropriate timeframe.¹⁷

On June 16, 2022, after the Commission issued the ANPRM and received comments, the Ocean Shipping Reform Act of 2022 (OSRA 2022) was

⁹ 87 FR at 8507, 8509 (Questions 2 and 3).

¹⁰ 87 FR at 8508.

¹¹ *Id.*

¹² 87 FR at 8509 (Question 6).

¹³ *Id.*

¹⁴ 87 FR at 8508, 8509 (Question 12).

¹⁵ The UIIA is a standard industry contract that provides rules for the interchange of equipment between motor carriers and equipment providers, such as VOCCs. Participation is voluntary.

¹⁶ 87 FR at 8508.

¹⁷ 87 FR at 8508, 8509 (Question 14).

enacted into law.¹⁸ In OSRA 2022, Congress amended various statutory provisions contained in part A of subtitle IV of title 46, U.S. Code. Specifically, OSRA 2022 prohibits common carriers from issuing an invoice for demurrage or detention charges unless the invoice includes specific information to show that the charges comply with part 545 of title 46, Code of Federal Regulations and applicable provisions and regulations.¹⁹ OSRA 2022 then lists the minimum information that common carriers must include in a demurrage or detention invoice:

- date that container is made available;
- the port of discharge;
- the container number or numbers;
- for exported shipments, the earliest return date;
- the allowed free time in days;
- the start date of free time;
- the end date of free time;
- the applicable detention or demurrage rule on which the daily rate is based;
- the applicable rate or rates per the applicable rule;
- the total amount due;
- the email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees;
- a statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage; and
- a statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.²⁰

Failure to include the required information on a demurrage or detention invoice eliminates any obligation of the billed party to pay the applicable charge.²¹ In addition, OSRA 2022 authorizes the Commission to revise the minimum information that common carriers must include on demurrage or detention invoices in future rulemakings.

OSRA 2022 additionally requires the Commission to initiate a rulemaking further defining prohibited practices by common carriers, marine terminal operators, shippers, and OTIs regarding the assessment of demurrage or detention charges.²² OSRA 2022

provides that such rulemaking must “only seek to further clarify reasonable rules and practices *related to* the assessment of detention and demurrage charges to address the issues identified in the final rule published on May 18, 2020, entitled ‘Interpretive Rule on Demurrage and Detention Under the Shipping Act’ (or successor rule)[.]”²³ Specifically, the Commission’s rulemaking must clarify “which parties may be appropriately billed for any demurrage, detention, or other similar per container charges.”²⁴

On October 14, 2022, the Commission published a notice of proposed rulemaking (NPRM) that would require common carriers and marine terminal operators to include specific minimum information on demurrage and detention invoices and outlined certain billing practices relevant to appropriate timeframes for issuing invoices, disputing charges with the billing party, and resolving such disputes.²⁵ The proposed rule addressed considerations identified in the Ocean Shipping Reform Act of 2022. The proposed rule sought comment on the adoption of minimum information that common carriers must include in a demurrage or detention invoice; the addition to this list of information that must be included in or with a demurrage or detention invoice; a proposed definition of prohibited practices clarifying which parties may be appropriately billed for demurrage or detention charges; and billing practices that billing parties must follow when invoicing for demurrage or detention charges.

II. Comments

In response to the NPRM published October 14, 2022, the Commission received 191 comments from interested parties. All major groups of interested persons were represented in the comments: vessel-operating common carriers (VOCCs), non-vessel-operating common carriers (NVOCCs), marine terminal operators (MTOs), motor carriers, beneficial cargo owners (BCOs), ocean transportation intermediaries (OTIs), third party logistics providers, customs brokers, bi-partisan groups of the U.S. House of Representatives, another Federal agency, and the National Shipping Advisory Committee (the Commission’s federal advisory committee). Comments were submitted by individuals, large and small companies, and by national trade associations. All comments submitted

on the NPRM are available at <https://www.regulations.gov/docket/FMC-2022-0066/comments>.

About 75 percent of commenters supported the rule, about 15 percent questioned the rule, and 10 percent did not specify. Motor carriers overwhelmingly support the entire rule. BCOs mostly support the rule but some object to prohibiting others from being billed. NVOCCs and OTIs generally supported the rule, but with many objecting to the inclusion of NVOCCs. VOCCs overwhelmingly questioned or did not support the rule. Nearly all VOCCs questioned the rule prohibiting billing other parties and the timing of billing requirements. About half of VOCCs questioned the required information from the ANPRM that the Commission added to the information specifically required by OSRA 2022. MTOs overwhelmingly questioned the rule, with most arguing these regulations should not apply to MTOs.

The top three issues addressed by commenters were: (1) concerns with the prohibition on billing other parties that are not contractually connected, (2) concerns with additional information the Commission proposed to require in addition to the OSRA 2022 mandated information, and (3) concerns with the time periods for billing.

These comments are addressed in the discussion that follows.

III. Discussion of Comments

A. § 541.1 Purpose

Issue: Two commenters requested that “minimum” be added to the second sentence before “procedures” to mirror the use of “minimum” before “information” in the first sentence.²⁶

FMC response: FMC declines to make the proposed change. Neither commenter provided sufficient justification as to why such a change would provide additional clarity. The Commission has drafted § 541.1 to reflect the language of OSRA 2022.

B. § 541.2 Scope and Applicability

1. Regulation of MTO Demurrage and Detention Billing Practices

(a) FMC’s Authority To Regulate

Issue: MTOs and MTO trade associations argued that MTOs should not fall within the scope of the rule.

MTOs offered many reasons why they should not be subject to the proposed regulations. The majority presented their interpretation of the effect that the legislative process leading to the

¹⁸ Public Law 117–146, 136 Stat. 1272 (2022).

¹⁹ Public Law 117–146 at Sec. 7(a)(1), 136 Stat. at 1274 (codified at 46 U.S.C. 41104(a)(15)).

²⁰ Public Law 117–146 at Sec. 7(a)(2), 136 Stat. at 1275 (codified at 46 U.S.C. 41104(d)(2)).

²¹ Public Law 117–146 at Sec. 7(a)(2), 136 Stat. at 1275 (codified at 46 U.S.C. 41104(f)).

²² Public Law 117–146 at Sec. 7(b)(1), 136 Stat. at 1275.

²³ Public Law 117–146 at Sec. 7(b)(2), 136 Stat. at 1275 (emphasis added).

²⁴ *Id.*

²⁵ 87 FR 62341.

²⁶ Bass Tech International (FMC–2022–0066–0230); National Industrial Transportation League (FMC–2022–0066–0230–0104).

enactment of OSRA 2022 should have, which they believe demonstrates that Congress intended to prohibit inclusion of MTOs in this rulemaking. MTOs pointed first to how Congress amended 46 U.S.C. 41104, which applies to common carriers, not MTOs.²⁷ MTOs argued that Congress deliberately chose not to amend 46 U.S.C. 41106 when it added invoicing requirements to 46 U.S.C. 41104, so that invoicing requirements would only apply to carriers, not to MTOs.²⁸ The National Association of Waterfront Employers (NAWE) and the Port of NY/NJ Sustainable Services Agreement (PONYNJSSA) also argued that Congress's choice not to add invoicing requirements to 46 U.S.C. 41102, which applies to both MTOs and carriers, precludes the Commission from including MTOs in the scope of this regulation.²⁹ Most commonly, these commenters pointed out that Congress, and specifically the House of Representative's version of OSRA 2021, originally included MTOs in the invoicing requirements.³⁰ The MTOs argue that Congress, late in the process, chose to exempt MTOs from compliance with demurrage and detention requirements in the enacted version of OSRA 2022.³¹ Two members of Congress, Congressman Jake Auchincloss and Congressman Brian Babin, wrote jointly [August 17th Congressional Letter] to make this argument, and stated that including MTOs within the scope of the regulation would threaten stability and cargo fluidity at United States ports.³²

²⁷ E.g., Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248); Port Houston (FMC–2022–0066–0268).

²⁸ Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248).

²⁹ National Association of Waterfront Employers (FMC–2022–0066–0276); Port of NY/NJ Sustainable Services Agreement (FMC–2022–0066–0218). NAWE and PONYNJSSA also argued that: (1) the only way OSRA 2022 can be harmonized with 46 U.S.C. 41102(c) is by excluding MTOs from the proposed rule's substantive demurrage and detention billing requirements, and (2) if 46 U.S.C. 41102(c) and OSRA 2022 cannot be harmonized, the more specific statute, OSRA 2022, should control.

³⁰ Port Authority of New York & New Jersey (FMC–2022–0066–0226); Port Houston (FMC–2022–0066–0268); West Coast MTO Agreement (FMC–2022–0066–0229).

³¹ Port Authority of New York & New Jersey (FMC–2022–0066–0226); American Association of Port Authorities (FMC–2022–0066–0255); West Coast MTO Agreement (FMC–2022–0066–0229).

³² Letter from Jake Auchincloss and Brian Babin, U.S. House Representatives (Aug. 17, 2023) (FMC–2022–0066–0282). The Congressmen also took issue with a recent Commission decision finding the imposition of equipment charges on a holiday weekend at odds with the incentive principle. That issue is outside the scope of this rulemaking.

NAWE also argued that the Commission cannot enforce 46 U.S.C. 41102(c) here without contravening the Commission's Interpretive Rule at 46 CFR 545.4(b). NAWE stated that the Commission's Interpretive Rule requires that an impermissible "practice" occur on a "normal, customary, and continuing basis," while the proposed rule would penalize any isolated invoice omission. NAWE argued that taking action in a case alleging a single shipment violation is an implicit repeal of the agency's Interpretive Rule at § 545.4 without public notice and comment.

Other members of Congress submitted comments on the proposed rule as well, but in support of the inclusion of MTOs in this rule.³³ A letter from these members of Congress [January 2nd Congressional Letter] stated that since authoring OSRA 2022, they became aware that MTOs are invoicing their own demurrage and detention charges separate from VOCC charges. They pointed out that this invoicing practice directly contradicts the statements of NAWE to Congress during the drafting of OSRA 2022.³⁴ The letter stated that they support applying any demurrage and detention invoicing requirements that apply to VOCCs to MTOs as well, with reasonable exceptions for demurrage charges set by public port tariffs and where MTOs are acting only as a collections agent.³⁵

FMC response: The Commission has the statutory authority to apply this rule to MTOs and declines to exclude them from the duties and responsibilities of issuing accurate demurrage and detention invoices. Commenters raised two major arguments against the Commission's proposed inclusion in the regulations of MTOs. Commenters argued that the Commission did not have authority to apply the regulations to MTOs³⁶ and that it should not apply regulations to MTOs for a variety of reasons addressed below individually.³⁷

³³ Letter from John Garamendi, Dusty Johnson, Jim Costa, David Valado, Mike Thompson, and Jimmy Panetta, U.S. House Representatives (Jan. 2, 2023) (FMC–2022–0066–0279).

³⁴ *Id.* ("Since enactment of the Ocean Shipping Reform Act of 2022, we have heard reports of marine terminal operators invoicing their own charges for demurrage and detention separate from those charged by ocean carriers. This practice directly contradicts written comments by the National Association of Waterfront Employers—the trade association for marine terminal operators—on the House discussion draft and to the Committee on Transportation and Infrastructure in 2021.")

³⁵ *Id.*

³⁶ National Association of Waterfront Employers (FMC–2022–0066–0276).

³⁷ American Association of Port Authorities (FMC–2022–0066–0255); West Coast MTO

The Commission has clear statutory authority to regulate MTOs under section 41102(c). There is also a clear need, based on the record of this rulemaking, for these regulations to address MTOs demurrage and detention invoices sent to entities other than VOCCs.

Section 41102(c) of Title 46 prohibits common carriers, MTOs, and ocean transportation intermediaries from failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering property. The Commission has authority under 46 U.S.C. 46105(a) to prescribe regulations to carry out its duties and powers. The Commission has repeatedly explained that the issue of detention and demurrage charges falls within the prohibitions of 46 U.S.C. 41102(c).³⁸ Further, the plain language of 46 U.S.C. 41102(c) describes exactly the type of conduct this rule intends to regulate. This section prohibits an MTO from "failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving . . . [or] storing property." This rule issued pursuant to the Commission's power to issue regulations³⁹ to define these prohibitions, as well as those found in OSRA 2022, interprets what constitutes just and reasonable practices on invoicing and charges related to the use of marine terminal space or shipping containers. The Commission concludes that this rule will help ensure that MTOs' demurrage and detention billing practices are just and reasonable pursuant to section 41102.

Arguments that the Commission lacks this authority because Congress chose to place detailed invoicing requirements in a section that only applies to carriers, or because Congress removed requirements that would expressly apply to MTOs during the statutory drafting process, do not address the Commission's pre-

Agreement (FMC–2022–0066–0229); Trapac, LLC (FMC–2022–0066–0136).

³⁸ Interpretive Rule on Demurrage and Detention Under the Shipping Act, 84 FR 48850, 48852 (Sep. 17, 2019); Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 FR 29638 (May 18, 2020); *Fact Finding Investigation No. 28, Final Report* (Dec. 3, 2018), available at: <https://www2.fmc.gov/readingroom/documents/20973>; *Fact Finding Investigation No. 29, Final Report* (May 31, 2022), available at: <https://www.fmc.gov/wp-content/uploads/2022/06/FactFinding29FinalReport.pdf>; see also *California v. United States*, 320 U.S. 577, 584–85 (1944) (interpreting the analogous provision in the Shipping Act of 1916 as applying to demurrage); *Am. Export-Isbrandtsen Lines, Inc. v. Fed. Mar. Comm'n*, 444 F.2d 824, 829 (D.C. Cir. 1970) (interpreting the analogous provision in the Shipping Act of 1916 as applying to detention).

³⁹ 46 U.S.C. 46105(a).

existing and continuing legal authority to issue demurrage and detention invoicing regulations that apply to MTOs even before OSRA 2022. The actual statutory text of 46 U.S.C. 41102(c) and Congress's direction to use 46 U.S.C. 41102(c) to define prohibited demurrage and detention practices for marine terminal operators is clear and does not necessitate resorting to the incomplete history of the legislative drafting process of OSRA 2022.⁴⁰ Moreover, Congress explicitly included in OSRA 2022 the direction that the Commission initiate a rulemaking to further define prohibited practices by MTOs, among others, under 46 U.S.C. 41102(c) regarding the assessment of detention and demurrage.⁴¹ Thus, in OSRA 2022, Congress amplified the Commission's existing authority to issue regulations that govern the issuance of demurrage and detention invoices in section 41102(c) and added to that authority a mandate to further define prohibited practices. The identification of MTOs within section 7(b), entitled "Common Carriers," does not support the view that Congress intended to limit the scope of its directive to the Commission to ensuring that invoices are accurate. Instead, the plain language of the statute shows an intent by Congress to address in a targeted manner the failures of the current invoicing process. Such a targeted approach requires ensuring that MTOs, as well as VOCCs and NVOCCs, issue accurate invoices.

The need to include MTOs in this rule is supported by the comments. Excluding MTOs from this rule is likely to create a regulatory loophole, significantly affecting the ability of the rule to effect change in the current invoicing process. The comments support a finding that MTOs are

invoicing for their own demurrage and detention charges.⁴² Common carriers, the usual contractual party, could simply have MTOs issue their demurrage and detention invoices to avoid the necessary invoicing requirements this rule puts into place, and invoices coming from MTOs would not be required to comply with either Congress's instructions at 46 U.S.C. 41104(d) or these regulations. Billed parties would receive a significant portion of invoices from MTOs with whatever information MTOs chose to provide, which may not include the critical information a billed party needs to ensure the bill is accurate. The MTO as the billing party would not be subject to the dispute resolution processes contained in these rules. Not including MTOs in the scope of this rule would meaningfully reduce the effectiveness of the rule and perpetuate current problematic invoicing practices. The Commission finds, as supported by the comments, that finalizing a rule that excluded MTOs would undermine Congress's intent as expressed through the plain language of OSRA 2022.⁴³

The August 17th Congressional Letter and other commenters argued that it was not Congress's intent that these rules apply to MTOs.⁴⁴ The August 17th Congressional Letter urged the removal of MTOs from the rulemaking's substantive requirements because the legislative history shows that Congress intended to remove MTOs from demurrage and detention invoicing requirements and such requirements could potentially increase port congestion.⁴⁵ However, as noted above, the legislative history of OSRA 2022 cannot be read to prohibit agency action to address an issue the legislation itself identifies as in need of resolution.

Further, the January 2nd Congressional Letter urged the Commission to ensure the inclusion of MTOs in the Commission's final rule. Congressmen Garamendi, Johnson, Costa, Valado, Thompson, and Panetta

wrote the January 2nd Congressional Letter.⁴⁶ The January 2nd Congressional Letter reported that comments submitted to Congress by NAWA in 2021 stated that MTOs do not invoice their own charges for detention and demurrage separate from those charged by ocean common carriers. Since then, the signatories of the January 2nd Congressional Letter state they have received reports of MTOs invoicing their own demurrage and detention charges separate from those of ocean common carriers. The January 2nd Congressional Letter concluded that all requirements in the final rule for invoicing demurrage and detention that cover ocean common carriers should apply to MTOs. The Commission finds the argument from the January 2nd Congressional Letter persuasive and consistent with the comments indicating that MTO invoicing is prevalent. It is critical to include MTOs in the final rule to ensure meaningful change to existing industry practice creating inefficiencies and confusion.

With respect to the specific information required in invoices, Congress and the President have already spoken on what they believe to be reasonable demurrage and detention invoicing requirements for billing parties, as evidenced by what they required of common carriers at 46 U.S.C. 41104(d). The Commission believes that these elements are appropriate to require in a demurrage and detention invoice sent to a billed party, regardless of whether the invoices come from an MTO or a common carrier, because these elements are mandated by Congress and supported by past agency investigation and review.⁴⁷ The need for consistency in demurrage and detention invoicing further supports requiring MTOs to comply with this rule, because billed parties should be able to expect a standardized set of information in a demurrage or detention invoice,⁴⁸ regardless of whether it comes from a carrier or an MTO.⁴⁹

Requiring standardized practices from MTOs also addresses the confusion raised in comments about what actual role MTOs play in invoicing for demurrage and detention. Some MTOs

⁴⁰ The Commission notes that canons of construction, such as reviewing legislative drafting history, are most useful in evaluating an interpretation of an ambiguous statute or regulation. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508–09 (1989) ("We begin by considering the extent to which the text of [the disputed provision] answers the question before us. Concluding that the text is ambiguous with respect to [that question], we then seek guidance from legislative history . . ."). But that is not why the commenters raised the legislative drafting history. The commenters would have the Commission affirmatively read into existence a prohibition on regulating MTO demurrage and detention invoices because some versions of legislation contemplated by Congress laid out statutory requirements and others did not. The absence of a statutory requirement is not proof of a prohibition on issuing regulations. If Congress wanted to prohibit the Commission from regulating MTO demurrage and detention invoices, it could have done so. The Commission does not agree that the legislative history prohibits inclusion of MTOs in these regulations.

⁴¹ Public Law 117–146, 136 Stat. 1272, at 1275.

⁴² Garamendi, Johnson, Costa, Valado, Thompson, and Panetta, *supra* note 33.

⁴³ See Balsam Brands (FMC–2022–0066–0095) (arguing that excluding MTOs potentially creates a loophole that would undermine the purposes and effectiveness of the regulation).

⁴⁴ Auchincloss and Babin, *supra* note 32.

⁴⁵ Many MTOs also made the argument that the legislative history of OSRA 2022 shows that Congress intended to exempt MTOs from demurrage and detention invoice requirements. American Association of Port Authorities (FMC–2022–0066–0255); West Coast MTO Agreement (FMC–2022–0066–0229); Fenix Marine Services, Ltd. (FMC–2022–0066–0186); Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248); Port of Houston (FMC–2022–0066–0268); Trapac, LLC (FMC–2022–0066–0136); National Association of Waterfront Employers (FMC–2022–0066–0276).

⁴⁶ Garamendi, Johnson, Costa, Valado, Thompson, and Panetta, *supra* note 33.

⁴⁷ "[T]he intent of this rulemaking is to ensure that the person receiving the bill understands the charges, regardless of whether the billing party is a VOCC, NVOCC, or an MTO." See 87 FR at 62347.

⁴⁸ Harbor Trucking Association (FMC–2022–0066–0261).

⁴⁹ As noted above, demurrage and detention invoices between MTOs and VOCCs are not subject to this rule.

told Congress that they do not issue their own demurrage and detention invoices separate from carriers.⁵⁰ Some MTOs have told the Commission that they do not send traditional demurrage and detention invoices, but instead issue “demurrage receipts” or “disclose charges.”⁵¹ One MTO contended to the Commission that it does not send demurrage and detention invoices to BCOs or truckers, and that it is VOCCs who charge BCOs demurrage and detention; but the same MTO also said that MTOs sometimes collect demurrage and detention on behalf of VOCCs.⁵² Other MTOs said that they do send demurrage and detention invoices.⁵³ Yet, even if these MTOs agreed that they do send demurrage and detention invoices, they disagreed with the idea that these invoices should be subject to the same regulation as other billing parties.

These inconsistent statements by MTOs highlight the need for clear rules governing all demurrage and detention billing parties so that billed parties receive accurate information to facilitate faster payment and dispute resolution. Allowing MTOs to escape the basic requirements of this rule by artfully styling their demurrage and detention invoices as “receipts” or “disclosures” would undermine the statute, frustrate the Commission’s expressed intention to simplify and clarify demurrage and detention invoicing for billed parties, and leave in place the confusing status quo that spurred Congress to pass OSRA 2022.

Further, the logic of the MTO argument against regulation is not persuasive. If, as some MTOs claim, they do not invoice shippers, BCOs, and truckers for demurrage and detention, the rule would not affect their practices in any event. If MTOs *do* send invoices, however, they should abide by the same rules as any other billing party. If they do have contractual privity, they should be able to obtain any information necessary to issue a compliant invoice through that contract. If MTOs do not have the information required to issue invoices consistent with these rules, they should not send invoices. If they still need to send these invoices, they should obtain all of the required information like any other billing party. If they cannot obtain that information and they still wish to collect a charge,

they should forward the invoice to a billing party with whom they have a contractual relationship and that can comply with this rule, and collect the demurrage and detention charge after providing the billing party accurate information about the charge.

Some commenters further challenged the Commission’s authority to regulate MTOs pursuant to 46 U.S.C. 41102. NAWA argued that the Commission lacks authority to regulate MTO invoicing through the general legal authority to regulate unjust and unfair practices at 46 U.S.C. 41102(c). NAWA argued that a more specific statutory provision controls over a more general provision, and that when two statutes cannot be harmonized, the later in time statute controls over the earlier. NAWA contended that 46 U.S.C. 41102(c) and OSRA 2022 can be harmonized, by simply omitting MTOs from the proposed rule. If, however, the authorities cannot be harmonized, it contends, the Commission must follow OSRA 2022 as it is the more specific and later-in-time statute.

As previously noted, the Commission has explained that it interprets 46 U.S.C. 41102(c) as governing the invoicing of demurrage and detention. Nothing in OSRA 2022 prohibited the Commission from regulating MTO demurrage and detention invoicing. Therefore, the Commission disagrees with NAWA’s argument that the statutes cannot be harmonized.

(b) Burden on MTOs To Comply With the Rule and Security Concerns

Issue: MTOs argued that applying these rules to MTOs would force them to expend significant resources to overhaul their websites and create additional security measures.⁵⁴

FMC response: MTOs did not submit estimates of or proposals for what work would be needed, or would cost, to modify their systems to comply with this rule. One MTO explained they have already invested significant resources to modify their system to incorporate the information from carriers required by OSRA 2022. This certainly suggests it is reasonable to expect MTOs to modify their systems to comply with this rule. It is not clear why MTOs could do this for their VOCC customers’ invoices but not their own invoices.⁵⁵

(c) Changes to Current MTO Practices

Issue: MTOs argued that this rule would upend settled practices and

increase confusion and congestion at ports.⁵⁶

FMC response: Current billing practices and the lack of transparency in those practices have raised concerns about whether current practices allow for a competitive and reliable American freight delivery system.⁵⁷ The changes to current practices this rule requires are meant to change the settled practices that do not ensure accuracy, clarity, and visibility of charges. This rule seeks to improve upon existing practices that do not provide adequate information for the efficient invoicing of charges. Further, these changes provide clarity on how billed parties access the dispute resolution process. Requiring targeted information may ultimately lead to fewer disputed bills and therefore streamline the demurrage and detention billing process. As discussed further in this preamble, the Commission is delaying implementation of the rule by 90 days. The Commission believes that this is sufficient time to allow MTOs and other regulated parties to make the necessary changes to their business operations in order to comply with the rule.

(d) Impacts on Common Law Lien Rights

Issue: MTOs argued that the rule would force MTOs to waive their common law lien rights. MTOs said they would have to choose between: (1) releasing cargo without demurrage or detention charges being paid (waiving their lien rights), or (2) refunding any collected charges if the invoice does not comply with this final rule.⁵⁸

FMC response: This rule does not impact traditional cargo lien rights. This rule allows MTOs to make their own business decisions about whether or not they require demurrage and detention charges to be paid prior to releasing cargo. Contrary to the commenters’ assertions, releasing cargo without payment of demurrage and detention charges does not automatically waive cargo lien rights. Cargo liens are lost upon delivery only if the cargo is delivered unconditionally.⁵⁹ It is well established law that a lien can survive delivery if the parties have contracted for such and the release has been

⁵⁰ Garamendi, Johnson, Costa, Valado, Thompson, and Panetta, *supra* note 33.

⁵¹ Fenix Marine Services (FMC–2022–0066–0186); West Coast MTO Agreement (FMC–2022–0066–0229).

⁵² Trapac, LLC (FMC–2022–0066–0136).

⁵³ Ports America/SSA Marine (FMC–2022–0066–0249).

⁵⁴ Fenix Marine Services, Ltd. (FMC–2022–0066–0186).

⁵⁵ Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248).

⁵⁶ American Association of Port Authorities (FMC–2022–0066–0255).

⁵⁷ See, e.g., Order of Investigation, Fact Finding Investigation No 28.

⁵⁸ See, e.g., American Association of Port Authorities (FMC–2022–0066–0255); West Coast MTO Agreement (FMC–2022–0066–0229).

⁵⁹ E.g., *Cross Equip. Ltd. v. Hyundai Merch. Marine (Am.) Inc.*, 214 F.3d 1349 (Table) (5th Cir. 2000)(2000 WL 633596)(citing e.g., *4,885 Bags of Linseed*, 66 U.S. (1 Black) 108, 109 (1861)).

conditioned.⁶⁰ In some circumstances releasing cargo conditionally might potentially carry additional administrative burden and risk, but it may be advantageous to a particular MTO in other circumstances. Alternatively, MTOs can require demurrage and detention charges be paid prior to releasing cargo. This option carries its own risks, however. As the commenter stated, if an MTO collects demurrage and detention charges and then those charges are later successfully contested by the billed party, the MTO must refund the incorrect charges. Under this rule, billed parties have 30 calendar days from the date the invoice is issued to contest demurrage and detention charges. This, however, should serve as an incentive for the invoices to be correct when issued. MTOs assert that issuing correct invoices will be difficult to impossible for them to do under the new rule because they do not know the end date of free time. The Commission is not convinced by this argument. MTOs have not presented evidence to the Commission that such information is unattainable by MTOs, only that they do not presently have it. The information needed to calculate this charge is knowable in advance of the release of cargo; it can be pulled from the bill of lading, tariff, terminal schedule, or other relevant transportation documents MTOs already have access to and billing formulas created that allow accurate invoices to be created quickly and accurately once an availability date is known (and projected outward for each day cargo pick-up is delayed).

(e) Impact on the Commission's Interpretive Rule Codified at 46 CFR 545.4

Issue: Commenters argued that the Commission's proposed rule amounts to an implicit repeal of the Commission's Interpretive Rule at 46 CFR 545.4 and therefore that the Commission's action violated the Administrative Procedure Act (APA).

FMC response: The Commission has solicited public comment in both an ANPRM and NPRM about whether the scope of this rule should cover MTO invoicing. The Commission stated unequivocally in the NPRM that MTOs would be subject to this rule. MTOs have had repeated and public notice that the Commission was considering this option, so the Commission disagrees with concerns that the rule lacked adequate time for public notice and comment. Any argument about

what parts of the Interpretive Rule at 46 CFR 545.4 remains in force is inherently an argument about that guidance and not about whether the Commission's instant rule complies with the APA.

Some commenters argue the rule is inconsistent with the Interpretive Rule at 46 CFR 545.4. The Commission finds that OSRA 2022 specifically required the Commission to issue rules under 46 U.S.C. 41102(c) that further define the prohibited practices by common carriers, marine terminal operators, and shippers, regarding the assessment of detention or demurrage charges. The plain language of this directive and the plain language of 41104(d) do not require evidence of multiple violations. This view is further supported by 46 U.S.C. 41104(f) which functions to void an invoice if a single required element is not included, not when the complainant can show multiple instances of such behavior.⁶¹ Thus, in the narrow context of demurrage and detention invoices issued by MTOs and common carriers, the Commission concludes that Congress dictated that evidence of a single violation is sufficient. To the extent that the commenters argue this narrowing by Congress repeals the Commission's entire Interpretive Rule codified at 46 CFR 545.4, the Commission disagrees.

(f) MTOs Collecting Demurrage and Detention on Behalf of Other Parties

Issue: Several MTOs have raised questions about how the rule does, and should, apply to them when they are collecting demurrage and detention charges on behalf of VOCCs, NVOCCs, and BCOs. For example, Maher Terminals said that the definition of "billing party" in the proposed rule does not clarify the identity of the billing party when an MTO bills and collects on behalf of a VOCC. (The rule would define "billing party" as "the ocean common carrier, marine terminal operator, or non-vessel-operating common carrier who issues a demurrage or detention invoice.") Maher Terminals proposed a revision to the definition that would have made clear that when an MTO bills on behalf of a VOCC/NVOCC/BCO that the VOCC/NVOCC/BCO is the billing party.

FMC response: In the scenario described above, it is assumed that the MTO would be acting as an agent of the VOCC/NVOCC/BCO. Whether an MTO must comply with the rule in this case

depends upon the contractual duties of the MTO as an agent. Traditional rules of agency remain applicable under the Shipping Act.⁶² According to the Restatement (Third) Of Agency § 1.01 (2006): "As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. . . ." The principal has a right to control the actions of the agent, but "a principal's failure to exercise the right of control does not eliminate it." Restatement (Third) Of Agency § 1.01 (2006). The Restatement also notes that an enforceable contract, written or oral, does not need to exist for there to be a principal-agent relationship. Restatement (Third) Of Agency § 1.01 (2006).

While the circumstances of each case must be known to make any particular determination as to whether an agency relationship exists, it is fair to assume, based on the Restatement's description of agency that the majority of instances where MTOs collect demurrage and detention charges on behalf of another party likely create an agency relationship. Thus, except to the extent that a principal VOCC or NVOCC has not delegated their obligations under 46 U.S.C. 41104, the agent-MTO must assume those obligations when acting to collect demurrage and detention charges. Of course, the exact principal-agent relationship is open to negotiation between the principal and agent. An agent is free to negotiate the specific acts they will or will not undertake on behalf of the principal. It is possible that in a particular MTO-principal demurrage and detention billing relationship that the MTO is responsible for providing all of the invoice elements in 46 U.S.C. 41104(d)(2) while in another MTO-principal demurrage and detention billing relationship that the MTO complies with only certain elements of 46 U.S.C. 41104(d)(2) and that the invoice must be sent back to the principal for completion of the other elements before the invoice is issued to the billed party.

2. 46 U.S.C. 41104(e), NVOCC Safe Harbor

Issue: One commenter said that the proposed rule did "not address the safe harbor provision provided to NVOCCs at 46 U.S.C. 41104(e), which exempts NVOCCs from the demurrage and

⁶⁰ *Id.* (citing e.g., *The Bird of Paradise*, 72 U.S. 545, 555 (1866)).

⁶¹ See also 46 U.S.C. 41310(b) (Charge complaints authority states that Commission is required to investigate compliance with section 41102 of "the charge" received and does not specify that multiple instances must be alleged for the Commission to investigate and order a refund and/or civil penalty).

⁶² E.g., *Landstar Exp. Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 495 (D.C. Cir. 2009).

detention invoice requirements and, importantly, liability for any invoice inaccuracies when the NVOCC passes through an underlying ocean common carrier's invoice.”⁶³ The commenter requested that the rule be modified “to ensure NVOCCs remain exempt from the demurrage and detention requirements when passing through the charges or invoice.”

FMC response: The commenter misinterprets the language of 46 U.S.C. 41104(e). The statute does not exempt NVOCCs from the demurrage and detention invoice requirements of 46 U.S.C. 41104(d)(2). It merely shifts responsibility for refunds or penalties under 46 U.S.C. 41104(d)(1) in the certain, specified scenario from the NVOCC to the ocean common carrier. The safe harbor provision is most applicable in a situation where an NVOCC receives an invoice from a VOCC and passes it on to its customers. In order for the safe harbor provision to apply, however, OSRA 2022 requires the Commission to make a finding that the non-vessel-operating common carrier is not otherwise responsible for the charge. The Commission declines to make a general finding as part of this rulemaking that all NVOCCs are “not otherwise responsible” for errors in invoices they pass through. Rather, this is a fact-based analysis that the Commission undertakes on a case-by-case basis. If the Commission finds in a particular matter that a violation of 46 U.S.C. 41104(d)(1) has occurred and also has made the relevant finding under 46 U.S.C. 41104(e) that the NVOCC is not otherwise liable, only then is the safe harbor provision applicable.

As discussed in the NPRM, there are important reasons for requiring NVOCCs to comply with detention and demurrage invoicing requirements: invoices that a BCO receives from an NVOCC may be their only notice of detention and demurrage charges and because of its contractual relationship with the BCO an NVOCC is often the only party in this transaction able to inform BCOs as to the nature of these charges.⁶⁴ The intent of this rulemaking is to ensure that the person receiving the bill understands the charges regardless of who the billing party is.

C. § 541.3 Definitions

1. “Billing Dispute”

Issue: One commenter raised two concerns about the proposed definition

of “billing dispute.”⁶⁵ First, the commenter was concerned that under the proposed definition, an MTO may not know when a “mere billing inquiry is tantamount to a ‘disagreement’ with respect to a specific invoice.” Second, the commenter was concerned that the word “raised” does not “provide adequate guidance in this context as it suggests that a disagreement is being broached for discussion purposes rather than being clearly conveyed to the billing party as a disagreement.”

FMC response: The Commission has removed the term “billing dispute” from § 541.3 in the final rule. “Billing dispute” does not need to be defined because it is not a term used in §§ 541.4–541.99, in either the NPRM or final rule. “Dispute” is used in § 541.6(d), but only in the paragraph header and does not require further definition.

2. “Billed Party” and “Billing Party”

(a) Responsibility for Payment

Issue: One commenter requested that the definition of “billed party” be amended by replacing “is responsible for the payment of any incurred demurrage or detention charge” with “has contracted with the billing party for the ocean carriage or storage of good.”⁶⁶ They were concerned that the language “responsible for the payment” “reads as a legal conclusion” and did not comport with the Commission’s goal that demurrage and detention invoices be billed to persons having a contractual relationship with the billing party for the carriage or storage of goods. Another commenter requested that the Commission amend the definition of “billed party” to include motor carriers that control containers to account for situations where VOCCs enter directly into written contracts with motor carriers that use containers in the transportation of goods.⁶⁷

FMC response: The Commission declines to make the requested changes. With respect to the first comment, the definition of “billed party” is simply to clarify the rights and responsibilities of the party receiving the bill. It is a fact-based definition centered on who the party is to whom the billing party issues the invoice. The definition is not the basis of an assessment of whether the billed party properly received the invoice, which is governed by § 541.4. Nothing in this rule prohibits third parties from receiving copies of invoices

or voluntarily paying demurrage or detention charges on behalf of the shipper/consignee.

In regard to the second comment, there seems to be a misunderstanding on the commenter’s part about the rule’s applicability. As discussed in the NPRM, a primary purpose of this rule is to stop demurrage and detention invoices from being sent to parties who did not negotiate contract terms with the billing party. That concern is not present where a motor carrier has directly contracted with a VOCC. Nothing in this rule, either in the proposed or final version, prohibits a VOCC from issuing a demurrage or detention invoice to a motor carrier when a contractual relationship exists between the VOCC and the motor carrier for the motor carrier to provide carriage or storage of goods to the VOCC. The definition of “billed party” is intentionally broad to capture any party to whom a detention or demurrage invoice is issued. When a VOCC issues a detention or demurrage invoice to a motor carrier, the VOCC must comply with the requirements of part 541. The Commission has jurisdiction over common carriers, marine terminal operators (MTOs), and ocean transportation intermediaries (OTIs), including over through transportation. Without knowing the particulars of the hypothetical, in this situation, presumably the FMC’s jurisdiction, and thus this rule, would apply only to cargo moved inland under a through bill of lading and contracts between a VOCC. A motor carrier not based on a through bill of lading would likely be outside the scope of this rule.

(b) Billing Party’s Control of Assets

Issue: One commenter was concerned that the Commission’s proposed definition of “billing party” “is missing the requirement that the entity issuing the invoice has the right to do so” and “[t]he regulations should recognize that there is a distinction between a billing party in control of the assets and one that is not, i.e., a non-vessel operating common carrier (NVOCC).”⁶⁸ The commenter suggested that the definition be amended to read as follows: *Billing party* means the ocean common carrier, marine terminal operator, or non-vessel operating common carrier who issues a demurrage or detention invoice because they control the equipment and terminal space or are passing through the charges for collection.

⁶³ National Customs Brokers & Forwarders Association of America, Inc. (FMC–2022–0066–0180).

⁶⁴ 87 FR 62341, 62347.

⁶⁵ Maher Terminals, LLC (FMC–2022–0066–0269).

⁶⁶ Shippers Coalition (FMC–2022–0066–0160).

⁶⁷ Metro Group Maritime (FMC–2022–0066–0209).

⁶⁸ New York New Jersey Foreign Freight Forwarders & Brokers Association, Inc. (FMC–2022–0066–0247).

FMC response: The Commission declines to make the requested change. In this final rule, the Commission has added a 30-day period to § 541.7 for NVOCCs to issue an invoice when they pass through demurrage and detention charges. This is an acknowledgement that NVOCCs are not always in control of the assets and often receive an invoice from a VOCC. For more information, see *Timeframes for NVOCCs* in the discussion of comments regarding § 541.7.

(c) Who is a person?

Issue: Two comments expressed concern that the proposed definitions of “billed party” and “billing party” included the term “person” but did not provide further clarification on what “person” means for purposes of the rule.⁶⁹ The commenters recommended either adding a cross reference to § 515.2(n) in the definitions or defining “person” in § 541.3 consistent § 515.2(n).

FMC response: The Commission agrees that identifying a definition for the term “person” can be helpful. It has added a definition of “person” to § 541.3 that aligns with § 515.2(n).

(d) Consignees

The Commission specifically sought comments on the NPRM as to whether it would be appropriate to allow common carriers to bill consignees named on the bill of lading as an alternative to the shipper.⁷⁰ In response to commenters’ support for including consignees as a party to whom an invoice can be properly billed, the Commission has revised the rule to incorporate this change. As part of this change, the Commission has added a definition of “consignee” to § 541.3 in this final rule. For a full analysis of comments concerning allowing consignees to be billed, see the discussion of consignees under § 541.4 concerning properly issued invoices.

(e) NVOCCs

Issue: One NVOCC commenter had concerns that the terms “billed party” and “billing party” “do not clearly separate the position of the NVOCC,” who, the commenter noted, can be both the billed party (when billed by the VOCC), and the billing party (when billing the BCO) on the same shipment.⁷¹

FMC response: The Commission acknowledges that there are

circumstances when an NVOCC is both a billed party and a billing party on the same shipment. As explained in more detail below in the response to § 541.7(c), the Commission has amended the rule to allow an extra thirty (30) days for NVOCCs to issue an invoice when they are passing through the charges from a VOCC to a customer. The Commission has also added § 541.7(c) to require that when an NVOCC informs a VOCC that its customer has disputed its invoice, the VOCC must then allow the NVOCC additional time to dispute the invoice it received from the VOCC. NVOCCs must still follow the correct procedures for issuing an invoice when acting as a “billing party” and are entitled to the same protections as other “billed parties” when acting in that capacity.

3. Demurrage and Detention

(a) Separate Definitions of “Demurrage” and “Detention”

Issue: Four comments requested that the rule separately define “demurrage” and “detention.”⁷² In support of this change, commenters generally made generic statements about how billing practices are frequently different for demurrage compared to detention.

FMC response: The Commission has made the determination not to split “demurrage and detention” into separately defined terms because part 541 and OSRA 2022 treat both charges equally. It may be true that practices differ when billing demurrage versus detention. None of the commenters, however, provided sufficient evidence to support what these specific differences are and how they would require changes to the rule. The Commission will continue to monitor the matter and retains the authority to separately define these terms in a future rulemaking for these or other regulations if circumstances warrant.

(b) Ports/MTO Demurrage Versus VOCC/NVOCC Demurrage

Issue: One commenter said that the rule needed to distinguish between demurrage and detention fees charged by ports and MTOs and those charged by VOCCs and NVOCCs because of the difference in underlying agreements and the fact that the charges serve different purposes.⁷³

FMC response: The Commission declines to make the requested change.

As noted in the NPRM, the definition of “demurrage or detention” in this rule is the same as the scope used in 46 CFR 545.5(b)—the goal is to encompass all charges having the purpose or effect of demurrage or detention.⁷⁴ The Commission has the same goal in this rule of ensuring all charges having the purpose or effect of demurrage or detention are covered and believes the definition proposed is the most accurate.

(c) Chassis and Other Special Equipment

Issue: One commenter requested that the Commission expand the proposed definition of “demurrage and detention” to include charges related to the use of chassis and other special equipment.⁷⁵

FMC response: The Commission declines to make the requested change. As noted in the NPRM, the definition of “demurrage or detention” in this rule is the same as the scope used in 46 CFR 545.5(b).⁷⁶ Section 7, paragraph (b)(2) of OSRA 2022 directs that this rulemaking “only seek to further clarify reasonable rules and practices related to the assessment of detention and demurrage charges to address the issues identified in [the 2020 Interpretive Rule].” Expanding the scope of the definition of “demurrage and detention” in this rule beyond the term’s definition in the 2020 Interpretive Rule would be contrary to statute because it would require us to address issues not identified in that Interpretive Rule.

(d) “Marine Terminal Space”

Issue: The Commission received two comments related to the phrase “marine terminal space” in the definition of “demurrage and detention.” New York New Jersey Freight Forwarders & Brokers Association, Inc. requested clarification of what “marine terminal space” means in the “demurrage or detention” definition.⁷⁷ They asked whether “marine terminal space” includes when a through bill of lading is used to transport imported merchandise into an interior port or rail yard and suggested that specific language be added to the definition of “detention and demurrage” to clarify this. The other commenter, International Dairy Foods Association, requested that the Commission include a provision in the final rule indicating that container dwell fees are “detention and demurrage charges” since they are

⁶⁹ Meat Import Council of America, Inc./North American Meat Institute (FMC–2022–0066–0188); Tyson Foods, Inc. (FMC–2022–0066–0225).

⁷⁰ 87 FR 62341, 62350 (Oct. 14, 2022).

⁷¹ CV International, Inc. (FMC–2022–0066–0217).

⁷² BassTech International LLC (FMC–2022–0066–0230); National Retail Federation (FMC–2022–0066–0231); Pacific Merchant Shipping Association (FMC–2022–0066–0233); Ports America/SSA Marine (FMC–2022–0066–0249).

⁷³ American Association of Port Authorities (FMC–2022–0066–0255).

⁷⁴ 87 FR 62341, 62348.

⁷⁵ Consumer Technology Association (FMC–2022–0066–0228).

⁷⁶ 87 FR 62341, 62348.

⁷⁷ FMC–2022–0066–0247.

“related to the use of marine terminal space.”⁷⁸

FMC response: The Commission declines to make these changes. As noted in Section I, regarding inland rail, the Commission has jurisdiction over cargo moved inland pursuant to a through bill of lading. This jurisdiction is clear pursuant to *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004). As a result, the Commission does not see a need to add this language specifically into this regulation. In response to International Dairy Foods Association, the Commission notes that the common definition of “container dwell fees” is interchangeable with the definition of “detention and demurrage.” As a result, the Commission declines to add another provision stating that container dwell fees are included in the rule’s definition.

4. Additional Comments

(a) “Designated Agent”

Issue: Two comments requested that the Commission define in § 541.3 the term “designed agent,” which was used in § 541.2 in the notice of proposed rulemaking.⁷⁹

FMC response: The Commission has not incorporated this request into the final rule. The term “designated agent” does not appear in any of the final regulatory text and thus including the term would not be useful or appropriate.

(b) “Billable party for origin demurrage”, “Billable party for destination demurrage”, and “Billable party for detention”

Issue: One commenter requested that the terms “billable party for origin demurrage”, “billable party for destination demurrage”, and “billable party for detention” be added to § 541.3 to “[define] the appropriately billable parties” associated with demurrage and detention charges.⁸⁰

FMC response: The Commission declines to make the proposed insertions. Just as the Commission determined not to split “demurrage and detention” into separate terms because the rule treats both charges equally, we also decline further delineations for origin demurrage, destination demurrage, and detention. The delineations are not required for the purposes of this rule.

D. § 541.4 Properly Issued Invoices

The Commission received many comments on proposed § 541.4, the “Properly Issued Invoice” provision. The majority of commenters, especially motor carriers and shippers, expressed support for the proposed rule. One commenter characterized this proposed provision as “critical to accomplishing the Commission’s objective in the rulemaking.”⁸¹

Many commenters that supported the proposed provision noted that third parties do not have a contractual relationship with the ocean carrier.⁸² Accordingly, it would be difficult for such third parties to dispute demurrage or detention invoices because they are not aware of the terms of the contract under which the container was shipped. Instead, commenters observed that the person that contracted for the carriage of goods or space to store cargo had the most knowledge about the shipment and are in the best position to understand the shipment invoice and to dispute the invoice if needed.⁸³ In addition, requiring that the billing party only invoice the person that contracted for carriage or storage of goods affirms that both the billing party and the billed party know the terms and conditions under which demurrage or detention may be charged.

Furthermore, several commenters asserted that because there is a contractual relationship between the billing and billed parties, there would be a greater incentive to provide timely and accurate invoices as well as a

greater willingness to resolve disputes.⁸⁴

Commenters stated that “parties who are not party to the ocean transportation contract and had no financial interests in the cargo itself, should not be subjected to detention [or] demurrage invoices.”⁸⁵ Commenters asserted that without a contractual relationship, third parties have little commercial leverage to dispute charges imposed upon them by common carriers.⁸⁶

Additionally, several commenters noted that the proposed provision would improve the current demurrage and detention billing process because the invoice would be sent to the person with the most knowledge of the terms of the contract.⁸⁷ Because the invoice is going to the party who has this knowledge, one commenter asserted that this will streamline the entire billing process, reduce costs, and increase efficiency to the supply chain.⁸⁸

Motor carriers and motor carrier trade organizations detailed several issues with the current system. For example, motor carriers frequently find themselves locked out from marine terminals for failure to pay detention charges as the motor carriers wait to receive payment from their customers.⁸⁹ Essentially, under the current system, motor carriers, who are threatened with being locked out of terminals, can be trapped in situations where they have no contractual leverage or negotiating power to fight back.⁹⁰ Such commenters stated that the current system does not adequately protect motor carriers from unfair billing practices.⁹¹ In addition, motor carrier and motor carrier trade organizations frequently stated that the party responsible for demurrage or detention charges is simply not them.⁹²

In addition, the proposed provision would reduce confusion with who is responsible for paying the invoice because it prohibits the billing party from invoicing more than one party.

⁸¹ E.g., Harbor Trucking Association (FMC–2022–0066–0261).

⁸² See, e.g., Bipartisan House Comment (FMC–2022–0066–0279); T.G. Logistics, Inc. (FMC–2022–0066–0253); Retail Industry Leaders Association (FMC–2022–0066–0259); Meat Import Council of America, Inc./North American Meat Institute (FMC–2022–0066–0188); RPM Courier Systems (FMC–2022–0066–0120); Monica Rivera Beattie’s Trucking Group (FMC–2022–0066–0115); Monk Transportation Ltd. (FMC–2022–0066–0117); Pacific Trucks, LLC (FMC–2022–0066–0118); Harbor Freight Transport Corp. (FMC–2022–0066–0123); BBT Logistics, Inc. (FMC–2022–0066–0127); Golden State Logistics (FMC–2022–0066–0158); Dependable Highway Express (FMC–2022–0066–0164); Impact Transportation (FMC–2022–0066–0172); Tricon Transportation, Inc. (FMC–2022–0166–0174); RANTA Transport LLC (FMC–2022–0066–0175); BridgeSide Incorporated (FMC–2022–0066–0179); RED Trucking agents for Cowan Systems LLC (FMC–2022–0066–0181); FOX Intermodal Corp. (FMC–2022–0066–0185); Pacific Coast Container Inc. (FMC–2022–0066–0194); Bonelli Logistics, Inc. (FMC–2022–0066–0196); DELKA Trucking, Inc. (FMC–2022–0066–0221); A1 Dedicated Transport, LLC (FMC–2022–0066–0232); Mutual Express Company (FMC–2022–0066–0243); Dray Trucking, LLC (FMC–2022–0066–0258). Several commenters highlighted the importance of prohibiting common carriers from invoicing parties.

⁸³ American Chemistry Council (FMC–2022–0066–0184).

⁸⁴ See, e.g., Eagle Systems, Inc. (FMC–2022–0066–0203); Association of Bi-State Motor Carriers (FMC–2022–0066–0212); Harbor Trucking Association (FMC–2022–0066–0090).

⁸⁵ Agriculture Transportation Coalition (FMC–2022–0066–0275).

⁸⁶ *Id.*

⁸⁷ Excargo Services Inc. (FMC–2022–0066–0151).

⁸⁸ Reliable Transportation Specialist, Inc. (FMC–2022–0066–0214).

⁸⁹ Association of Bi-State Motor Carriers (FMC–2022–0066–0212); Agriculture Transportation Coalition (FMC–2022–0066–0275); Intransit Container, Inc. (FMC–2022–0066–0227); Best Transportation (FMC–2022–0066–0090).

⁹⁰ Association of Bi-State Motor Carriers (FMC–2022–0066–0212).

⁹¹ Andale Trucking (FMC–2022–0066–0146).

⁹² See, e.g., Cloud Trucking Inc. (FMC–2022–0066–0105).

⁷⁸ FMC–2022–0066–0244.

⁷⁹ Meat Import Council of America, Inc./North American Meat Institute (FMC–2022–0066–0188); Tyson Foods, Inc. (FMC–2022–0066–0225).

⁸⁰ BassTech International, LLC (FMC–2022–0066–0230).

Although many commenters supported proposed § 541.4, a few commenters, especially ocean common carriers and MTOs, expressed concerns with the proposed regulation.

1. Alternative Approaches

Issue: A few commenters expressed concern with the Commission's analytical approach to the rule—using contractual relationships as the basis for establishing to whom demurrage and detention invoices should be sent. For example, Dole Ocean Cargo Express urged the Commission not to adopt a rule that “categorically limits the entities to which ocean carriers may bill detention and/or demurrage charges.”⁹³ NITL recommended that instead of a contractual relationship-based approach, the Commission's rule should instead focus on which party “is best able to comply with a carrier's reasonable demurrage and detention rules, except when an alternative party requests and assumes this responsibility in a written agreement with the carrier other than the bill of lading contract.” On the opposite end of the spectrum, the National Retail Federation said that instead the Commission should provide clear rules for who can be billed for detention or demurrage and provided example language based on who, in their opinion has influence over occurrences of these charges.⁹⁴ Hapag-Lloyd (America) LLC said that the rule's prohibition on issuing an invoice to any other person than the person for whose account the billing party provided ocean transportation or storage would slow down the release of cargo and complicate the process of properly assessing the lawfulness of a charge, particularly in the case of overseas shippers, and thus would not support cargo fluidity.⁹⁵

FMC response: After careful analysis, the Commission has determined that prohibiting billing parties from issuing demurrage and detention invoices to persons with whom they do not have a contractual relationship will best benefit the supply chain. If the billed party has firsthand knowledge of the terms of its contract, then they are in a better position to ensure that both they and the billing party are abiding by those terms. Although other parties may in some circumstances have more influence on whether demurrage or detention actually accrues, they are not the best party to understand the terms of the contract and dispute any charges. While there are benefits to bright-line rules

such as the one suggested by the National Retail Federation, there are drawbacks as well. For example, the National Retail Federation's specific suggestion that drayage motor carriers potentially be the responsible billed party under certain conditions fails to account for situations where a motor carrier's delay is the result of no action of their own, but rather the result of the actions of others, such as MTOs cancelling appointments with little to no notice to the motor carrier. The Commission understands that some regulated parties will need to change their business practices in order to comply with this rule.

Finally, the Commission does not believe that shippers located outside of the United States will serve as a basis of significant delay in the movement of cargo. As discussed in the preamble to the Interpretive Rule, shippers have commercial incentives to get their cargo off terminal, and modern digital Information Technology systems allow for prompt communications between parties, regardless of potential vast geographical distances.⁹⁶

2. Meaning of “Contracted With”

Issue: The Commission received several comments requesting clarification about the proposed requirement that the party “must have contracted” for the carriage or storage of goods. BassTech International LLC asked if, given that both the shipper and the consignee are parties to the bill of lading (which is the contract of carriage), this meets the Commission's intended criteria.⁹⁷ BassTech also asked whether, alternatively, the regulatory language is meant to limit invoicing to a party that has entered into a Service Contract with the ocean carrier for the transportation of the cargo.⁹⁸ The National Customs Brokers & Forwarders Association of America, Inc. requested guidance on whether a consignee may be considered to have a contract with a common carrier when listed on a bill of lading.⁹⁹ Other comments on this issue raised questions about implied contracts. The Shippers Coalition was concerned about implied contracts being used as the basis for an invoice and suggested that the Commission require in the regulation that these contracts be in writing.¹⁰⁰ Finally, several MTOs requested clarification or acknowledgement by the Commission

about their right to enforce a published Terminal Schedule as an implied contract against a BCO or trucker that enters the terminal.¹⁰¹

FMC response: “Contract” in this rule has its normal and ordinary legal meaning.¹⁰² This can be reflected in a document such as a contract of affreightment, for example, or a bill of lading, which courts have held to be maritime contracts.¹⁰³ Because contracts (other than contracts implied by law) require a meeting of the minds, merely listing a party on a bill of lading, or other shipping transportation document, is not sufficient for them to become a billed party for purposes of part 541 if they played no role in contracting for the transportation of the cargo. Whether a meeting of the minds has occurred is something that can vary based on the specific circumstances of a given relationship. Because a contract can exist even if not memorialized in writing, the Commission declines to add a requirement that contracts need to be in writing for purposes of this rule. The Commission notes, however, that written contracts can provide important documentary evidence of agreement. In addition, the Commission notes that the term “contracts” for the purposes of § 541.4 is not limited to service contracts; the term is broader given its normal and ordinary legal meaning and a contractual relationship can exist without a written document or specific form.

This rule does not prohibit or otherwise limit an MTO from maintaining the practice of issuing any party—including BCOs or Motor Carriers—an invoice based on a Terminal Schedule, including charges for detention or demurrage, if the Terminal Schedule includes such charges and the Schedule has been made available in accordance with 46 CFR 525.3. In fact, the practice of issuing invoices based on a Terminal Schedule that includes those charges continue to be permissible if they are just and reasonable as stated in 46 CFR 545.4. The consistent application of the Terminal Schedule charges to various customers is likely to be done on a normal, customary, and continuous

¹⁰¹ TraPac (FMC–2022–0066–0136); Fenix Marine Services (FMC–2022–0066–0186); West Coast MTO Agreement (FMC–2022–0066–0229). Furthermore, “schedule” is defined by FMC regulations at 46 CFR 525.1(c)(17).

¹⁰² See, e.g., *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 16 (2004) (“[C]ontracts for carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties”); *Contract*, Black's Law Dictionary (11th ed. 2019).

¹⁰³ E.g., *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004).

⁹³ FMC–2022–0066–0201.

⁹⁴ FMC–2022–0066–0231.

⁹⁵ FMC–2022–0066–0240.

⁹⁶ 85 FR 29638, 29652.

⁹⁷ FMC–2022–0066–0230.

⁹⁸ “Service Contract” is defined at 46 U.S.C. 40102(21).

⁹⁹ FMC–2022–0066–0180.

¹⁰⁰ FMC–2022–0066–0160.

basis, meeting that crucial element of the interpretive rule. Also, as noted by commenters, 46 U.S.C. 40501(f) and 46 CFR 525.2(a)(2) establish that such Schedules are enforceable as implied contracts. Under such a scenario, a Motor Carrier has a contractual relationship with the MTO and the terms of the contract (the Schedule) are known to the Motor Carrier in advance by operation of 46 CFR 523.3. This is a very different situation than where a Motor Carrier is billed for demurrage or detention and the Motor Carrier has no contractual relationship with the billing party and is not privy to the specifics of the contractual agreement (such as where a Motor Carrier is billed demurrage or detention based on an agreement between a shipper and a billing party).

This rule does require that when an MTO issues a bill for demurrage or detention for purposes of enforcing a Terminal Schedule, the billing must comply with part 541, including providing all the information required by § 541.6. The Commission recognizes that this may require MTOs to revise their current business practices. The Commission's primary concern with this rule is to ensure that billed parties understand the demurrage or detention invoices they receive.¹⁰⁴ Additional burdens on MTOs to be able to provide the necessary data, which the Commission does not believe to be unduly burdensome, is outweighed by the benefits of transparency, which will allow billed parties to verify the accuracy of demurrage and detention charges and with whom the charges originate (for example, the MTO itself or the VOCC). As discussed in the Commission's Order of Investigation for Fact Finding Investigation No. 28, the lack of visibility surrounding current MTO demurrage and detention billing practices "have raised questions over whether the current practices allow for a competitive and reliable American freight delivery system."¹⁰⁵

3. Consignees

Issue: Noting that there are a variety of shipping arrangements that allocate risks, obligations, and costs between the shipper and the consignee named on the bill of lading, the Commission sought comments in the NPRM on whether it would be appropriate to also include the consignee named on the bill of lading as another person who may receive a

demurrage or detention invoice, thus allowing the common carrier to bill either the person who contracted for the shipment of the cargo or consignee named on the bill of lading.¹⁰⁶ The Commission received 29 comments in response. Three comments said that invoices should be sent to contractual parties only.¹⁰⁷ These commenters said consignees were not the party responsible for payment,¹⁰⁸ or that consignees typically do not have enough knowledge to determine whether the billing information is consistent with the terms of the underlying contract.¹⁰⁹ Two comments said that invoices should be sent only to consignees.¹¹⁰ The International Tank Container Organisation (ITCO) opposed allowing charges to be sent back to the shipper, saying that it would "further complicate an already complex supply chain and hinder both efficient operations and global trade."¹¹¹ ITCO asserted doing so ignores the INTERCOMS understanding and will put the United States in conflict with international trading terms.¹¹²

The vast majority of comments (24), however, were of the opinion that the rule should make allowances for sending invoices to the shipper or the consignee (in at least some scenarios).¹¹³ Comments that supported

allowing invoices to be sent to consignees generally said that consignees should be included because: (1) consignees are frequently the party best situated to mitigate against the accrual of demurrage and detention charges and (2) consignees frequently have the most knowledge about a shipment and therefore best able to dispute any charges. A few supporters put qualifiers on when they thought consignees should be allowed to be invoiced. For example, SM Line said that consignees should be included as a potential party to be billed but that the Commission should not limit billed parties according to how, and whether the party appears on a specific bill of lading.¹¹⁴ In contrast, Shippers Coalition and the American Association of Exporters and Importers said that consignees should only be allowed to be invoiced if there is an advance written agreement between the carrier and consignee to do so.¹¹⁵

FMC response: In light of these comments, the Commission has made changes to this final rule to allow consignees to be billed as an alternative to the shipper when the consignee is the party contracting for the shipping and is therefore in contractual privity with the carrier. The Commission does not adopt the concept in the proposed rule's preamble that consignees should be required to be listed on the bill of lading in order to be billed. Rather, it is the consignee's contractual privity with the shipper that determines whether the consignee can be billed. Merely listing the consignee on the bill of lading is not sufficient to support billing the consignee. (Conversely, although presumably a less common scenario, it is possible to properly issue an invoice to a consignee that has not been listed on the bill of lading.) Corresponding to the changes in § 541.4 which allow consignees to be billed, the Commission has also added a definition of "consignee" to § 541.3. This definition comports with the definition of "consignee" that appears in § 520.2 so as to align this definition with the rest of the CFR, while containing language

¹⁰⁶ 87 FR 62341, 62349–62350.

¹⁰⁷ Meat Import Council of America, Inc./North American Meat Institute (FMC–2022–0066–0188); International Association of Movers (FMC–2022–0066–0222); and Consumer Technology Association (FMC–2022–0066–0228).

¹⁰⁸ International Association of Movers (FMC–2022–0066–0222).

¹⁰⁹ Consumer Technology Association (FMC–2022–0066–0228).

¹¹⁰ International Tank Container Organisation (FMC–2022–0066–0096); Flexport, Inc. (FMC–2022–0066–0111).

¹¹¹ FMC–2022–0066–0096.

¹¹² INTERCOMS (International Commercial Terms) are a set of standardized trade terms published by the International Chamber of Commerce (ICC) that are commonly used in international trade contracts.

¹¹³ Shippers Coalition (FMC–2022–0066–0160); FedEx Trade Networks Transport & Brokerage, Inc. (FMC–2022–0066–0165); American Association of Exporters and Importers (FMC–2022–0066–0168); National Customs Brokers & Forwarders Association of America, Inc. (FMC–2022–0066–0180); SM Line Corp. (FMC–2022–0066–0182); American Chemistry Council (FMC–2022–0066–0184); International Housewares Association (FMC–2022–0066–0187); A Customs Brokerage, Inc. (FMC–2022–0066–0200); Dole Ocean Cargo Express (FMC–2022–0066–0201) (would prefer no limits on who an invoice could be issued to but included statements that a consignee is sometimes the proper person to be billed); National Association of Chemical Distributors (FMC–2022–0066–0208); Metro Group Maritime (FMC–2022–0066–0209); Consumer Brands Association (FMC–2022–0066–0210); CV International (FMC–2022–0066–0217); Seafrigo USA Inc. (FMC–2022–0066–0223); West Coast MTO (FMC–2022–0066–0229); Bass Tech International LLC (FMC–2022–0066–0230);

National Retail Federation (FMC–2022–0066–0231); Pacific Merchant Shipping Association (FMC–2022–0066–0233); Connection Chemical LP (FMC–2022–0066–0236); World Shipping Council (FMC–2022–0066–0242); Husky Terminal and Stevedoring LLC (FMC–2022–0066–0248); New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (FMC–2022–0066–0247); Ocean Carrier Equipment Management Association, Inc. (FMC–2022–0066–0257); Cheese Importers Association of America (FMC–2022–0066–0265).

¹¹⁴ FMC–2022–0066–0182.

¹¹⁵ Shippers Coalition (FMC–2022–0066–0160); National Association of Exporters and Importers (FMC–2022–0066–0168).

¹⁰⁴ E.g., 87 FR 62341, 62347.

¹⁰⁵ FMC Order of Investigation, Fact Finding Investigation No. 28, 2 (2018). The Order of Investigation and other materials related to Fact Finding 28 are available on the Commission's website at <https://www.fmc.gov/fact-finding-28/>.

that further clarifies the consignee's place in the chain of shipping transactions for purposes of demurrage and detention billing practices. As such, and consistent with the comments, the rule finds a middle ground between acknowledging that a consignee may be the correctly billed party in some cases, but not all. The Commission encourages, but is not requiring, advance written agreements between carriers and consignees regarding demurrage and detention billing.

4. Payment by Third Parties Generally

Issue: The Commission received four comments regarding allowing payment of invoices by third parties.¹¹⁶ The Agriculture Transportation Coalition and Pacific Coast Council of Customs Brokers and Freight Forwarders Association requested that the rule include a clear mandate that the delegation payment authority is allowed but must be based on actual acceptance of such responsibility by the third party, such as a written or digital signature evidencing acceptance. FedEx Trade Networks and John S. Connor, Inc. requested that the rule specify that third parties may only receive copies of invoices and pay them with the billed party's knowledge and consent (but did not say that such consent should be required to be in writing). FedEx Trade Networks and John S. Connor, Inc. also requested that the regulation contain an explicit statement that if a third party receives a copy of the invoice that the third party itself is not accountable for the payment.

FMC response: The Commission does not believe that the suggested changes are necessary. The rule is clear in its direction that, with a limited exception for consignees, demurrage and detention invoices must be issued to the person for whose account the billing party provided ocean transportation or storage and who contracted with the billing party for the carriage or storage of goods. This will often, but not always, be the shipper of record. Outside of the exception for consignees, billing parties must not send invoices to third parties. The rule only mandates to whom the invoice can be issued and therefore who has legal liability to pay it. It is purposefully silent on third parties voluntarily paying an invoice—thus allowing the practice by declining to prohibit it. The Commission does not

believe it is necessary to require such agreements to be in writing or otherwise memorialized between the billed party and the third party. The Commission does not believe it is the agency's place to dictate a third party's business liability decision in this scenario. A third party will either: (1) pay the invoice on behalf of the billed party based on a previous guarantee by the billed party that they will be reimbursed; or (2) pay the invoice without such an agreement in place and assume the risk that they potentially may not be reimbursed.

E. § 541.5 Failure To Include Required Information

1. Invoice Attachments

Issue: Four commenters requested clarification whether a billing party may provide the required data elements as an attachment, addendum, additional pages, etc. to their invoice, for reasons of convenience or necessity because of the invoice's length.¹¹⁷ FedEx Trade Networks asserted that when an NVOCC is merely passing through the VOCC's charges, it should be able to satisfy the requirements by attaching the ocean carrier's invoice.¹¹⁸

FMC response: The required information may be included as an attachment to the invoice, as the statute simply requires that invoices "include" this information. In addition, § 541.6 states that an invoice must "contain" that information. As such, it is the Commission's position that this information may be included as an attachment, or otherwise incorporated. An NVOCC passing through VOCC demurrage or detention charges can satisfy the requirements by merely attaching the ocean carrier's invoice if that invoice contains all the necessary information in § 541.6. If all the necessary information is not on the ocean carrier's invoice, the NVOCC must locate and amend the missing information prior to sending the invoice on.

2. Voiding of Invoice Too Extreme a Penalty

A few commenters asserted that the penalty of having a billed party not be required to pay an invoice if the invoice was not compliant is an extreme penalty

for a single violation.¹¹⁹ The National Association of Waterfront Employers (NAWE) additionally argued that such a stringent penalty is not consistent with the Commission's Interpretive Rule on 46 CFR 545.4, which requires more than a single instance to something that happens on a "normal, customary, and continuous basis."¹²⁰

FMC response: The elimination of the billed party's obligation to pay an invoice that lacks the required information is statutorily mandated under 46 U.S.C. 41104(f) for common carriers. As such, 46 CFR 541.5 merely states what the statute already requires and the Commission lacks discretion to eliminate or relax this requirement. Section 41104(f) does allow the elimination of payment obligation for "an invoice" that does not meet the contents of the invoice requirements. This language signals Congress' desire to not require that a common carrier repeat the error multiple instances for a shipper to be able to seek relief. Thus, in the demurrage and detention context, the statutory language of section 41104(f) is clear and unambiguous in requiring only a single instance to trigger the elimination of the obligation to pay the inaccurate invoice and supersedes the "more than one instance" interpretation of the "normal, customary, and continuous basis" language found in 46 CFR 545.4.

Similarly, pursuant to 46 U.S.C. 41102(c), it is a prohibited practice for an MTO to fail to include the required minimum information in a demurrage and detention invoice sent to a party other than a VOCC. Sending incomplete bills that do not contain sufficient information for shippers to verify if the bills received are accurate would not constitute having just and reasonable practices relating to or connected with receiving, handling, storing or delivering property. Extending the elimination of charge obligations provision at 46 U.S.C. 41104(f) to MTOs issuing demurrage and detention invoices would meet the statutory direction that the Commission must "further define prohibited practices by . . . marine terminal operators, . . . under section 41102(c) of title 46, United States Code, regarding the assessment of demurrage or detention charges" and ensure that all demurrage and detention bills sent to billed parties provide the necessary information for the bills to be paid or disputed quickly

¹¹⁶ FedEx Trade Networks Transport & Brokerage, Inc. (FMC-2022-0066-0165); Pacific Coast Council of Customs Brokers and Freight Forwarders Association (FMC-2022-0066-0224); John S. Connor, Inc. (FMC-2022-0066-0267); and Agriculture Transportation Coalition (FMC-2022-0066-0275).

¹¹⁷ New York New Jersey Foreign Freight Forwarders & Brokers Association, Inc. (FMC-2022-0066-0247); CV International, Inc. (FMC-2022-0066-0217); National Customs Brokers & Forwarders Association of America, Inc. (FMC-2022-0066-0180); FedEx Trade Networks Transport & Brokerage, Inc. (FMC-2022-0066-0165).

¹¹⁸ FMC-2022-0066-0165.

¹¹⁹ E.g., National Association of Waterfront Employers (FMC-2022-0066-0276); Ports America/SSA Marine (FMC-2022-0066-0249); Port Houston (FMC-2022-0066-0268).

¹²⁰ FMC-2022-0066-0202.

thereby ensuring efficiency across the shipping system. Having the invoice content and elimination of charge obligations requirements for all billing parties be the same throughout the industry will ensure that there is more clarity and accuracy in invoicing throughout the shipping system.

F. § 541.6 Contents of Invoice

1. § 541.6(a), Identifying Information

(a) § 541.6(a)(1), Bill of Lading and § 541.6(a)(2), Container Number

Issue: The Commission did not receive any comments directly addressing the requirement that the invoice must list the container number—presumably because this is a data element listed in OSRA 2022. A few commenters, however, raised concerns that requiring the bill of lading number, especially in conjunction with the container number, would increase the risk of theft of the cargo and create security risks by allowing for false pick-up appointments.¹²¹ Some of these comments further asserted that requiring bill of lading information to be included on the invoice would require significant and costly upgrades to their IT systems.

FMC response: The Commission disagrees with the commenters' assertion regarding potential security issues. The Commission previously addressed this concern when the issue was raised by the Ocean Carrier Equipment Management Association (OCEMA) in response to the ANPRM.¹²² Here, we reiterate and expand upon that response. Bill of lading numbers are available through publicly accessible import and export data systems, such as the Journal of Commerce's Port Import/Export Reporting Services (PIERS) and are already frequently included on demurrage and detention invoices. Because bill of lading numbers are not confidential information, they are not a good basis for security measures. Container numbers are not protected information either. Container numbers are written on the outside of the container. Thus, like bill of lading numbers, they are not a good basis for security measures. Including an already publicly available number on an invoice does not increase security concerns. The commenters' claims also do not

consider the multiple levels of security at the port that deter an incorrect party from taking the cargo. These security measures include basic security infrastructure such as perimeter fencing, security gates, monitoring equipment, and alarm systems, and other access control measures such as Port Security Plans and Transportation Worker Identification Credential ("TWIC") requirements. Nor do their comments consider that the rule prohibits the billing party from issuing demurrage or detention invoices to a person other than the person for whose account the billing party provided ocean transportation or space to store goods.

The bill of lading number and container number provide valuable identifying information to the billed party such as determining which shipment is being charged and a means of verifying accuracy of charges. Therefore, the Commission is retaining the requirement that this information be included on the invoice. The Commission recognizes that some billing parties may need to revise operations, including software and website updates, such as those related to how they generate cargo pick-up numbers. However, the Commission has no evidence to support a finding nor received data from commenters showing that such revisions would be time intensive or costly. Billing parties could, for example, for minimal time and cost, replace that portion of a pick-up number currently based on bill of lading number/container number with a number produced by a random number generator and doing so would be more secure than current systems that incorporate bill of lading numbers/container numbers into the pick-up number.

(b) § 541.6(a)(3), Port(s) of Discharge

Issue: New York New Jersey Foreign Freight Forwarders and Brokers Association requested the Commission amend § 541.6(a)(3) to clarify that the port of discharge can be any U.S. port—ocean or interior—to address situations, for example, where cargo arrives at a West or East Coast port, or via Canada, and then moves by rail to the interior.¹²³ The commenter was concerned that without the suggested clarification to the regulation there is the risk that the billed party would not receive the proper billing information to assess the correctness of invoices issued for charges incurred at interior ports.

FMC response: The commenter is correct that detention or demurrage invoices issued for cargo delivered on a

through bill of lading under the Commission's jurisdiction are required under this rule to list all ports of discharge, ocean and inland. The Commission believes that this requirement is sufficiently incorporated into the language we proposed in the NRPM and have adopted in this final rule. The regulation's use of "port(s)," as opposed to "port" accounts for situations where there are multiple ports of discharge.

(c) § 541.6(a)(4), Basis for Why the Billed Party Is the Proper Party of Interest

Issue: The Commission received several requests from commenters to clarify what level of detail is necessary to satisfy the requirement that the invoice include the basis for why billed party is the proper party of interest and thus liable for the charge.¹²⁴ Mediterranean Shipping Company specifically requested guidance as to whether the requirement would be satisfied with: (1) a reference to the applicable tariff rule supporting the billing; (2) specific reference needed to contractual provisions; or (3) a reference number to identify the contract at issue.¹²⁵

FMC response: There is no specific or set of specific documents or reference(s) that would meet the requirement of § 541.6(a)(4). The purpose of the regulation is that billed parties must be able to identify why the billing party believes that they are responsible for paying the invoice and to refute that basis if they believe that they have been billed incorrectly. A reference to the applicable tariff rule supporting the billing, specific reference to contractual provisions, or a reference number to identify the contract at issue might all, or might all not, meet this standard depending on the specific circumstances of a particular invoice.

(d) Requests for Additional Identifying Information

Issue: The U.S. Department of Agriculture requested that the Commission also require billing parties include on the invoice transportation history information, such the date and time a container was loaded on or off a vessel, and the date and time the vessel left or arrived at the port.¹²⁶ The Meat

¹²¹ TraPac, LLC (FMC-2022-0066-0136); Fenix Marine Services (FMC-2022-0066-0186); West Coast MTO Agreement (FMC-2022-0066-0229); National Association of Waterfront Employers (FMC-2022-0066-0276); Pacific Merchant Shipping Association (FMC-2022-0066-0233); Husky Terminal and Stevedoring, LLC (FMC-2022-0066-0248); Port Houston (FMC-2022-0066-0268).

¹²² 87 FR 62341, 62350 (Oct. 14, 2022).

¹²³ FMC-2022-0066-0247.

¹²⁴ National Customs Brokers & Forwarders Association of America, Inc. (FMC-2022-0066-0180); Mediterranean Shipping Company (FMC-2022-0066-0143); FedEx Trade Networks Transport & Brokerage, Inc. (FMC-2022-0066-0165); U.S. Dairy Export Council/National Milk Producers Federation (FMC-2022-0066-0235).

¹²⁵ FMC-2022-0066-0143.

¹²⁶ FMC-2022-0066-0274.

Import Council of America, Inc. (MICA) and the North American Meat Institute proposed that the Commission should require billing parties to identify on the invoice the vessel(s) used to transport the cargo.¹²⁷ These commenters believe that these additional data elements on the invoice would increase transparency and help billed parties in verifying calculations of free time, availability, and earliest-return-date, and thus make it easier to identify and dispute excess charges.

FMC response: The Commission agrees that having this additional information may be helpful in some circumstances. The Commission, however, has not been presented with enough evidence to be convinced that the potential benefits to some billed parties on some invoices outweigh the burden to billing parties by requiring this information on all invoices. The Commission will continue to monitor detention and demurrage billing trends and retains the authority to revise non-statutorily mandated detention and demurrage invoice data elements in the future if it determines there is a need to do so.

(e) Billing Exceptions

Issue: The American Association of Exporters and Importers (AAEI) supported § 541.6 and the required contents of the invoice.¹²⁸ AAEI also stated that if demurrage and detention charges are incurred or removed due to terminal or vessel operating deficiencies, then the invoices should include the details with standardized categories of billing exceptions.

FMC response: The Commission declines to add a requirement for billing exceptions to § 541.6. Under OSRA 2022, the billing party has an obligation to ensure the accuracy of its invoices. In addition, § 541.8 specifies the procedures for disputing charges—these disputes can be initiated if the billed party feels they are not responsible for the charges. As a result, the Commission declines to proscribe that billing parties deduct certain charges, especially given that there could be disagreement over where the fault in the charges lies.

2. § 541.6(b), Timing Information

(a) § 541.6(b)(1), Invoice Date

Issue: The National Customs Brokers & Forwarders Association of America,¹²⁹ CV International,¹³⁰ and New York New Jersey Foreign Freight Forwarders and Brokers Association,

Inc.¹³¹ asked the Commission to clarify whether backdating of invoices is permissible under this rule, or whether the billing date on demurrage and detention invoices should reflect the actual date an invoice is mailed out or otherwise finalized. John S. Connor, Inc. agreed, saying that backdating is a common practice that must not be allowed.¹³² National Industrial Transportation League raised related concerns about some carriers continuing to assess charges during the time spent to process payments after payment has been made by the billed party or its agent.¹³³

FMC response: Billing parties have an obligation under 46 U.S.C. 41104(d)(2) to issue detention and demurrage invoices that contain accurate information concerning the statutorily specified data elements as well as any additional information determined necessary by the Commission. To solidify this point, the Commission has incorporated into § 541.6 the requirement for accurate information. Accuracy is an implied legal condition of any statutory or regulatory information collection imposed on regulated parties by Congress or agencies and is generally not specifically incorporated as a written requirement. However, based on these comments, it appears that such clarification in the regulatory text may be of use to regulated parties and its incorporation mirrors the use of the word in 46 U.S.C. 41104(d).

(b) § 541.6(b)(2), Invoice Due Date

Issue: Seafrigo USA urged the Commission to clarify the meaning of “billing due date,” and specifically asked whether it means the payment due date.¹³⁴ The Meat Import Council of America, Inc. and the North American Meat Institute, in a joint comment, suggested that billing parties must be prohibited from listing the payment due date as the same date the invoice is issued as billed parties should have the full 30 days after an invoice is received, not simply issued.¹³⁵ The U.S. Department of Agriculture recommended that the Commission specify in the regulation the timeframe for payment of an invoice, making certain that the regulation is clear that payment is not due until any disputes are resolved.¹³⁶ Fenix Marine Services stated that the proposed demurrage and

detention invoice requirements are incompatible with traditional MTO billing practices, and changing their practice to conform to the FMC’s rule would mean a major overhaul of many MTO’s longstanding billing practices.¹³⁷

FMC response: The billing due date (or “invoice due date” as worded in this final rule) is the date by which the billed party must pay the invoiced charges. The Commission has revised § 541.8(a) to make clear that billing parties must allow billed parties at least 30 calendar days from the invoice issuance date to request mitigation, refund, or waiver of fees. Correspondingly, the due date of an invoice must be on or after 30 days after it is issued. As discussed in the NPRM and elsewhere in this document, the Commission acknowledges that this rule may require some billing parties to change their billing information technology systems and practices.

(c) § 541.6(b)(3)–(5), Free Time

Issue: One commenter requested that “end of free time” in § 541.6(b)(5) be defined as “the end of free time as determined by the ocean common carrier or marine terminal, whichever, is later” because ocean common carriers and marine terminal may have disparate last free day dates.¹³⁸

FMC response: The Commission declines to define “end of free time”, “start of free time”, or “free time” as part of this rulemaking for the reason noted by the commenter—their meaning can vary terminal to terminal.¹³⁹ The Commission does not have evidence at this time to support a finding that standardizing these terms is warranted.

(d) § 541.6(b)(6), Container Availability Date

Issue: Two NVOCCs requested clarification of the meaning of “availability date” in § 541.6(b)(6).¹⁴⁰ One of the commenters requested that FMC define the term in § 541.3.¹⁴¹ A third commenter said that the term “availability date” creates too much ambiguity in that some shipments may be delayed in customs resulting from actions taken or not taken by the receivers and import customs brokers.¹⁴² They argued that vessel arrival date should be used instead because actual time of arrival of the

¹³⁷ FMC–2022–0066–0186.

¹³⁸ FedEx Trade Networks Transport & Brokerage, Inc. (FMC–2022–0066–0165).

¹³⁹ See 85 FR 29638, 29654.

¹⁴⁰ Seafrigo USA (FMC–2022–0066–0223); DHL Global Forwarding (FMC–2022–0066–0219).

¹⁴¹ Seafrigo USA (FMC–2022–0066–0223).

¹⁴² International Tank Container Organisation (FMC–2022–0066–0096).

¹²⁷ FMC–2022–0066–0188.

¹²⁸ FMC–2022–0066–0168.

¹²⁹ FMC–2022–0066–0180.

¹³⁰ FMC–2022–0066–0217.

¹³¹ FMC–2022–0066–0247.

¹³² FMC–2022–0066–0267.

¹³³ FMC–2022–0066–0277.

¹³⁴ FMC–2022–0066–0223.

¹³⁵ FMC–2022–0066–0188.

¹³⁶ FMC–2022–0066–0274.

vessel is clearly defined and gives NVOCCs a clear date from which to start the clock.

FMC response: The Commission declines to incorporate the commenters' suggestions. First, the date of container availability is statutorily mandated by 46 U.S.C. 41104(d)(2)(A). Congressional action would be needed to change it to vessel arrival date. Second, the Commission declines to add a definition of "availability date" to § 541.3 for the same reason we declined to define it in our 2020 final Interpretive Rule on demurrage and detention—"availability" can vary by port or marine terminal.¹⁴³ As we discussed there: "Suffice it to say, availability at a minimum includes things such as the physical availability of a container: Whether it is discharged from the vessel, assigned a location, and in an open area (where applicable)." ¹⁴⁴ Additionally, as discussed in the Interpretive Rule's notice of proposed rulemaking: "In this context, 'cargo availability' or 'accessibility' refers to the actual ability of a cargo interest or trucker to retrieve its cargo. Cargo is not available, for instance, if a cargo interest or trucker cannot pick it up because it is in a closed area of a terminal, or if the port is closed." ¹⁴⁵ We adopt the meaning for these terms provided in the Interpretive Rule in this rule as well.

(e) § 541.6(b)(7), Earliest Return Date

A number of comments raised the issue of earliest return date. Intermodal Motor Carriers Conference urged the Commission to clarify OSRA 2022's earliest return date, and to require that date on the detention and demurrage invoice.¹⁴⁶ The International Tank Container Organisation (ITCO) noted that OSRA 2022 requires that the earliest return date be specified, while this rule does not require it on the invoice.¹⁴⁷ ITCO opined that the term "availability date," which is currently used in the rule, creates too much ambiguity. Balsam Brands¹⁴⁸ and Harbor Trucking Association¹⁴⁹ said that the earliest return date should be listed for export shipments, and any modifications to this date should be identified. The New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (NYNJFF&BA) stated that the requirement to provide the

earliest return date for export shipment should be understood as meaning the first notice for receiving containers at ports, as this notice sets the rest of the process in motion for getting a container back on a vessel.¹⁵⁰ NYNJFF&BA states that if demurrage and detention can be charged in instances when cargo remains at the terminal beyond the free time as a result of VOCC decisions, then there is no incentive to improve the information and receiving window dates in the early return date (ERD) notices. When containers are delivered per ERD notices, the cargo waiting for a new vessel cannot be incentivized by the imposition of demurrage and detention to reduce time at the terminal.

To strengthen the rule's requirements, the National Association of Chemical Distributors¹⁵¹ and Connection Chemical¹⁵² suggested that the Commission add the term "accurate" before the earliest return date, to ensure that any changes to this date are reflected as conditions change. CV International stated that earliest return dates change frequently because of unreliable vessel schedules and congested terminals.¹⁵³ As a result, CV International suggested that when a container is in motion, the earliest advised return date should apply. John S. Connor, Inc. made similar comments.¹⁵⁴

The Meat Import Council of America, Inc. (MICA) and the North American Meat Institute (NAMI) jointly argued that the final rule should not diminish the significance of intervening, clock-stopping events when a billed party disputes the charges.¹⁵⁵ MICA/NAMI suggests that the Commission requiring including earliest return date and changes to that date on detention and demurrage invoices would increase transparency and minimize billing disputes. Lastly, the National Customs Brokers and Forwarders Association of America requested clarification and Commission guidance on how billing parties should account for data elements in the minimum invoice information requirements where dates, such as the earliest return dates, change.¹⁵⁶

FMC response: The Commission declines to make the commenters' changes requested regarding earliest return date in this rule. This is an issue that the Commission will continue to examine. For example, the Commission

issued a Request for Information in August 2023 seeking comments on what shippers and BCOs can do to better predict container earliest return dates.¹⁵⁷

In addition, Commissioner Rebecca Dye has proposed to reform three practices of ocean carriers and marine terminal operators at the Ports of Los Angeles and Long Beach, and the Port of New York and New Jersey that relate to earliest return date, container returns, and container pickup (notice of availability).¹⁵⁸ Commissioner Dye encourages reactions or questions regarding these proposals from the shipping public. More information on this project may be found on FMC's website.

(f) § 541.6(b)(8), Date(s) for Which Demurrage and/or Detention Were Charged

Issue: TraPac LLC stated that requiring billing parties to include the specific dates on which demurrage or detention is charged would, for MTOs, result in an unnecessary burden on terminals as MTOs would need to develop a reporting system to provide information regarding the container's status on a "clock start" and "clock stop" basis.¹⁵⁹ According to the commenter: (1) it is not reasonable or realistic to expect MTOs to transmit information in real time; and (2) if not in real time, it could result in significant delay. Consumer Technology Association said that the Commission should require disclosure of any relevant "stop-the-clock" events that toll the passage of free time—such as container availability, facility closures, port congestion, or lack of available appointment slots. They said that having this information would greatly facilitate the timely resolution of disputes but noted that this information is often only available to billing parties.¹⁶⁰ BassTech International LLC suggested that, for emphasis of the billing party's obligation for the accurate assessment of charges, the Commission change "were charged" to "were incurred and charged." ¹⁶¹

FMC response: As discussed in the NPRM, instead of requiring billing parties to identify specific "clock-stopping" events on demurrage and detention invoices, this rule requires the billing parties to identify the specific

¹⁴³ 85 FR 29638, 29654 (May 18, 2020) (internal citation omitted).

¹⁴⁴ *Id.*

¹⁴⁵ 84 FR 48850, 48852 (Sept. 17, 2019) (internal citation omitted).

¹⁴⁶ FMC–2022–0066–0189.

¹⁴⁷ FMC–2022–0066–0096.

¹⁴⁸ FMC–2022–0066–0095.

¹⁴⁹ FMC–2022–0066–0262.

¹⁵⁰ FMC–2022–0066–0247.

¹⁵¹ FMC–2022–0066–0208.

¹⁵² FMC–2022–0066–0236.

¹⁵³ FMC–2022–0066–0217.

¹⁵⁴ FMC–2022–0066–0267.

¹⁵⁵ FMC–2022–0066–0188.

¹⁵⁶ FMC–2022–0066–0180.

¹⁵⁷ 88 FR 55697, 55698 (Aug. 16, 2023) (Question 6).

¹⁵⁸ <https://www.fmc.gov/commissioner-dye-proposes-reforms-to-international-ocean-supply-chain-practices/> (July 26, 2023).

¹⁵⁹ FMC–2022–0066–0136.

¹⁶⁰ FMC–2022–0066–0228.

¹⁶¹ FMC–2022–0066–0230.

dates on which they charged demurrage or detention.¹⁶² The rule permits billing parties to take into account any intervening events that affected the charges, if known, and enables billed parties to confirm or dispute the validity of charges on specific dates. The rule incorporates the intent of OSRA 2022 to shift the burden to billing parties to justify the demurrage or detention charges while allowing billing parties to correct invoices when the intervening events are not initially known to them.

(g) General Comments

Issue: One commenter said that any schedule data on invoices must include all previous revisions and not only the final dates.¹⁶³ The commenter said such information was necessary because issues on exports in demurrage and detention invoices are caused by last minute schedule changes over which the shipper has no control.

FMC response: The Commission declines at this time to mandate that billing parties include all previous revisions. We do not believe that enough evidence has been presented to the Commission at this time to justify the increased burden of such a requirement. However, we will continue to monitor the issue of demurrage and detention invoices and may consider this or other additional changes in the future if circumstances warrant.

3. § 541.6(c), Rate Information

The Commission did not receive comments regarding proposed § 541.6(c). It is adopting the proposed language from the NPRM in this final rule with minor, non-substantive, clarifying amendments. In paragraph (c), “The invoice” has been changed to “A demurrage or detention invoice” to reflect the language of § 541.3. Paragraph (c) has also been amended to clarify that these are minimum requirements. Paragraph (c)(2) has been amended by adding terminal schedule to the listed examples of documents, and “i.e.,” has been changed to “e.g.,” to reflect that this is not an exhaustive list of all possible documents.

4. § 541.6(d), Dispute Information

(a) § 541.6(d)(1)

One commenter suggested eliminating paragraphs (d)(2) and (3) and merging the necessary information into a single paragraph § 541.6(d) to read as follows: “The invoice must contain sufficient information to enable the billed party to readily identify a contact to whom they may direct questions or concerns related

to the invoice including the name, email, telephone number and mailing address of the responsible person to whom invoice questions or notifications of a billing dispute must be submitted.”¹⁶⁴ According to the commenter, the proposed revision “prevent[s] the imposition of potentially unreasonable or obstructive processes by the billing party” and instead allows disputes to be handled following the standard business practice for similar events.

FMC response: The Commission declines to make the suggested changes. Subsection (d)(1) already accomplishes what the proposed changes seek. In addition, this rule makes dispute resolution simpler, more consistent, and transparent. These are the same goals that the Commission espoused in the Interpretive Rule, which the commenter acknowledges in their submission. In addition, the “conventional manner” in which these disputes have been handled “in the normal course of business” for which the commenter advocates have until now not always been successful and resulted in practices that resulted in OSRA 2022 and this rulemaking. Maintaining the existing model would fail to address the reasons behind the statute and this rulemaking.

(b) § 541.6(d)(2), Information on How To Request Fee Mitigation, Refund, or Waiver

Issue: The Commission received a number of comments regarding the proposed requirement in § 541.6(d)(2) that the URL address of a publicly accessible part of the billing party’s website provide a detailed description of what the billed party must provide to request fee mitigation, refund or waiver. Two commenters said that the proposed URL requirement would be too burdensome. One of these commenters urged the Commission to instead adopt a requirement that allows for any method of delivery of such information to the shipper so long as it includes a transparent description of the required information.¹⁶⁵ The other commenter said that the proposal could lead to burdensome procedures that are inconsistent with the shifting of the burden of proof regarding reasonableness of the charges from shippers to carriers that OSRA 2022 espouses.¹⁶⁶ Six commenters were in support of the URL requirement.¹⁶⁷ The

International Dairy Foods Association stated that this requirement “will help cargo owners easily find and understand what information they need to include in such requests. This will improve the efficiency of the dispute process and make it less likely that requests are denied on procedural grounds.”¹⁶⁸

Three additional commenters all said the rule would benefit from expanding the acceptable digital platforms beyond URLs to include QR codes or digital watermarks, for example, so that information regarding the dispute process can be retrieved to keep pace with evolving innovations and technologies.¹⁶⁹ The Meat Import Council of America, Inc. and the North American Meat Institute proposed replacing “URL address” with either “[a] digital trigger (URL address, QR code, digital watermark or other similar digital triggers) to the publicly-accessible portion of the billing party’s website that provides a detailed description of information or documentation that the billed party must provide to successfully request fee mitigation, refund, or waiver” or “[a] digital trigger to the publicly-accessible portion of the billing party’s website that provides a detailed description of information or documentation that the billed party must provide to successfully request fee mitigation, refund, or waiver.”¹⁷⁰

FMC response: The Commission disagrees with the two commenters’ assertion that the proposed requirement is too burdensome. While there may be some initial time/infrastructure requirements in order for some billing parties to comply, those will be minimal, and the benefits of transparency to billed parties greatly outweigh these minimal burdens. In response to commenters, the Commission has added language to § 541.6(d)(2) to expand this category from URLs to digital means more generally, including URLs, QR codes and other digital means that would allow this requirement to keep pace with technology.

Association (FMC–2022–0066–0244); and the Retail Industry Leaders Association (FMC–2022–0066–0259).

¹⁶⁸ FMC–2022–0066–0244.

¹⁶⁹ Meat Import Council of America, Inc. and the North American Meat Institute (FMC–2022–0066–0188); Tyson Foods Inc. (FMC–2022–0066–0225); and the Agriculture Transportation Coalition (FMC–2022–0066–0275).

¹⁷⁰ FMC–2022–0066–0188.

¹⁶² 87 FR 62341, 62351.

¹⁶³ Anonymous (FMC–2022–0066–0093).

¹⁶⁴ BassTech International LLC (FMC–2022–0066–0230).

¹⁶⁵ Seafrigo USA Inc. (FMC–2022–0066–0223).

¹⁶⁶ National Retail Federation (FMC–2022–0066–0231).

¹⁶⁷ International Tank Container Organisation (FMC–2022–0066–0096); International Dairy Foods

(c) § 541.6(d)(3), Disclosure of Timeframe for Requesting a Fee Mitigation, Refund, or Waiver

The Commission did not receive comments regarding proposed § 541.6(d)(3) and is adopting the proposed language from the NPRM in this final rule.

5. § 541.6(e), Certifications

(a) § 541.6(e)(1), Certification of Compliance With FMC Demurrage and Detention Rules

Issue: The International Tank Container Organisation¹⁷¹ and Maher Terminals LLC¹⁷² argued that the certification of compliance is not necessary given that it is legally required for regulated parties to comply with Commission regulations. Maher Terminals also expressed concern that such a certification would require billing parties “to state as a fact a matter that which is really a conclusion of law.”¹⁷³

FMC response: Certification that the billing party’s charges are consistent with FMC detention and demurrage rules is required by 46 U.S.C. 41104(d)(2)(L). Accordingly, the Commission will include it in the rule.

(b) § 541.6(e)(2), Certification That Billing Party’s Performance Did Not Cause or Contribute to the Underlying Invoiced Charges

Issue: One commenter said that the certification statement should reflect an NVOCC’s more limited liability in instances where it is simply passing through the charges from a VOCC and, as with the other required elements on the invoice, is just a vehicle and not the responsible party.¹⁷⁴ They provided the following sample certification statement for the Commission’s consideration: “To the best of our knowledge the charges on this invoice are a direct pass through and compliant with the requirements of the Shipping [Act] of 1984 as amended by [OSRA 2022] and that our NVOCC did not cause, contribute, or mark up these underlying charges.”

FMC response: The Commission declines to change the proposed language and finalizes it in this rule. A billing party has a legal obligation to include accurate information on each of the invoice elements found in § 541.6. In accordance with 46 U.S.C. 41104, the Commission will make a determination if a particular self-certification is inaccurate or false only after an

investigation following filing of a charge complaint.

(c) MTOs

Issue: Four commenters argued that MTOs do not have the information necessary to make these certifications and certifications should not be required of MTOs because of the burden it would impose on them to collect the necessary information, and further, such certification would not address the Commission’s primary concern, which is having transparent and clear invoices for billed parties to clearly understand billed charges.¹⁷⁵ A fifth commenter asserted that imposing these certifications on MTOs is beyond OSRA 2022.¹⁷⁶

FMC response: In instances where an MTO invoices a shipper, the Commission has determined that the MTO should be subject to the same regulations that apply to VOCCs and NVOCCs, including certification requirements. As discussed earlier in this preamble, the Commission has statutory authority to apply this rule to MTOs. Paragraph (c) of section 41102, title 46, United States Code, prohibits MTOs from failing to establish, observe, and enforce reasonable practices connected to the receiving, handling, storing, or delivering of property. This section provides clear and direct authority for the Commission to regulate MTO practices connected to the receiving, handling, storing, or delivery of cargo, including mandating certification requirements. In addition, OSRA 2022 explicitly instructed the Commission to issue a rule defining prohibited practices by common carriers, marine terminal operators, shippers, and ocean transportation intermediaries under 46 U.S.C. 41102(c) regarding the assessment of demurrage and detention charges. MTOs are not required to include the data elements listed in § 541.6 when they are issuing invoices to VOCCs.

(d) Additional Certification/Disclaimer

Issue: One comment said that the rule should include a requirement on the invoice or the accompanying website a note that reminds the billed party that if the information is incorrect or details are missing, then the shipper is not obligated to pay the invoice.¹⁷⁷

¹⁷⁵ The National Association of Waterfront Employers (FMC–2022–0066–0276); Husky Terminal and Stevedoring, LLC (FMC–2022–0066–0248); and Ports America/SSA Marine (FMC–2022–0066–0249).

¹⁷⁶ Maher Terminals LLC (FMC–2022–0066–0269).

¹⁷⁷ The U.S. Dairy Export Council/National Milk Producers Federation (FMC–2022–0066–0235).

FMC response: At this time, the Commission will not impose additional mandatory certifications/disclaimers on top of those found in OSRA 2022, as codified at 46 U.S.C. 41104(d)(2)(L) and (M). Nonetheless, the agency recognizes the potential benefits of such a statement and does not object to the voluntary adoption of this practice.

(e) Independent Assessment

Issue: One commenter posited that in addition to the self-certification requirements of OSRA 2022, the Commission should also consider requiring billing parties to utilize an independent third-party certification body, from an official roster of such bodies that is recognized by the Commission, to conduct an annual audit of billing party’s detention and demurrage practices and provide an annual report to the FMC with its findings.¹⁷⁸ According to the commenter, the self-certification requirements of OSRA 2022 provide no benefit to billed parties as they do not prevent “over-invoicing by carriers.” According to the commenter, since the self-certification requirements took effect with the passage of OSRA 2022, their members “have received detention and demurrage invoices that included such a statement, that were later refunded or waived by the carrier when disputed because the carrier issued the invoice after having rolled shippers’ bookings for weeks on end.”¹⁷⁹

FMC response: The Commission declines to adopt this change at this time. The Commission will continue to monitor the situation following implementation of this final rule and may take additional action(s) in the future if circumstances warrant.

6. Contents of Invoice, Generally

(a) Machine-Readable Invoice Data

Issue: A few commenters indicated their support for the Commission to explore mandating that invoice data be provided in electronic, computer-readable format, such as spreadsheets. American Chemistry Council¹⁸⁰ and Consumer Brands Association,¹⁸¹ for example, highlighted that providing computer-readable data invoices would allow for faster and more accurate analysis of demurrage charges and associated data. American Chemistry Council¹⁸² and Agriculture

¹⁷⁸ International Dairy Foods Association (FMC–2022–0066–0244).

¹⁷⁹ *Id.*

¹⁸⁰ FMC–2022–0066–0090.

¹⁸¹ FMC–2022–0066–0210.

¹⁸² FMC–2022–0066–0184.

¹⁷¹ FMC–2022–0066–0096.

¹⁷² FMC–2022–0066–0269.

¹⁷³ *Id.*

¹⁷⁴ A Customs Brokerage, Inc. (FMC–2022–0066–0200).

Transportation Coalition¹⁸³ both noted in their comment that U.S. Surface Transportation Board (STB) regulations require Class I railroads to provide machine-readable access to demurrage billing information.

FMC response: Electronic invoices have a number of benefits for billing parties and billed parties, and the Commission highly encourages billing parties to adopt computer-readable invoice formats into their standard operating procedures. The Commission, however, has chosen not to mandate usage at this time due to concerns about the current low rate of infiltration of electronic documentation processes within the industry. The Journal of Commerce, for example, recently reported that: “[o]nly 2.1% of bills of lading and waybills in the container trade were electronic last year.”¹⁸⁴ The Commission will continue to monitor the use of machine-readable invoices within the industry and may consider compulsory use in the future.

(b) MTOs

Issue: One comment asserted that if the Commission requires demurrage or detention invoices issued by MTOs to contain information in addition to those elements specifically enumerated in OSRA 2022, it should “recognize the nature of MTO pass through charges and either afford MTO invoices a conceptually similar safe harbor, or not compel MTOs to provide such information.”¹⁸⁵

FMC response: While the most common practice is for MTOs to invoice the VOCC and the VOCC to send a combined invoice to the shipper, in some cases MTOs bill shippers directly. The Commission’s primary concern with this rule is to ensure that billed parties understand the demurrage or detention invoices they receive. In instances where an MTO invoices a shipper, the MTO should be subject to the same regulations that apply to VOCCs and NVOCCs when they invoice shippers.

G. § 541.7 Issuance of Demurrage or Detention Invoices

1. § 541.7(a), Timeframe for Issuing an Invoice

Issue: The Commission received 109 comments on its proposal to require billing parties to issue detention and

demurrage invoices within 30 days: one from another federal agency, 16 from BCOs, 66 from motor carriers, 10 from NVOCCs/OTIs/Customs Brokers/Third-party logistics (3PLs), 10 from individuals, and 6 from VOCCs/MTOs.

The U.S. Department of Agriculture supported the 30-day time limit.¹⁸⁶ Fifteen of the 16 BCOs supported the 30-day requirement. One BCO thought that 30 days was too long and that the deadline should be 10 days.¹⁸⁷ All of the motor carriers other than the Intermodal Association of North America (IANA), which administers the UIAA supported the 30-day time limit. The IANA advocated for the Commission to follow the UIAA standard of 60 days to issue demurrage and detention invoices (UIAA Section E.6).¹⁸⁸ All of the NVOCC/OTI/Customs Brokers/3PLs supported the 30-day deadline.

VOCCs/MTOs and their trade associations were mixed in their responses. Intransit Container fully supported a deadline of 30 days.¹⁸⁹ The World Shipping Council (WSC)¹⁹⁰ and the American Association of Port Authorities¹⁹¹ supported a deadline but said that the deadline should align with the UIAA standard of 60 days. Port Houston¹⁹² and the Ocean Carrier Equipment Management Association, Inc. (OCEMA)¹⁹³ were adamant that the Commission should not impose a deadline at all. OCEMA said that if a deadline was imposed, it should be no later than the UIAA standard. OCEMA acknowledged that the Commission based their deadline of 30 days on an understanding that billing parties are capable of issuing demurrage or detention invoices, on average, within 30 days. OCEMA, however, believes that justification was not adequately supported and potentially flawed. First, OCEMA said that the Commission did not explain how the average was derived, and it was therefore unclear how many of the transactions exceeded 30 days. Second, OCEMA asserted that in making its determination, the Commission did not consider the potential sources of delay for those invoices that take more than 30 days to be issued, such as delays in transmission of essential data by third parties, IT system capabilities and differing levels of automation regionally

in the invoicing process, personnel and labor shortages, force majeure events, or cyber-attacks or system outages. Related to this point, OCEMA also asserts that the Commission did not take into consideration that under a free-contract system, parties sometimes come to an agreement for longer deadlines in light of the circumstances applicable to a particular shipment for a given shipper or consignee’s product supply chain.

The VOCCs and their trade associations also complained that the proposal is unfair. Hapag-Lloyd (America) LLC argued that the proposal provides no consequences for failure to timely submit a dispute to an invoice, so it is unclear what incentive billed parties have to respond quickly.¹⁹⁴ WSC said that billed parties would face no consequences for failing to meet the deadline to dispute an invoice, while billing parties forfeit contractual rights by missing the deadline. WSC argued that fundamental fairness, equal protection, and due process dictate the Commission must add language to impose similar requirements on billed parties, namely that they forfeit the right to request fee mitigation, refund, or waiver by failing to submit that request within 30-days from receiving the invoice. OCEMA focused on the fact that the rule includes no flexibility for delays outside the billing parties’ control, for instance caused by third parties, that prevent compliance with the 30-day deadline to issue invoices. Finally, OCEMA argued that the 30-day deadline could turn out to create a disincentive principle since shippers or truckers in possession of equipment will no longer feel compelled to return it quickly as the unavailability of data or other tools to delay billing will prevent billing parties from meeting the 30-day deadline.

BassTech International LLC stated that the proposed rule’s invoicing requirements do not address the need for invoicing “on demand” in instances where payment is a prerequisite for cargo release, such as is customary for import demurrage charges.¹⁹⁵ As such, they suggested revising § 541.7(a) to read as follows: “A billing party must issue a demurrage or detention invoice within thirty (30) days from the date on which the charge was last incurred *or, when payment of charges is a precondition for delivery of cargo or containers, on demand.* If the billing party does not issue demurrage or detention invoices within the required

¹⁸³ FMC–2022–0066–0275.

¹⁸⁴ Greg Knowler, *Key supply chain stakeholders commit to electronic bills of lading*, Journal of Commerce, Sept. 5, 2023 (https://www.joc.com/article/key-supply-chain-stakeholders-commit-electronic-bills-lading_20230904.html).

¹⁸⁵ Ports America/SSA Marine (FMC–2022–0066–0249).

¹⁸⁶ FMC–2022–0066–0274.

¹⁸⁷ National Fisheries Institute (FMC–2022–0066–0256).

¹⁸⁸ FMC–2022–0066–0157.

¹⁸⁹ FMC–2022–0066–0227.

¹⁹⁰ FMC–2022–0066–0242.

¹⁹¹ FMC–2022–0066–0255.

¹⁹² FMC–2022–0066–0268.

¹⁹³ FMC–2022–0066–0257.

¹⁹⁴ FMC–2022–0066–0240.

¹⁹⁵ FMC–2022–0066–0230.

timeframe, then the billed party is not required to pay the charge.”

FMC response: The Commission will maintain the 30 days proposed in the NPRM. The Commission explained in the NPRM why a deadline of 30 days for issuing demurrage or detention invoices is reasonable.¹⁹⁶ WSC and OCCEMA suggest the Commission should prove why other deadlines are unreasonable before proposing a deadline, but the Commission declines this invitation to try to prove a negative. WSC and OCCEMA did not offer concrete examples of why billing parties could not comply with a 30-day deadline, and instead made reference to delays caused by third parties without offering specifics of the types of delays they routinely face or how long they take to resolve.¹⁹⁷ The Commission does not agree with the argument that the deadline in the rule is insufficiently supported.

Neither is the Commission persuaded by commenters stating that it should follow widely accepted and longstanding practices. The text of OSRA 2022 indicates it was written to help remedy dysfunctional, predatory, and unfair invoicing permitted by these accepted and longstanding practices.¹⁹⁸ The complaint that this proposal is unfair and inequitable to carriers misunderstands the regulation’s approach to implementing OSRA. The rule provides a minimum time for the dispute of detention and demurrage invoices, after which billing parties are free to reject any further attempts at dispute as untimely. The rule does not lay out penalties for failure by a billed party to timely dispute an invoice, because it is up to the billing party to choose how to remedy that failure.

2. § 541.7(b), Invoices Sent to an Incorrect Party

Issue: The U.S. Department of Agriculture expressed concern about

billed parties incurring additional costs of unexpected and harder-to-verify charges in situations where the invoice was originally sent to the wrong person.¹⁹⁹ USDA urged that the Commission remove from the rule the proposed grant of additional time to the billing party to issue an invoice to a billed party when the invoice was originally issued to an incorrect person (and that original recipient disputed the charges). USDA asserted that the carrier should, in all circumstances, have 30 days from the date charges stop accruing to bill the correct party.

Hapag-Lloyd (America) LLC noted that the rule provides no consequences for failing to timely dispute an invoice.²⁰⁰ They asserted that, given the requirement that billing parties must issue corrected invoices within 60 days, the rule actively dissuades billed parties from timely settling disputes. The World Shipping Council pointed out that 46 CFR 541.7(b) sets a hard deadline of 60 days after the charges were last incurred by which the correct party must be invoiced but if a billing party uses 30 days to issue the invoice and the billed party takes 30 days to dispute the invoice, there is no time left to bill another party before the 60-day invoicing deadline.²⁰¹ WSC said that this would result in the correct party not having to pay the invoice and billed parties being incentivized to delay disputing invoices.

Another commenter requested that paragraph (b) be deleted from § 541.7 “and to leave this exceptional circumstance to be handled through reasonable and conventional business practice”²⁰²

FMC response: The final rule removes the link between a billing party’s ability to reissue an invoice with an incorrectly billed party’s disputing of that invoice. With this reworded language, the billing party must reissue the invoice to the correct party within 30 calendar days of when the charges were last incurred. Otherwise, the billed party is not required to pay the charges. This penalty is consistent with the language and purposes of OSRA 2022. It also reflects the Commission’s position that the billing party should only be issuing a demurrage and detention invoice to a billed party based on their contractual privity with that billed party, and that this invoice should be sent to the correct party in the first instance. Tying the issuance of the corrected invoice to

when the demurrage and detention charges stop accruing is consistent with the incentive present in the rest of the rule. The burden of issuing a correct invoice should not rely on an incorrectly billed party to dispute the incorrect invoice. The change is also consistent with the comments received on the NPRM.

3. Timeframes for NVOCCs

Issue: The Commission solicited comments in the NPRM on whether different timeframes should apply to NVOCCs. Most commenters supported applying the same timelines to NVOCCs and VOCCs. However, when NVOCCs pass through demurrage or detention invoices assessed against their customers, it may be difficult for them to issue demurrage and detention invoices within the required timeframe if the NVOCC does not receive the initial invoice in a timely manner. Therefore, the Commission requested comments on how it could best reflect the application of the deadline to NVOCCs that pass through demurrage or detention charges. A number of NVOCCs commented that § 541.7’s thirty (30) calendar-day timeframe for a billing party to issue an invoice did not allow time for an NVOCC to issue an invoice when it passes through the charges. Many of these comments supported adding additional time to § 541.7 for NVOCCs to issue an invoice. Some of the comments suggested specific extra time that ranged from 21 days to 60 days. Many suggested an extra 30 days because the initial billing party had 30 days to issue an invoice, and NVOCCs should be given the same amount of time. CMA CGM argued that it is vital that the deadline for resolution not be triggered until all the information required to support the dispute is submitted to the carrier and that the rule should emphasize, not undermine, the carriers’ publicly available dispute resolution process.

FMC response: In response to these comments, the Commission has amended § 541.7 to state that NVOCCs have an additional thirty (30) calendar days in which to issue an invoice. This 30-day period runs from the date on which the invoice the NVOCC received was issued. In addition, the Commission recognizes the fact that an NVOCC can be both a billed party and a billing party with respect to the same transaction, and that in such a situation, the NVOCC may not be in a position to dispute an invoice with a VOCC until the NVOCC’s customer has disputed the invoice with the NVOCC. As such, the Commission has added § 541.7(c) to require that when an NVOCC informs a VOCC that

¹⁹⁶ 87 FR 62341, 62354.

¹⁹⁷ FMC–2022–0066–0242; FMC–2022–0066–0257.

¹⁹⁸ See Testimony of Chairman Maffei before Congress: “Review of Fiscal Year 2024 Budget Request for the Federal Maritime Transportation Programs, and Implementation of the Ocean Shipping Reform Act of 2022,” March 23, 2023, available at <https://www.fmc.gov/testimony-of-chairman-maffei-before-congress-review-of-fy2024-budget/>; Statement by President Joe Biden on Congressional Passage of Ocean Shipping Reform Act, June 13, 2022, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/13/statement-by-president-joe-biden-on-congressional-passage-of-ocean-shipping-reform-act/#:~:text=Statement%20by%20President%20Joe%20Biden%20on%20Congressional%20Passage%20of%20Ocean%20Shipping%20Reform%20Act,-Home&text=Lowering%20prices%20for%20Americans%20is,American%20retailers%2C%20farmers%20and%20consumers.>

¹⁹⁹ FMC–2022–0066–0274.

²⁰⁰ FMC–2022–0066–0240.

²⁰¹ FMC–2022–0066–0242.

²⁰² BassTech International LLC (FMC–2022–0066–0230).

its customer has disputed its invoice, the VOCC must then allow the NVOCC additional time to dispute the invoice it received from the VOCC.

4. Ability To Cure an Invoice Not in Compliance With § 541.6

Issue: A number of commenters requested the ability to correct an invoice that lacked certain information or contained incorrect data. FedEx Trade Networks, for example, stated that the ability to cure an invoice error is reasonable, especially given that a billed party is not required to pay the invoice in the face of any error.²⁰³ Commenters also sought clarification on the timing of amendments, if amendments are allowable. FedEx Trade Networks stated that each billing party should have the same amount of time to correct the invoice, as an error that originates with the VOCC may need to be remedied by the ocean carrier and each subsequent billing party. CV International suggested that the billing party have two working days from the time the billed party communicates the error to make the corrections, during which time no additional demurrage and detention charges should accrue.²⁰⁴ The New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. echoed these sentiments and also suggested that billed parties should be required to notify the billing party of any errors within a specific time frame, such as seven days.²⁰⁵ John S. O'Connor Logistics made similar suggestions as well.²⁰⁶ U.S. Dairy Export Council/National Milk Producers Federation requested clarification regarding a carrier's submission of a corrected invoice, and whether that must be completed within the 30-day timeframe, or whether it restarts the clock.²⁰⁷ Connection Chemical requested similar clarification.²⁰⁸

FMC response: The Commission declines to add time for a billing party to correct its invoice. While billing parties have an obligation under 46 U.S.C. 41104(d)(2) to issue accurate invoices, issuing an invoice that does not comply with OSRA 2022's requirements does not permanently eliminate the billed party's obligation to pay those charges. In particular, 46 U.S.C. 41104(f) cancels the obligation to pay an invoice that does not conform to OSRA but does not prevent the carrier from reissuing the charges on an

invoice/bill that *does* meet the statutory requirements. The correctly billed party has an obligation to pay charges billed via a compliant invoice. In addition, given the statutory obligation in 46 U.S.C. 41104(d)(2), the Commission also declines to add a requirement that billed parties inform billing parties of any inaccuracies.

5. § 541.7, General Comments

FedEx Trade Networks stated that the Commission should make clear that when a demurrage or detention charge is in dispute, the billing party should be prohibited from issuing further overdue statements.²⁰⁹ In addition, FedEx Trade Networks recommended that the Commission explicitly state conditions under which the billing party may not charge demurrage and detention, such as when: the container has not arrived at the port; the container is not available within the terminal; the container cannot be released due to a hold by any government action; the container is in the terminal, but the ocean carrier fails to load it on the ocean vessel; the container is in a closed, blocked or inaccessible area; no appointments to pick-up freight are available; there is a "dual transaction," in which a container cannot be picked up unless another piece of equipment is returned is required; and the equipment must be returned to a different location to be accepted.

FedEx Trade Networks also recommended that when demurrage and detention fees do have to be paid, the Commission should implement certain requirements to create greater efficiencies and serve the objective of demurrage and detention: demurrage bills should be separated from freight pick-up for credit-worthy customers; demurrage should be a standard amount per port and per day, with no tiered fees; more payment options, such as electronic funds transfers, credit cards (without fees), should be available, and credit should be universally accepted; charges should be fair and reasonable, with the goal of moving freight from the terminal; the amortized value of the equipment should be considered when setting detention rates; and the bill should be readily available, especially online.

FMC response: The Commission declines to make these changes to the final rule. The information required to be included in an invoice as per § 541.6 should discourage billing parties from issuing demurrage and detention invoices when charges have not yet accrued, such as when a vessel has not

yet arrived in port, because an improperly issued invoice means that the billed party will not have to pay it under the terms of § 541.5. In addition, the rule contains a dispute resolution process that is designed to motivate the parties to find a resolution within a short timeframe. This process should allow cargo to be released sooner, as well as discourage parties from repeated behaviors such as continuously issuing overdue invoices.

Furthermore, this rule provides the requirements for detention and demurrage invoices and is already designed to make the process more efficient. FedEx Trade Networks' suggestions are outside the process for demurrage and detention billing requirements. As such, they are outside the scope of this rulemaking.

H. § 541.8 Requests for Fee Mitigation, Refund, or Waiver

1. § 541.8(a), Request for Mitigation, Refund, or Waiver of Fees From the Billing Party

Issue: The Commission proposed giving billed parties 30 days to dispute demurrage and detention charges. Forty-five comments were submitted on this issue. Twenty-eight comments supported or supported with qualification the proposal (1 VOCC,²¹⁰ 5 NVOCCs/OTIs/3PLs,²¹¹ 8 BCOs,²¹² 13 Motor Carriers,²¹³ and 1 Federal agency²¹⁴). One commenter that

²¹⁰ American Association of Exporters and Importers (FMC-2022-0066-0168).

²¹¹ International Tank Container Organisation (FMC-2022-0066-0096); Excargo Services Inc. (FMC-2022-0066-0151); Seafrigo USA Inc. (FMC-2022-0066-0223); APL Logistics Americas, Ltd (FMC-2022-0066-0271); New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (FMC-2022-0066-0247).

²¹² Northwest Horticultural Council (FMC-2022-0066-0178); American Chemistry Council (FMC-2022-0066-0184); International Housewares Association (FMC-2022-0066-0187); MICA/NAMI (FMC-2022-0066-0188); Tyson Foods, Inc. (FMC-2022-0066-0225); National Association of Beverage Importers, Inc. (FMC-2022-0066-0238); International Dairy Foods Association (FMC-2022-0066-0244); Agriculture Transportation Coalition (FMC-2022-0066-0275).

²¹³ BW Mitchum Trucking Co. (FMC-2022-0066-0110); GBA Transport (FMC-2022-0066-0152); Triple G Express (FMC-2022-0066-0154); MacMillan-Piper, Inc. (FMC-2022-0066-0159); Bridgeside Inc. (FMC-2022-0066-0179); Intermodal Motor Carriers Conference (FMC-2022-0066-0189); Eagle Systems, Inc. (FMC-2022-0066-0203); Bi-State Motor Carriers (FMC-2022-0066-0212); California Trucking Association (FMC-2022-0066-0220); Maryland Motor Truck Association, Inc. (FMC-2022-0066-0241); Virginia Trucking Association (FMC-2022-0066-0260); Harbor Trucking Association (FMC-2022-0066-0261); California Trucking Association (FMC-2022-0066-0270).

²¹⁴ U.S. Department of Agriculture (FMC-2022-0066-0274).

²⁰³ FMC-2022-0066-0165.

²⁰⁴ FMC-2022-0066-0217.

²⁰⁵ FMC-2022-0066-0247.

²⁰⁶ FMC-2022-0066-0267.

²⁰⁷ FMC-2022-0066-0235.

²⁰⁸ FMC-2022-0066-0236.

²⁰⁹ FMC-2022-0066-0165.

supported the proposal said that the 30-day time limit “will incentivize billing parties to ensure the accuracy of their invoices from the start.”²¹⁵ Fourteen comments were in clear opposition (11 BCOs²¹⁶ and 3 NVOCCs/3PLs²¹⁷). Three additional commenters submitted comments on the matter that did not fall neatly into either support or opposition.²¹⁸

As noted above, some of the commenters that supported the proposal, did so with qualification. The Agriculture Transportation Coalition said that 30 days is sufficient time for shippers to review invoices and submit requests for fee mitigation, refund, or waiver but that the clock should start once the shipper receives the invoice or after the invoice has been posted on-line in a location accessible to the shipper.²¹⁹ American Chemistry Council had similar views to Agriculture Transportation Coalition but said that the clock should not start until invoices are received by the billed party.²²⁰ American Chemistry Council explained: “Carriers are increasingly moving to online systems where the billed party must search for new invoices. Because of resource constraints, small companies may track new invoices on a weekly basis, rather than daily.”²²¹ To address this concern, American Chemistry Council proposed amending § 541.8 by adding at the end “. . . or within thirty-seven (37) days of the billing party making the invoice available online” to ensure that these companies have the full 30-day window to review invoices. The National Association of Beverage Importers, Inc. supported the 30-day timeframe but said that it should be subject to a one-time additional 30-day extension.²²²

Similarly, NYNJFF&BA supported a 30-day timeframe generally, but said the timeframe should be allowed to be extended if both parties agreed to the extension.²²³ (NYNJFF&BA did not put a time limit on how far the deadline could be extended so long as both parties were in agreement.) NYNJFF&BA also said that the 30-day clock for a VOCC receipt of a dispute must be extended to accommodate the request if the dispute was raised within the proper timelines from the final party billed.

Billed parties, such as shippers and their trade associations, generally argued that 30 days is insufficient. They argued that they need more time because shippers do not have the administrative bandwidth to examine each invoice carefully within 30 days and to determine if a dispute should be filed, particularly considering that some charges have unique and complex scenarios that need to be investigated before they are disputed.²²⁴ Commenters noted that low administrative bandwidth could be caused by a variety of factors, including: the billed party being a small business,²²⁵ because of high transactional volume,²²⁶ or because of the use of third-party auditors.²²⁷ Some commenters pointed out that a billed party’s primary business is not transportation, as opposed to billing parties, so shippers are at a disadvantage relative to carriers in validating and disputing invoices. Some expressed concern that a 30-day period for submitting invoice disputes could be construed as a legal “condition precedent” to filing a claim and essentially function to shorten the statute of limitations for claims brought before the Commission.²²⁸ The National Retail Federation pointed out that while the Commission said in the NPRM that it was basing the 30-day deadline on the UIAA, that shippers have never been a party to the UIAA.²²⁹ As an alternative, several of these commenters argued that a 60-day time period is more appropriate.²³⁰ Other billed parties,

however, argued that 30 days is insufficient without proposing an alternative timeframe,²³¹ or proposed eliminating the timeframe requirement entirely.²³²

VOCCs and their trade associations asserted the proposal is unfair. Hapag-Lloyd (America) LLC argued that the proposal provides no consequences for failure to timely submit a dispute to an invoice, so it is unclear what incentive billed parties have to respond quickly.²³³ The World Shipping Council said that billed parties face no consequences for failing to meet the deadline to dispute an invoice, while billing parties forfeit contractual rights by missing the deadline.²³⁴ WSC argued that fundamental fairness, equal protection, and due process dictate the Commission must add language to impose similar requirements on billed parties, namely that they forfeit the right to request fee mitigation, refund, or waiver by failing to submit that request within 30-days from receiving the invoice. The Ocean Carrier Equipment Management Association, Inc. focused on the fact that the rule includes no flexibility for delays outside the billing parties’ control, for instance caused by third parties, that prevent compliance with the 30-day deadline to issue invoices.²³⁵ Finally, OCEMA argued that the 30-day deadline could turn out to create a disincentive principle since shippers or truckers in possession of equipment will no longer feel compelled to return it quickly as the unavailability of data or other tools to delay billing will prevent billing parties from meeting the 30-day deadline.

Commenters also expressed concern about the Commission setting strict deadlines for billing parties that could result in forfeiting contractual rights, with billed parties potentially facing no consequences for failing to meet the rule’s deadlines. For instance, WSC, OCEMA, and Hapag-Lloyd all argued that it is unfair that billed parties face no consequences for failing to timely submit a dispute to an invoice. The Pacific Merchant Shipping Association (PMSA) agreed with WSC that the lack of consequences for billed parties is

²¹⁵ Harbor Trucking Association (FMC–2022–0066–0261).

²¹⁶ Shippers Coalition (FMC–2022–0066–0160); National Association of Chemical Distributors (FMC–2022–0066–0208); Consumer Brands Association (FMC–2022–0066–0210); Consumer Technology Association (FMC–2022–0066–0228); BassTech International LLC (FMC–2022–0066–0230); National Retail Federation (FMC–2022–0066–0231); National Milk Producers Federation/U.S. Dairy Export Council (FMC–2022–0066–0235); Connection Chemical (FMC–2022–0066–0236); Retail Industry Leaders Association (FMC–2022–0066–0259); National Association of Manufacturers (FMC–2022–0066–0264); National Industrial Transportation League (FMC–2022–0066–0277).

²¹⁷ DHL Global Forwarding (FMC–2022–0066–0219); CVI International (FMC–2022–0066–0217); International Association of Movers (FMC–2022–0066–0222).

²¹⁸ Hapag-Lloyd (America) LLC (FMC–2022–0066–0240); World Shipping Council (FMC–2022–0066–0242); Maher Terminals LLC (FMC–2022–0066–0269).

²¹⁹ FMC–2022–0066–0275.

²²⁰ FMC–2022–0066–0184.

²²¹ *Id.*

²²² FMC–2022–0066–0238.

²²³ FMC–2022–0066–0247.

²²⁴ *E.g.*, Connection Chemical (FMC–2022–0066–0236); National Association of Chemical Distributors (FMC–2022–0066–0208).

²²⁵ National Association of Chemical Distributors (FMC–2022–0066–0208).

²²⁶ *E.g.*, Consumer Technology Association (FMC–2022–0066–0228); Retail Industry Leaders Association (FMC–2022–0066–0259).

²²⁷ *E.g.*, National Retail Federation (FMC–2022–0066–0231).

²²⁸ National Association of Chemical Distributors (FMC–2022–0066–0208).

²²⁹ *Id.*

²³⁰ Shippers Coalition (FMC–2022–0066–0160); Consumer Brands Association (FMC–2022–0066–0210); International Association of Movers (FMC–

2022–0066–0222); National Milk Producers Federation/U.S. Dairy Export Council (FMC–2022–0066–0235); Retail Industry Leaders Association (FMC–2022–0066–0259).

²³¹ *E.g.*, Connection Chemical (FMC–2022–0066–0236); National Retail Federation (FMC–2022–0066–0231).

²³² National Association of Chemical Distributors (FMC–2022–0066–0208); BassTech International LLC (FMC–2022–0066–0230); National Industrial Transportation League (FMC–2022–0066–0277).

²³³ FMC–2022–0066–0240.

²³⁴ FMC–2022–0066–0242.

²³⁵ FMC–2022–0066–0257.

unfairly incongruous and inconsistent.²³⁶ PMSA argued that if the consequences of failing to meet the prescribed deadlines are not removed for billing parties, then the rule should require billed parties to pay the charge if they have not disputed it within the 30-day deadline.²³⁷

FMC response: The Commission must balance the benefits to billed parties against the detriment to billing parties of an extended timeline to dispute invoices. The longer billed parties take to investigate charges, validate them, and marshal evidence, the longer billing parties remain in limbo about whether the billed party intends to pay. Billed parties advocated for an extended timeframe but did not provide compelling evidence of how long each part of the dispute process takes, for instance investigating invoices or validating charges. Nor did they explain how an extended timeframe for billed parties to evaluate invoices helps facilitate the movement of cargo. The rule's new deadlines ensure billed parties are not scrambling to unearth ancient evidence to dispute stale invoices, and the Commission is not convinced by the evidence billed parties presented in support of extending the timeframe.

Further, the regulatory timeframe for disputes serves only as a minimum timeframe billed parties must permit dispute. The timeframes are not designed or intended to control in every dispute scenario. They are intended to ensure billing parties provide some minimum time for a billed party to dispute an invoice. The billing and billed parties can agree to extend the timeframe, or the billed party can file a complaint with the Commission at any time. Nothing in the final rule prevents a billed party from filing a complaint during the 30-day dispute deadline or prevents a billed party from filing a complaint with the Commission even though they did not dispute the charge with the billing party during the 30-day timeframe.

Based on this record, the Commission has removed the language from § 541.8(b) stating that a billed party was not required to pay an invoice if a billing party takes longer than 30 days to resolve a dispute. The Commission also added language to § 541.8(b) to allow the parties to agree to longer timeframes for the dispute resolution process. These changes better allow for the balancing of benefits that this process requires.

2. § 541.8(b), Resolution of Dispute (a) 30-Day Timeframe

Issue: The Commission proposed giving parties 30 days to resolve a disputed demurrage or detention invoice charge. Thirty-nine comments were submitted on this issue. Thirty comments supported or supported with qualification the proposal (8 BCOs,²³⁸ 5 NVOCCs/OTIs/Customs Brokers/3PLs,²³⁹ 13 Motor Carriers,²⁴⁰ 3 VOCCs/MTOs,²⁴¹ and 1 Federal agency²⁴²). Six comments were opposed (all BCOs).²⁴³ The other three comments (all NVOCCs/OTIs/Customs Brokers/3PL) that were submitted neither clearly supported nor opposed the proposal.²⁴⁴

Consumer Technology Association was concerned that the process would be subject to abuse and potentially undermine incentives of demurrage and detention charges.²⁴⁵ The commenter was particularly concerned with the possibility of parties overwhelming a

carrier with requests for waivers/refunds with the express intent of making it impossible for the carrier to act within 30 days. They said the Commission should make clear that:

(1) carriers may adopt reasonable documentation requirements for claims for waivers/refunds, and that carriers do not waive their right to collect charges when they do not act on claims that fail to comply with reasonable documentation requirements;

(2) claims that are not submitted to carriers via the informal dispute process are presumed reasonable and the burden of proof as to the unreasonableness of such charges shifts back to the entity challenging the charge;

(3) Abuse of the informal dispute resolution process (e.g., by submitting excessive or frivolous claims) may constitute a violation of 46 U.S.C. 41102(a).

(Alternatively, that abuse of the system creates a presumption that the charge was reasonable that must be overcome by the party challenging same);

(4) At an absolute minimum, indicate that: billed parties have an obligation to act in good faith when disputing invoices, that submission of excessive and/or frivolous disputes does not constitute good faith, and that charges that are the subject of waiver/refund requests not submitted in good faith are to be presumed reasonable.

Other commenters who opposed the proposed regulation, generally said that they disagreed with it because it did not account for those instances when more than 30 days is required to investigate and reach a final resolution.²⁴⁶ Some commenters who generally supported the regulation agreed with these concerns. (The dividing line between support and opposition generally came down to those that supported some type of alternative timeframe to the strict 30 days in the NPRM and those that would eliminate a specified timeframe entirely.) For example, the World Shipping Council generally supported the proposal but recommended that the 30-day period be subject to a single extension request of a second 30-day period.²⁴⁷ Maher Terminals supported having a specific timeframe but said that instead of 30 days, the timeframe should be extended to 90–120 days.²⁴⁸

FMC response: The Commission has decided to maintain a 30-day dispute resolution timeframe, but in response to these comments has created an exception to allow for resolution beyond 30 days when a later date has been agreed to by both parties. The Commission has also clarified in the text that the 30-day deadline is 30

²³⁸ Northwest Horticultural Council (FMC–2022–0066–0178); American Chemistry Council (FMC–2022–0066–0184); International Housewares Association (FMC–2022–0066–0187); MICA/NAMI (FMC–2022–0066–0188); Tyson Foods, Inc. (FMC–2022–0066–0225); National Association of Beverage Importers, Inc. (FMC–2022–0066–0238); International Dairy Foods Association (FMC–2022–0066–0244); Agriculture Transportation Coalition (FMC–2022–0066–0275).

²³⁹ International Tank Container Organisation (FMC–2022–0066–0096); Excargo Services Inc. (FMC–2022–0066–0151); Seafargo USA Inc. (FMC–2022–0066–0223); New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (FMC–2022–0066–0247); APL Logistics, Ltd (FMC–2022–0066–0271).

²⁴⁰ BW Mitchum Trucking Co. (FMC–2022–0066–0110); GBA Transport (FMC–2022–0066–0152); Triple G Express (FMC–2022–0066–0154); MacMillan-Piper, Inc. (FMC–2022–0066–0159); Bridgeside Inc. (FMC–2022–0066–0179); Intermodal Motor Carriers Conference (FMC–2022–0066–0189); Eagle Systems, Inc. (FMC–2022–0066–0203); Bi-State Motor Carriers (FMC–2022–0066–0212); California Trucking Association (FMC–2022–0066–0220); Maryland Motor Truck Association, Inc. (FMC–2022–0066–0241); Virginia Trucking Association (FMC–2022–0066–0260); Harbor Trucking Association (FMC–2022–0066–0261); California Trucking Association (FMC–2022–0066–0270).

²⁴¹ American Association of Exporters and Importers (FMC–2022–0066–0168); World Shipping Council (FMC–2022–0066–0242); Maher Terminals LLC (FMC–2022–0066–0269).

²⁴² U.S. Department of Agriculture (FMC–2022–0066–0274).

²⁴³ Consumer Technology Association (FMC–2022–0066–0228); National Retail Federation (FMC–2022–0066–0231); National Milk Producers Federation/U.S. Dairy Export Council (FMC–2022–0066–0235); Retail Industry Leaders Association (FMC–2022–0066–0259); National Association of Manufacturers (FMC–2022–0066–0264); National Industrial Transportation League (FMC–2022–0066–0277).

²⁴⁴ CVI International (FMC–2022–0066–0217); DHL Global Forwarding (FMC–2022–0066–0219); International Association of Movers (FMC–2022–0066–0222).

²⁴⁵ Consumer Technology Association (FMC–2022–0066–0228).

²⁴⁶ E.g., National Retail Federation (FMC–2022–0066–0231); Retail Industry Leaders Association (FMC–2022–0066–0259).

²⁴⁷ FMC–2022–0066–0242.

²⁴⁸ FMC–2022–0066–0269.

²³⁶ FMC–2022–0066–0233.

²³⁷ *Id.*

calendar days. The rule does not prescribe or prohibit the billing party from imposing reasonable consequences on the billed party for failing to dispute the charge during the 30-calendar-day period.

(b) What does “resolve” mean?

Issue: The Commission received several comments concerning what “resolve” means in the proposed regulation.²⁴⁹ These commenters said it was unclear from the text of the proposed regulation whether a refund, if one were to be issued, or other final form of redress, needed to be completed within the 30-day deadline, or whether the parties merely needed to come to an agreement for resolution of the matter and final tender could be after the 30 day deadline. Two commenters, Mediterranean Shipping Company²⁵⁰ and the World Shipping Council,²⁵¹ requested that the Commission formally define the term in the rule. American Chemistry Council had similar concerns, but instead of requesting that “resolution” be defined, they requested that the Commission codify into the regulation that final redress be completed within the 30-day limit.²⁵² Shippers Coalition expressed their concern that the proposed language would result in billing parties just saying “no” to a request for mitigation/refund/waiver, in order meet the 30-day deadline.²⁵³ To address this concern, Shippers Coalition proposed amending § 541.8(b) to include an additional sentence such as: “In considering a request for mitigation, refund, or waiver of fees, a common carrier shall consider that under 46 U.S.C. 41310(b) a common carrier shall bear the burden of establishing the reasonableness of any demurrage or detention charges.”²⁵⁴

FMC response: The Commission has amended § 541.8(b) to: (1) require attempted resolution, rather than resolution, within 30 days; and (2) allow extension of the timeframe, if such a later date is agreed to by the parties. The Commission recognizes that this change will mean that the rule will no longer impose definite outer limits for closing

out of a disputed transaction. These changes, however, further the goal of building better relationships in the demurrage and detention context between the billing and billed parties, the parties that know the most about the transaction. While parties can come to the Commission at any time during the process, the Commission wants to encourage to the fullest extent possible good-faith efforts for resolution between the parties when disagreements occur.

We decline to formally define “resolution” or “attempted resolution” because what these terms mean in any particular instance will be determined based upon mutual agreement of the involved parties. The Commission believes it is acceptable for some ambiguity, especially given that the Commission has removed the penalty of the billed party not having to pay the invoice if the parties do not come to a resolution. Applying the normal meaning of the word, resolution of a request includes payment by the billing party of any refund due to the billed party.

As noted above, § 541.8 does not impact a party’s right to file a Charge Complaint with the Commission. Parties do not need to wait a certain period of time or for a triggering event to occur prior to filing a complaint under § 541.8. Parties interested in filing a Charge Complaints at the Commission may do so by following the *Interim Procedures for Submitting “Charge Complaints.”*²⁵⁵

(c) Penalty

Pacific Merchant Shipping Association (PMSA) argued that voiding an invoice is a harsh result.²⁵⁶ PMSA disagreed with the Commission’s conclusion that voiding a charge in its entirety is the only potential remedy of consequence that the Commission could establish, or that this penalty is consistent the Commission’s current practices or the Congressional mandates in OSRA 2022. PMSA stated that such a conclusion flies in the face of the Commission’s charge compliant process and argued that even if this penalty were intended to be punitive, it exceeds the congressional direction and authority granted to the Commission in OSRA 2022. PMSA noted that OSRA 2022, at section 7(b), directs the Commission to conduct the present rulemaking in order to “further clarify

reasonable rules and practices” regarding demurrage and detention, and to determine “which parties may be appropriately billed for any demurrage, detention, or other similar per container charges.” PMSA argued that Congress did not authorize the Commission to adopt new penalties whereby demurrage and detention charges would be eliminated as a punishment for violating a prohibited practice, and that the rule contravenes Congress’ wishes in this regard.

Furthermore, PMSA argued that because the Charge Complaint process is available to any billed party, § 541.8(b) could have been set up in any number of more reasonable and less punitive ways to address a non-responsive billing party and still be within the scope of clarifying the process, such as introducing a rebuttable presumption against a non-responsive billing party or foreclosing certain defenses against a non-responsive billing party in the Complaint process.

FMC response: In consideration of these concerns, the Commission has removed the provision from § 541.8(b) that allows the billed party to avoid paying the invoice if the dispute is not resolved within 30 days. Although that provision had been added to speed up and incentivize the dispute resolution process, this was not a requirement that was mandated by OSRA 2022. By contrast, the rule keeps the requirement of 46 U.S.C. 41104(d)(1) and codified in 46 CFR 541.5, regarding voiding an invoice that does not include the necessary information, because this requirement was mandated by OSRA 2022.

(d) Release of Cargo During Dispute

Issue: The Commission received a few comments concerning the ability to hold cargo as a lien against demurrage and detention invoices when an invoice is disputed. Commenters were concerned not only about the cargo that is the subject of a dispute but also about the potential for lockouts of non-related cargo.

Mediterranean Shipping Company argued that cargo that is the subject of a disputed demurrage or detention invoice should be permitted to be maintained by the billing party pending payment.²⁵⁷ FedEx Trade Networks argued, in contrast, that when a demurrage or detention charge is in dispute, the billing party should be required to release the cargo that is the subject of a disputed charge.²⁵⁸

²⁴⁹ E.g., International Tank Container Organisation (FMC–2022–0066–0096); Dole Ocean Cargo Express, LLC (FMC–2022–0066–0201); Mediterranean Shipping Company (FMC–2022–0066–0142); World Shipping Council (FMC–2022–0066–0242); American Chemistry Council (FMC–2022–0066–0184); Shippers Coalition (FMC–2022–0066–0160); New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (FMC–2022–0066–0247).

²⁵⁰ FMC–2022–0066–0142.

²⁵¹ FMC–2022–0066–0242.

²⁵² FMC–2022–0066–0184.

²⁵³ FMC–2022–0066–0160.

²⁵⁴ *Id.*

²⁵⁵ *Industry Advisory—Interim Procedures for Submitting “Charge Complaints” Under 46 U.S.C. 41310—Federal Maritime Commission—Federal Maritime Commission (fmc.gov)* (posted July 14, 2022) (<https://www.fmc.gov/industry-advisory-interim-procedures-for-submitting-charge-complaints/>).

²⁵⁶ FMC–2022–0066–0233.

²⁵⁷ FMC–2022–0066–0143.

²⁵⁸ FMC–2022–0066–0165.

A third alternative was proposed by Consumer Technology Association.²⁵⁹ CTA argued that during a dispute resolution period, the billing party should be required to release the billed party's property so long as the billed party pays the undisputed portion of an invoice.

The joint comment of the Meat Import Council of America and North America Meat Institute said that it is a common practice by VOCCs to hold additional, unrelated cargo from being released until all outstanding invoices are paid, even when the receiving party may be contesting the validity of those original invoices.²⁶⁰

MICA/NAMI said that when invoiced charges are contested by the receiving party, it is unacceptable for VOCCs to "lock out" that entity from all future business with the VOCC until those outstanding fees are paid. MICA/NAMI argued that the current practice does not comport with the tenets of the Incentive Principle, and that allowing it to continue would dissuade importers and exporters, as well as third party service providers, from availing themselves of any dispute settlement mechanisms that are available given the need to service other, unrelated loads with the VOCC.

The Retail Industry Leaders Association echoed similar concerns of MICA/NAMI, stating that a common complaint among its members is the practice of ocean common carriers and MTOs refusing to provide additional bookings to a BCO unless the BCO or another entity in the supply chain pays outstanding detention and demurrage charges that are under dispute.²⁶¹ According to RILA, this practice is often used as a way of forcing a BCO to abandon a dispute with the carrier or MTO and pay the charges due. The Association noted that this practice could take several forms, including a demand for payment upon receipt of an invoice. The Association expressed its concern that this practice could be used to circumvent the text and purpose of the rule and recommended that the Commission thus prohibit it.

FMC response: This rule does not impact traditional cargo lien rights. This rule allows billing parties to make their own business decisions about whether or not they require demurrage and detention charges to be paid prior to releasing cargo or whether or not to release cargo conditionally or unconditionally.

The Commission does not believe that leaving the issue of not allowing

additional bookings unaddressed will result in circumvention of the rule. The main purpose of this rule is to provide clarity and transparency of invoices and the billing process. This rule also eliminates the practice of issuing invoices to multiple parties in the hopes that one of them will pay it, which was one of the concerns raised by RILA.

I. Rail

1. Through Bill of Lading

Issue: One NVOCC/OTI requested that the Commission explicitly state in § 541.2 whether the rule applies demurrage and detention billing originating from the rail for the rail leg of a through bill of lading.²⁶²

FMC response: Ocean cargo that is shipped under a through bill of lading to a final destination in the United States remains under Commission jurisdiction for any Shipping Act violations, including violations occurring under OSRA 2022, and associated implementing regulations.²⁶³ These cases are discussed in greater detail below.

2. Storage and Demurrage Fees for Shipments Moving on Through Bill of Lading

Issue: National Customs Brokers & Forwarders Association of America, Inc. requested guidance as to whether the proposed definition of "demurrage and detention" would cover certain storage or demurrage fees for shipments moving on through bills of lading.²⁶⁴ Two other commenters, John S. Connor, Inc.²⁶⁵ and CV International,²⁶⁶ specifically requested that inland rail be included in the definition of "demurrage and detention" to account for storage at inland rail terminals.

FMC response: The Commission declines to make a specific addition to the definition of "demurrage and detention" to add inland rail. This is an issue that has been raised in the National Shipper Advisory Committee (NSAC) and continues to be examined by the Commission.²⁶⁷ The Commission has direct jurisdiction over common carriers, marine terminal operators (MTOs), and ocean transportation

intermediaries (OTIs).²⁶⁸ This includes jurisdiction over "through transportation," meaning continuous transportation between the origin and destination and is offered or performed by one or more carriers, at least one of which is a common carrier under the Shipping Act. As such, ocean cargo that is shipped under a through bill of lading to a final destination in the United States remains under Commission jurisdiction for any Shipping Act violations. The Commission has long held that its jurisdiction extends to ocean cargo that is shipped under a through bill of lading to a final destination in the United States. The Supreme Court addressed this issue in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), which held that inland transportation pursuant to a through bill of lading does not change the fact that the bill of lading is a maritime contract. This case addressed the delivery of machinery from Australia to Huntsville, Alabama, on a through bill of lading. The machinery arrived in Savannah, Georgia, by way of an ocean vessel, where it was discharged and loaded onto a train whose ultimate destination was the inland port of Huntsville. The train derailed en route to Huntsville, causing damage to the machinery.²⁶⁹ The Supreme Court decided *Norfolk Southern Railway Co.* under admiralty law even though the machinery's damage arose from the train crash because the inland rail portion was pursuant to through bills of lading, which the court noted were "essentially, contracts" for the transportation of the goods. These bills of lading were "maritime contracts because their primary objective is to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States."²⁷⁰

This principle has become settled in Commission case law decided under the Shipping Act. For example, in *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., Olympus Partners, Olympus Growth Fund III, L.P., Louis J. Mischianti, David Cadenas, Keith Heffernan, CJR World Enterprises, Inc. and Chad J. Rosenberg*, the Commission stated that the Shipping Act of 1984's legislative history specifically recognized intermodalism "as an important component of ocean transportation, and the implications of intermodalism for ocean transportation

²⁶² FedEx Trade Networks Transport & Brokerage, Inc. (FMC-2022-0066-0165).

²⁶³ See *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14; see also *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., Olympus Partners, Olympus Growth Fund III, L.P., Louis J. Mischianti, David Cadenas, Keith Heffernan, CJR World Enterprises, Inc. and Chad J. Rosenberg* (2011 WL 7144008 (F.M.C.) January 30, 2014).

²⁶⁴ FMC-2022-0066-0180.

²⁶⁵ FMC-2022-0066-0267.

²⁶⁶ FMC-2022-0066-0217.

²⁶⁷ <https://www.fmc.gov/industry-oversight/national-shipper-advisory-committee/>.

²⁶⁸ See 46 U.S.C. 40901-40904, 41104, 41106.

²⁶⁹ 543 U.S. at 18-19.

²⁷⁰ *Id.* at 24 (internal citations omitted).

²⁵⁹ FMC-2022-0066-0228.

²⁶⁰ FMC-2022-0066-0188.

²⁶¹ FMC-2022-0066-0259.

were addressed.”²⁷¹ In particular, the legislative history “recognized that an ocean carrier’s use of a single intermodal tariff could save shippers time and allow them to avoid having to arrange the transfer of cargo from one transportation mode to another.” The legislative history further stated that “when an ocean carrier offers an intermodal service, that carrier has the single responsibility for assuring the delivery of cargo from point to point, and only that carrier needs to be concerned with the arrangements for transferring the cargo between modes. Furthermore, this process involves a single bill-of-lading rather than multiple bills of lading.”²⁷²

In *Mitsui*, the Commission also stated that “the intermodal nature of ocean transportation was reflected in the [Shipping] Act’s inclusion of definitions of ‘through rate’ and ‘through transportation,’ ” which were “in recognition of the need to permit the employment of modern intermodalism concepts and practices in our foreign trade.”²⁷³ As such, the Commission concluded that “given this legislative history, it appears that Congress intended to extend the Commission’s jurisdiction to encompass through rates and through transportation. Congress specifically noted the use by ocean carriers of single intermodal bills of lading, such as those involved in this case, to cover shipments going to inland destinations or points.”²⁷⁴

Given this discussion, it remains the Commission’s position that it has jurisdiction over ocean cargo that is shipped under a through bill of lading to a final destination in the United States. This rulemaking does not change the Commission’s authority over merchandise carried pursuant to a through bill of lading.

3. Amending the Definition of “Demurrage and Detention”

Issue: One commenter requested that the Commission add “storage” to the definition of “demurrage and detention,” as well as including rail/inland depot space in the definition.²⁷⁵ There, the commenter reasoned that on through bills of lading, the VOCC is responsible for transporting cargo inland via rail, and that the same demurrage and detention billing

regulations should apply to rail storage/demurrage.

FMC response: The Commission declines to add storage to the definition of “demurrage and detention.” The terms “detention and demurrage” are used extensively in the shipping industry, and they are not generally defined within the industry to include “storage.” Expanding the definition to include “storage” is beyond the scope of this rulemaking.

J. Paperwork Reduction Act

Issue: One commenter asserted that the Commission violated the Paperwork Reduction Act of 1995 (PRA) because “it does not appear that any effort was made to realistically assess the time or cost burdens imposed by the rule[.]”²⁷⁶

FMC response: The Commission complied with PRA requirements. In accordance with 5 CFR 1320.11, in the NPRM, the Commission discussed costs associated with the information collection outlined in the proposed rule, and the bases for those costs.²⁷⁷ The Commission requested comments on the information collection generally, and specifically requested comments on the accuracy of the burden estimate. Neither the commenter²⁷⁸ nor anyone else submitted a comment on the proposed information collection. While some commenters on the NPRM, particularly MTOs, generally asserted concerns about potential burdens that the rule would impose on them, neither this particular commenter nor any other commenter provided data or information to the Commission that directly challenged the FMC’s burden calculation or provided additional information to improve the calculation estimate.²⁷⁹

K. Miscellaneous Comments

1. Requests for Additional Regulations

Issue: While many commenters expressed support for this rulemaking, a number of them mentioned items they thought required further action by the Commission. In particular, the Cheese Importers Association of America (CIAA) noted that even with the regulation’s change to billing practices, there are operational practices that are still harming food importers.²⁸⁰ This included charging detention and

demurrage even when parties cannot access their shipping containers, when the ship did not go to the proper port, and when the carrier failed to properly notify that the container was available for pick up. CIAA requested that the Commission develop a reasonable standard regarding delivery practices. Similarly, the Northwest Horticultural Council (NHC) stated that the Commission should take further action to clarify reasonable detention and demurrage practices and make sure shippers are not unreasonably charged in situations where delays are beyond their control, an issue that was echoed in a comment by an anonymous exporter.²⁸¹ This exporter also noted that a number of issues regarding earliest return dates could be ripe for Commission regulation.

Pacifica Trucks LLC stated that in addition to the invoicing rules that this regulation encompasses, the Commission should address ocean carriers’ application of demurrage and detention fees in other situations that Pacifica Trucks considers unfair.²⁸² In particular, Pacifica Trucks opined that the Commission should ban ocean carriers from assessing demurrage and detention fees in the following situations: when the carrier’s intermodal marine or terminal truck gate is closed; when the carrier’s intermodal marine or terminal does not offer unrestricted appointments to pick up cargo; when the motor carrier documents an unsuccessful attempt to make an appointment for either a loaded or empty container and no other unrestricted appointments were available; when the intermodal marine container terminal diverts equipment from the original interchange location without 48 hours’ notice to the motor carrier; when a loaded container is not available for pickup when the motor carrier arrives at the intermodal marine terminal, or the area containing the cargo is closed or inaccessible; when the intermodal marine terminal is too congested to accept the container and turns the motor carrier away; when the carrier’s intermodal marine terminal unilaterally imposes transaction restrictions such as chassis matching or empty container requirements that prevent a transaction and fail to provide a return location or other conditions that impede the motor carrier’s ability to pick up or return their containers.

In addition, the Harbor Trucking Association requested Commission action on the return of empty containers, as well as standardizing

²⁷¹ 2011 WL 7144008 (F.M.C.) January 30, 2014.

²⁷² *Id.* at 6, citing H.R. REP. NO. 98–53, pt. 1, at 13 (1983).

²⁷³ *Id.* at 6, citing H.R. REP. NO. 98–53, pt. 1, at 29.

²⁷⁴ *Id.* at 6.

²⁷⁵ CV International, Inc. (FMC–2022–0066–0217).

²⁷⁶ Ocean Carrier Equipment Management Association, Inc. (FMC–2022–0066–0257).

²⁷⁷ 87 FR 62341, 62356.

²⁷⁸ Ocean Carrier Equipment Management Association, Inc. (FMC–2022–0066–0257).

²⁷⁹ *Regulations.gov*, Docket FMC–2022–0066 and https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202210-3072-001# (last visited June 12, 2023).

²⁸⁰ FMC–2022–0066–0265.

²⁸¹ FMC–2022–0066–0178.

²⁸² FMC–2022–0066–0118.

payment practices such as payment centers having differing hours of operation, delays in payment processing and the need for consistency as to how free days are applied.²⁸³ Other commenters raised similar issues.

FMC response: The Commission agrees that these are important issues but concludes that they are outside the scope of this rulemaking. The Commission thanks commenters for their thoughtful input on these issues.

2. APA Challenge

Issue: Three commenters asserted that the NPRM violates the Administrative Procedure Act (APA).²⁸⁴

The World Shipping Council argued that the proposed rule violates the APA “because the Commission’s replacement of the Interpretive Rule and the Incentive Principle with a series of bright-line rules represents a clear departure from its past precedent on detention and demurrage without any reasonable explanation.” WSC elaborated, saying:

[T]he Commission’s proposed bright-line regulations on which parties can be billed cannot logically coexist with its current policies under the Interpretive Rule, which employs a case-by-case analytical tool and the Incentive Principle to determine if a carrier, MTO, or OTI’s detention and demurrage billing practices are reasonable. The proposed rules and the Interpretive Rule cannot coexist because there are numerous instances when it is not only reasonable for carriers to take actions prohibited by this proposed regulation, but to do otherwise would disincentivize the fluid movement of freight through the supply chain. The predictable result is a proposal that is not only unworkable and unreasonable as a matter of policy, but per se arbitrary and capricious as a matter of law.

The National Association of Waterfront Employers and Port Houston said that in contravention of 46 CFR 545.4(b)’s requirement that an unjust and unreasonable practice must be something that occurs on a “normal, customary, and continuous basis,” this rule, as proposed would penalize MTOs for any isolated, one-off invoice omission, and apply the penalty to the entire invoice, including as to charges that may not be implicated by the mistake at issue. These commenters said that: “In effect, this regulation would be an implicit repeal of the existing regulatory definition of “unjust and unreasonable practices” under 46 CFR 545.5 as it relates to MTO demurrage charges, without an opportunity for

public comment on such repeal, as required by the APA.”

FMC response: The Commission disagrees with the commenters’ characterization of this action and assertion of APA violations. The rule’s provisions have been extensively explained by the agency, and the rule is implemented by the Commission in accordance with the APA’s rulemaking procedures under 5 U.S.C. 553. As noted above, the Commission has twice solicited public input on the proposal to regulate MTO invoicing. The Commission stated unequivocally in the NPRM that MTOs would be subject to this rule. MTOs have had repeated public notice that the Commission was considering regulating MTO demurrage and detention invoicing, so the Commission disagrees with concerns that the rule lacked adequate public notice and comment.

As for concerns that this rule implicitly overrules the Commission’s Interpretive Rule at 46 CFR 545.4, these concerns have also been previously addressed. Any argument about what parts of the Interpretive Rules at 46 CFR 545.4 and 545.5 remain in force is inherently an argument about that guidance and not about whether this rule complies with the APA. OSRA 2022 specifically required the Commission to issue rules under 46 U.S.C. 41102(c) that further define the prohibited practices by common carriers, marine terminal operators, and shippers, regarding the assessment of detention or demurrage charges. The plain language of this direction and the plain language of 41104(d) do not require evidence of multiple violations. This view is further supported by 46 U.S.C. 41104(f) which functions to void an invoice if a single required element is not included, not when the complainant can show multiple instances of such behavior.²⁸⁵ To the extent that this rule requires a change in the narrow context of the Commission’s guidance on how it will apply 46 U.S.C. 41102(c) to MTO demurrage and detention invoicing, this rule merely implements changes made by Congress.

In response to NAWA and Port Houston, the Commission has amended § 541.5 to read “applicable charge” rather than “applicable invoice.” This change mirrors the statutory language of 46 U.S.C. 41104(f). It was not the Commission’s intent to imply that a

failure to include the mandatory invoice requirements related to detention and demurrage charges would void non-detention or demurrage charges that might appear on the same invoice.

3. Extended Implementation Time Period

Issue: The Commission received four requests for delayed implementation of the final rule. Two MTOs requested an implementation date of no less than 120 days from publication of any final rule.²⁸⁶ The Intermodal Association of North America (IANA) requested no less than 90 days, saying that would be the minimum amount of time needed they would need to make necessary changes to the UIAA associated with implementation of § 541.7(a).²⁸⁷ The third MTO requested delayed implementation but did not propose a specific timeframe.²⁸⁸

FMC response: The agency is delaying the general effective date of this rule 90 days from publication in the **Federal Register** and § 541.6’s implementation is delayed pending approval of the associated Collection of Information by the Office of Management and Budget. The Commission believes that the additional days of general implementation together with any additional waiting period for OMB approval of the Information Collection will provide industry with sufficient time to implement all changes required by this rule.

4. Requests for Hearing and Additional Public Comment Period

Issue: The Commission received two requests for a hearing so that the Commission could further hear from stakeholders about impacts and potential unintended consequences of implementing the rule.²⁸⁹

FMC response: After careful consideration, the Commission declines to establish another round of public comments or to hold the requested hearings. The Commission has already issued an ANPRM and an NPRM on this subject. As such, there have been two opportunities for public comments on these matters. As demonstrated by the number and quality of the comments received, the Commission believes that the ANPRM and the NPRM have

²⁸⁶ West Coast MTO Agreement (FMC–2022–0066–0229); Fenix Marine Services, Ltd. (FMC–2022–0066–0186).

²⁸⁷ West Coast MTO Agreement (FMC–2022–0066–0229).

²⁸⁸ CMA CGM (America) LLC (FMC–2022–0066–0183).

²⁸⁹ National Retail Federation (FMC–2022–0066–0231); National Industrial Transportation League (FMC–2022–0066–0277).

²⁸³ FMC–2022–0066–0261.

²⁸⁴ World Shipping Council (FMC–2022–0066–0242); National Association of Waterfront Employers (FMC–2022–0066–0276); Port Houston (FMC–2022–0066–0268).

²⁸⁵ See also 46 U.S.C. 41310(b) (Charge complaints authority states that Commission is required to investigate compliance with section 41102 of “the charge” received and does not specify that multiple instances must be alleged for the Commission to investigate and order a refund and/or civil penalty).

provided the public and interested parties with sufficient opportunity to comment on the underlying issues. As such, the Commission believes that a hearing or additional opportunity for public comment is unnecessary. In addition, the Commission is not making significant changes to the final regulations such that a Supplementary Notice of Proposed Rulemaking (SNPRM) would be warranted.

5. Costs and Benefits Analysis

Issue: Three commenters asserted that the Commission did not adequately assess costs and benefits of the proposed rule in the NPRM and that the Commission violated Executive Order 13579.²⁹⁰

FMC response: The Commission provided an estimate of the costs for regulated entities to implement the proposed rule to be between \$6.3 and \$12.7 million.²⁹¹ As discussed above with regards to comments concerning the Paperwork Reduction Act, the Commission did not receive information from these, or any other commenters, to support changing that estimate. The Commission highlights for the awareness of these commenters that, as an independent agency, the Commission is not subject to the same cost benefit analysis requirements as non-independent agencies. Executive Order 13579 was written taking into account the unique nature of independent agencies. The Executive Order does not require independent agencies to take specific actions, nor does it impose mandates on independent agencies to comply with Executive Order 12866, Executive Order 13563, or any other Executive order.

IV. Summary of Final Rule and Changes From the NPRM

§ 541.1 Purpose

There are no changes from the text proposed in the NPRM.

§ 541.2 Scope and Applicability

This final rule makes minor changes to the text proposed in the NPRM. In paragraph (a), “to a billed party or their designated agent” has been removed. “To a billed party” has been removed because part 541 also covers demurrage or detention invoices that are sent to persons who are not a “billed party” as defined in § 541.3. “Or their designated agent” has been removed as the text is unnecessary. Traditional rules of agency

remain applicable under the Shipping Act.²⁹² In paragraph (b), “regulation” has been replaced with “part.” “Regulation” was a scrivener’s error in the proposed text. While “regulation” is sometimes used to describe a rule in totality, it more frequently is used to describe a single section or subsection of the Code of Federal Regulations. “Part” is more precise and, most importantly, aligns with the Code of Federal Regulation’s organizational taxonomy.

Part 541 governs any invoice issued by an ocean common carrier or non-vessel-operating common carrier for the collection of demurrage or detention charges. Part 541 does not govern the billing relationships among and between ocean common carriers and marine terminal operators. The Commission has not received information about the relationships or interactions between VOCCs and MTOs that warrants regulating the format used by MTOs to bill VOCCs. At the present time, the Commission is confident that the strong commercial relationships between the parties is enough to ensure that the proper information is shared and that the party who ultimately receives the invoice is receiving accurate information. Part 541 does apply to all other demurrage and detention invoices issued by MTOs. MTOs often do not have direct contractual relationships with shippers. However, MTOs are entitled to separately assess demurrage as an implied contract provided that it is published as part of an MTO Schedule and there are some situations where marine terminal operators impose fees directly on shippers and NVOCCs. A primary concern of the Commission is to ensure billed parties understand the demurrage or detention invoices they receive. Therefore, in those cases where an MTO charges any party other than a VOCC detention or demurrage charges, the Commission finds that MTOs should be subject to the same regulations that apply to VOCCs and NVOCCs.

§ 541.3 Definitions

This final rule makes three changes from the text proposed in the NPRM. “Billing dispute” has been removed and “consignee” and “person” have been added as defined terms. “Billing dispute” does not need to be defined because it is not a term used in §§ 541.4–541.99, in either the NPRM or final rule.

Billed party. For purposes of part 541, “billed party” means the person

receiving the demurrage or detention invoice and who is responsible for payment of any incurred demurrage or detention charge.

Billing party. For purposes of part 541, “billing party” means the VOCC, NVOCC, or MTO who issues a demurrage or detention invoice. While in most cases, the billing party will be a VOCC, this term is defined broadly to incorporate the occasions when an MTO or an NVOCC may issue a demurrage or detention invoice.

Consignee. The definition of “consignee” that has been added to § 541.3 comports with the definition of “consignee” that appears in § 520.2.

Demurrage or detention. “Demurrage or detention” includes any charge assessed by common carriers and marine terminal operators related to the use of marine terminal space or shipping containers. The scope of the term in § 541.3 is the same as the scope of “demurrage or detention” in § 545.5(b). It encompasses all charges having the purpose or effect of demurrage or detention regardless of what those charges may be called by the billing party. The definition excludes charges related to equipment other than containers, such as chassis, because depending on the context, “per diem” can refer to containers, chassis, or both.

Demurrage or detention invoice. For purposes of part 541, “demurrage or detention invoice” means any statement, printed, written, or accessible online, that documents an assessment of demurrage or detention charges. This broad definition includes all currently existing methods of invoicing shipping (e.g., email and online portal), as well as those that may be developed in the future.

Person. The definition of “person” that has been added to § 541.4 aligns with § 515.2(n).

§ 541.4 Properly Issued Invoices

This final rule makes changes to the proposed § 541.4 text to allow consignees to be issued demurrage and detention invoices as an alternative billed party. The revised regulation makes clear that the consignee is an alternative billed party, and the same invoice may be not issued to both the shipper and the consignee. Additionally, the Commission has made minor, non-substantive changes that aid in clarity.

If the billed party has firsthand knowledge of the terms of a service contract with a common carrier, then they are in a better position to ensure that both they and the carrier are abiding by those terms. When demurrage or detention invoice disputes

²⁹⁰ TraPac, LLC (FMC–2022–0066–0136); National Association of Waterfront Employers (FMC–2022–0066–0276); Port Houston (FMC–2022–0066–0268).

²⁹¹ 87 FR 62342, 62356 (Oct. 14, 2022).

²⁹² E.g., *Landstar Exp. Am., Inc. v. Fed. Mar. Comm’n*, 569 F.3d 493, 495 (D.C. Cir. 2009).

do arise, the billed party is in a better position than third parties such as truckers and customs brokers to analyze the accuracy of the charge. Further, when the billed party disputes a charge, they have an existing commercial relationship with the billing party and are in a better position to resolve the dispute. Therefore, under this final rule, a properly issued invoice is an invoice that is issued to: (1) the person that has contracted with the billing party for the ocean transportation or storage of cargo, or (2) the consignee (when in contractual privity with the carrier).

In the final rule, the Commission has changed the word “goods” to “cargo” in § 541.4(a)(1). “Cargo” is a broader term that puts the focus on the container, rather than the items inside it. As such, this comports with the rule’s focus on the container, as demurrage and detention charges are levied on the container rather than the items inside it.

“Contract” in this rule has its normal and ordinary legal meaning.²⁹³ Because contracts (other than contracts implied by law) require a meeting of the minds, merely listing a party on a bill of lading, or contract of affreightment, will not be sufficient for them to become a billed party for purposes of part 541 if they played no role in contracting for the ocean transportation or storage of cargo. Whether a meeting of the minds has occurred is something that can vary based on the specific circumstances of a given relationship. Because a contract can exist even if not memorialized in writing, the Commission declines to add a requirement that contracts need to be in writing for purposes of this rule. The Commission notes, however, that written contracts can provide important documentary evidence of agreement.

Consignees may be billed as an alternative to the shipper when the consignee is the party contracting for the shipping and is therefore in contractual privity with the carrier. Merely listing the consignee on the bill of lading is not sufficient to support billing the consignee. (Conversely, although rarer, it is possible to properly issue an invoice to a consignee that has not been listed on the bill of lading.)

This rule does not prohibit or otherwise limit an MTO from issuing any party—including BCOs or Motor Carriers—an invoice based on a Terminal Schedule, including charges for detention or demurrage, if the Terminal Schedule includes such

charges and the Schedule has been made available in accordance with 46 CFR 525.3. As noted by the commenters, 46 U.S.C. 40501(f) and 46 CFR 525.2(a)(2) establish that such Schedules are enforceable as implied contracts. Under such a scenario, a Motor Carrier has a contractual relationship with the MTO and the terms of the contract (the Schedule) are known to the Motor Carrier in advance by operation of 46 CFR 525.3. This is a very different situation than where a Motor Carrier is billed for demurrage or detention and the Motor Carrier has no contractual relationship with the billing party and is not privy to the specifics of the contractual agreement (such as where a Motor Carrier is billed demurrage or detention based on an agreement between a shipper and a billing party).

This rule does require that when an MTO issues a bill for demurrage or detention for purposes of enforcing a Terminal Schedule, the billing must comply with part 541, including providing all the information required by § 541.6. The Commission recognizes that this may require MTOs to revise their current business practices. As discussed in the NPRM, the Commission’s primary concern with this rule is to ensure that billed parties understand the demurrage or detention invoices they receive.²⁹⁴ Any additional burden on MTOs to be able to provide the necessary data, which the Commission does not believe will be unduly burdensome, is outweighed by the benefits of transparency.

The Commission notes that other MTO billing relationships are also subject to part 541. For example, an MTO issuing a demurrage or detention invoice in order to collect on behalf of a VOCC or issuing a demurrage or detention invoice to an NVOCC must comply with part 541. However, MTOs sometimes require BCOs or their agents to pay freight charges prior to removal of cargo and those freight charges are excluded from the definition of “demurrage and detention” in § 541.3.

§ 541.5 Failure To Include Required Information

Under 46 U.S.C. 41104(f), failure to include any of the required minimum information in 46 U.S.C. 41104(d) eliminates the obligation of the charged party to pay the applicable charge. Section 541.5 is intended to mirror this requirement. To clarify that intent, the Commission has changed the paragraph from “applicable invoice” in the NPRM to “applicable charge” in this final rule.

It was not the agency’s intent to imply that non-demurrage or detention charges could be voided by failure to include the information in § 541.6.

Similarly, pursuant to 46 U.S.C. 41102(c), it is a prohibited practice for an MTO to fail to include the required minimum information in a demurrage and detention invoice sent to a party other than a VOCC. Sending incomplete bills that do not contain sufficient information for shippers to verify if the bills received are accurate would not constitute having just and reasonable practices relating to or connected with receiving, handling, storing or delivering property. Extending the elimination of charge obligations provision at 46 U.S.C. 41104(f) to MTOs issuing demurrage and detention invoices would enforce Congress’ intent to have the Commission “further define prohibited practices by . . . marine terminal operators, . . . under section 41102(c) of title 46, United States Code, regarding the assessment of demurrage or detention charges” and ensure that all demurrage and detention bills sent to billed parties provide the necessary information for the bills to be paid or disputed quickly thereby ensuring efficiency across the shipping system.

§ 541.6 Contents of Invoice

This final rule makes minor changes to the proposed requirements regarding digital notification of how a billed party can request fee mitigation, refund, or waiver as well as minor, non-substantive changes to align language with OSRA 2022 and the defined terms in § 541.3.

The Commission has made changes throughout the regulation to align the text to the defined terms in § 541.3. “Invoice” has been replaced with “demurrage or detention invoice.” “Billing date” and “billing due date” have been changed to “invoice date” and “invoice due date.” Finally, “invoiced party” has been changed to “billed party.”

In response to comments, the Commission has added language that clearly specifies that the information submitted on the invoice must be accurate. Inclusion of the language aligns with the language used in 46 U.S.C. 41104(d)(2).

The Commission has amended the introductory sentences of paragraphs (a), (b), and (c) to make clear that these are minimum information elements. Billing parties may include additional information on the invoices and are encouraged to do so if they believe that such information will be useful to billed parties in verifying the validity of demurrage and detention charges.

²⁹³ See, e.g., *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 16 (2004) (“[C]ontracts for carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties”); *Contract*, Black’s Law Dictionary (11th ed. 2019).

²⁹⁴ E.g., 87 FR 62341, 62347.

The Commission has amended paragraph (c)(2) by adding terminal schedule to the listed examples of documents, and changing “i.e.,” to “e.g.,” to reflect that this is not an exhaustive list of all possible documents.

The Commission has amended paragraph (d)(2) to expand the means of digital notification to billed parties of what they need to do to successfully submit a fee mitigation, refund, or waiver request. The language in the proposed rule required that the invoice contain a URL address that directs the billed party to a publicly accessible website that provides the necessary information. This final rule has expanded that to any digital means, including QR codes, or digital watermarks.

§ 541.7 Issuance of Demurrage and Detention Invoices

This rule requires detention and demurrage invoices to be issued within specified timeframes. As the proposed timeframe language was ambiguous, in this final rule the Commission has clarified that all “days” in the regulation are calendar days.

The Commission is retaining the requirement as proposed in the NPRM that, generally, all demurrage and detention invoices must be issued in 30 days. The Commission has removed the language “required timeframe” from the version of § 541.7(a) that appeared in the NPRM in order to make this subsection clearer. The Commission has revised this subsection to more explicitly dictate the required timing for purposes of clarity.

In response to comments received during the NPRM, the Commission has revised § 541.7 to allow an exception for NVOCCs. That exception is located in

paragraph (b) in this final rule. NVOCCs must issue demurrage and detention invoices within 30 days from the issuance date of the demurrage or detention invoice it received. If a billing party does not issue a demurrage or detention invoice within the required timeframe, then the billed party is not required to pay the charge. Paragraph (c) has been added to reflect situations where an NVOCC is acting as both a billing and billed party in relation to the same charge, and allows the NVOCC to inform its billing party that the charge has been disputed by the NVOCC’s billed party. In that circumstance, the NVOCC must provide an additional 30 days for the NVOCC to dispute the charge upon notice.

The final language of § 541.7(d) has removed the link between a billing party reissuing an invoice with an incorrectly billed party’s disputing of that invoice. This is consistent with the incentive present in the rest of the rule. The burden of issuing a correct invoice should not rely on an incorrectly billed party to dispute the incorrect invoice. Removing this link is also consistent with several comments that requested removing the 60-day requirement from § 541.7(d), which applied to bills sent to a correctly billed party following the billing of an incorrect party. Section 541.7(d) now gives a billing party 30 calendar days to issue a corrected invoice, which is consistent with the rule’s purpose of a swift timeline for demurrage and detention billing.

The NPRM’s linking a billing party’s ability to reissue an invoice with an incorrectly billed party’s disputing that invoice also caused confusion as to whether there was any interplay between § 541.7 and § 541.8. The changes to the rule text adopted in this final rule make clear that § 541.7 spells

out the rules for issuing an invoice to the correctly billed party. By contrast, § 541.8 speaks to a process that assumes the invoice was sent to the correct party, as the term “billed party” encompasses the fact that it is the correct party.

§ 541.8 Requests for Fee Mitigation, Refund, or Waiver

This rule requires billing parties to allow at least 30 days for billed parties to submit a fee mitigation, refund, or waiver request. The Commission has retained the NRPM’s proposal that if such a request is submitted by the billed party, the billing party must resolve the request within 30 days. However, based on public comments, the Commission has allowed an exception. A request for fee mitigation, refund, or waiver may be resolved later than 30 days if both parties agree to the later date. The Commission has added language to clarify that the timeframes in the regulation are calendar days. Also based on public comment, the Commission has removed the penalty provision proposed in the NPRM that if the billing party fails to resolve the fee mitigation, refund, or waiver request within the 30-day deadline, the billed party is not required to pay the charge at issue. This proposed penalty provision is not a requirement of OSRA 2022.

Section 541.8 does not impact a party’s right to file a Charge Complaint with the Commission. Parties do not need to wait a certain period of time or for a triggering event to occur prior to filing a complaint. Parties interested in filing a Charge Complaints at the Commission may do so by following the steps outlined on the Commission’s website.²⁹⁵

When the Commission receives sufficient information, it will promptly initiate an investigation.²⁹⁶

TABLE 1—CHANGES FROM NRPM TO FINAL RULE

Section	Paragraph	Change from NPRM	Reason
541.2 Scope and applicability	(a) (b)	Removes “to a billed party or their designated agent”. Changes “regulation” to “part”	Language unnecessary. Correction of scrivener’s error.
541.3 Definitions	“Billing dispute” ... “Consignee” “Person” (a)	Definition removed Definition added Definition added Paragraph divided into subparagraphs (a)(1) and (2); consignees listed as an alternative billed party.	Language unnecessary. Correction of scrivener’s error. Term not used in §§ 541.4–541.99. Final Rule allows consignees to be an alternative billed party. Clarification. Final Rule allows consignees to be an alternative billed party.

²⁹⁵ Industry Advisory—Interim Procedures for Submitting “Charge Complaints” Under 46 U.S.C. 41310—Federal Maritime Commission—Federal Maritime Commission (*fmc.gov*) (posted July 14, 2022) (<https://www.fmc.gov/industry-advisory->

interim-procedures-for-submitting-charge-complaints/).

²⁹⁶ *Id.*

TABLE 1—CHANGES FROM NRPM TO FINAL RULE—Continued

Section	Paragraph	Change from NPRM	Reason
		“provided ocean transportation or storage” changed to “provided ocean transportation or storage of cargo”.	The term “cargo” was added to put the focus on the storage of the container rather than the merchandise inside of it and to be consistent with the addition of the term in the second clause.
		“for the carriage or storage of goods” changed to “for the ocean transportation or storage of cargo”.	The term “goods” was changed to “cargo” for a broader term that put the focus on the container rather than the merchandise inside it.
	(b)	Language added stating that invoices cannot be issued to more than one party.	Clarification.
541.5 Failure to include required information	(c)	Formerly paragraph (b) “invoice” changed to “charge”	Conforming amendment. Conforms regulatory language to statutory language.
541.6 Contents of invoice	Introductory paragraph.	removed	Information incorporated into other paragraphs.
	(a)	“The invoice” changed to “A demurrage or detention invoice”. “including” changed to “and at a minimum must include”. In (a)(4), “invoiced party” changed to “billed party”.	Correction of scrivener’s error.
	(b)	“must be accurate” added “The invoice” changed to “A demurrage or detention invoice”. “including” changed to “and at a minimum must include”. “must be accurate” added	Clarification. Correction of scrivener’s error. Clarification.
	(c)	“The invoice” changed to “A demurrage or detention invoice”. “including” changed to “and at a minimum must include”. “must be accurate” added In (c)(2) “(i.e., the tariff name and rule number, applicable service contract number and section, or applicable negotiated arrangement)” changed to “e.g., the tariff name and rule number, terminal schedule, applicable service contract number and section, or applicable negotiated arrangement”.	Clarification. Correction of scrivener’s error. Clarification. Clarification/Correction of scrivener’s error. Adds terminal schedule to the list of examples and clarifies that this is a non-exhaustive set of examples.
	(d)	“The invoice” changed to “A demurrage or detention invoice”. “including” changed to “and at a minimum must include”. In (d)(2), “The URL address” changed to “Digital means, such as a URL address, QR code, or digital watermark, that directs the billed party to”; “portion of the billing party’s website” removed.	Correction of scrivener’s error. Clarification. Expands the means of digital notification.
	(e)	“The invoice” changed to “A demurrage or detention invoice”. “must be accurate” added	Correction of scrivener’s error. Clarification.
541.7 Issuance of demurrage and detention invoice.	(a)	“30 days” changed to “thirty (30) calendar days”. “demurrage or detention invoices” changed to “a demurrage or detention invoice”. In the second sentence “the required timeframe” changed to “thirty (30) calendar days from the date on which the charge was last incurred”.	Clarification. Correction of scrivener’s error. Clarification.

TABLE 1—CHANGES FROM NRPM TO FINAL RULE—Continued

Section	Paragraph	Change from NPRM	Reason
541.8 Requests for fee mitigation, refund, or waiver.	(b)	New paragraph added	Clarifies timeframe for NVOCCs passing through demurrage and detention charges to issue their own invoices.
	(c)	New paragraph added	Clarifies timeframe for NVOCCs when acting as both a billing and billed party in relation to the same charge.
	(d)	Formerly paragraph (b) In the first sentence “the incorrect party” changed to “an incorrect person”. “days” changed to “calendar days” In the NPRM, the correct billed party had to receive the invoice within 30 days from the date of the dispute, but no later than 60 days after the charges were last incurred. The final rule instead imposes a strict 30-calendar-day deadline from when the charges were last incurred for the issuance of an invoice to a correct billed party, regardless of whether or not there may have been an invoice previously issued to an incorrect party.	Conforming amendment. Correction of scrivener’s error and clarification to further distinguish an incorrectly issued invoice. Clarification. Shifts burden to the billing party to issue accurate invoices.
	(a)	Paragraph reworded	Clarification. The paragraph has been re-worked for clarity. No substantive change from the NPRM; billing parties must still allow billed parties 30 days from when an invoice is issued to request mitigation, refund or waiver. Clarification that the timeframe is in calendar days.
	(b)	“must resolve” changed to “must attempt to resolve”. “30 days” changed to “thirty (30) calendar days”. added “or at a later date as agreed upon by both parties” to the end of the first sentence. “If the billing party fails to resolve the fee mitigation, refund, or waiver request within the 30-day deadline, the billed party is not required to pay the charge at issue.” removed.	Change promotes good-faith efforts of billing and billed parties to work resolve disputes. Clarification. Clarification. Removes non-statutory penalty.

V. Rulemaking Analyses and Notices

A. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, provides that whenever an agency is required to publish a notice of proposed rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. 553, the agency must prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities, unless the head of the agency certifies that the rulemaking will not have a significant economic impact on a substantial

number of small entities. 5 U.S.C. 603, 605.

This final rule requires VOCCs, NVOCCs, and MTOs to include minimum billing information on detention and demurrage invoices. The rulemaking additionally requires billing parties that issue demurrage and detention invoices to follow certain billing practices; specifically, billing parties must issue demurrage and detention invoices within 30 calendar days from when charges stop accruing. See 87 FR at 27975–27976.

The Commission presumes that VOCCs and MTOs generally do not qualify as small entities under the

guidelines of the Small Business Administration (SBA). The Commission previously stated that VOCCs and MTOs generally are large companies that exceed the employee (500) and/or annual revenue (\$21.5 million) thresholds to be considered small business entities. However, the Commission presumes that NVOCCs are small business entities.

There are likely two types of costs imposed by the proposed rulemaking on the affected businesses. The imposition of a 30-calendar day deadline to issue an invoice from when demurrage and detention charges stop accruing could result in a loss of revenue to the billing

party. In addition, the minimum billing information requirements imposed by the proposed rule may require the billing party to collect additional information and change its billing information technology system to include all the required information on invoices.

Most of the costs of the rulemaking will be borne by VOCCs and MTOs as they generally assess demurrage and detention charges, and not NVOCCs. As discussed above, in most cases, NVOCCs pass through detention and demurrage charges billed to them on invoices generated by VOCCs or MTOs. Accordingly, NVOCCs should receive the minimum billing information required by the proposed rule from either the VOCC or MTO issuing the invoice.

For these reasons, the Chairman of the Federal Maritime Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

B. Congressional Review Act

The rule is not a “major rule” as defined by the Congressional Review Act (5 U.S.C. 801 et seq). The rule will not result in: (1) An annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign based companies. 5 U.S.C. 804(2).

C. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) requires Federal agencies to consider the environmental impacts of proposed major Federal actions significantly affecting the quality of the human environment, as well as the impacts of alternatives to the proposed action. When a Federal agency prepares an environmental assessment, the Council on Environmental Quality (CEQ) NEPA implementing regulations (40 CFR parts 1500–1508) require it to “include brief discussions of the need for the proposal, of alternatives [. . .], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” 40 CFR 1508.9(b). After an environmental assessment, the Commission issued a Finding of No Significant Impact (“FONSI”), 87 FR 73278 (Nov. 29, 2022), and explained that the FONSI would become final 10 days after publication unless a petition for review was filed with FMC by Dec. 9, 2022. (The World Shipping Council

and Pacific Merchant Shipping Association jointly filed a petition for review on December 9, 2022.²⁹⁷ FMC denied the petition on January 6, 2023.²⁹⁸) The FONSI and environmental assessment, as well as the petition and the Commission’s denial of the petition are available for inspection in the docket at www.regulations.gov.

D. Paperwork Reduction Act

This final rule calls for a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). As defined in 5 CFR 1320.3(c), “Collection of Information” comprises reporting, recordkeeping, monitoring, posting, labeling, and other, similar actions. In compliance with the PRA, the Commission submitted the proposed information collection to the Office of Management and Budget. Notice of the information collections was published in the **Federal Register** and public comments were invited. 87 FR 62341, 62356 (Oct. 14, 2022). Neither the Commission nor OMB received any comments that impacted the FMC’s burden calculation or provided additional information to improve the calculation estimate.

The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

Title: 46 CFR Part 541—Demurrage and Detention Billing Requirements

Summary of the Collection of Information: Title 46 U.S.C. 41104(a)(15) and (d)(2), as well as 46 CFR part 541 subpart A, require demurrage and detention invoices to contain certain additional information to increase transparency so that billed parties can identify the containers at issue, the applicable rate, dates for which charges accrued, and how to dispute charges. Further, 46 U.S.C. 41104(d)(2) and 46 CFR part 541 also require demurrage and detention invoices to certify that the charges comply with applicable regulatory provisions and that the invoicing party’s behavior did not contribute to the charges.

Need for Information: The Commission identifies information that entities must include on demurrage and

detention invoices to ensure compliance with the Shipping Act of 1984, as amended. Specifically, 46 CFR part 541 subpart A implements the billing information requirements contained in 46 U.S.C. 41104(d)(2) and adds additional minimum information that billing parties must include on demurrage and detention invoices.

Frequency: The frequency of demurrage and detention invoices is determined by the billing party. It is the billing entity’s responsibility to ensure that their demurrage and detention charges comply with applicable statutory and regulatory provisions. The Commission estimates that between five and ten percent of all containers moving in U.S.-foreign trade will receive a demurrage and/or detention invoice or an estimated range of 1,135,000 and 2,270,000 invoices annually.

Type of Respondents: VOCCs, MTOs, and NVOCCs are required to include specific information on their demurrage and detention invoices sent to billed parties.

Number of Annual Respondents: The Commission anticipates an annual respondent universe of 354 VOCCs and MTOs. The Commission did not include NVOCCs in its annual respondent universe because in most, if not all cases, NVOCCs pass through the demurrage and detention charges it receives to their customers. Because NVOCCs are passing through the charges, they are not collecting the required minimum information themselves.

Estimated Time per Response: The Commission estimates a one-time burden of an estimated 25 hours per respondent to integrate the required billing information elements into their existing invoicing system. After this initial burden, the Commission anticipates that the estimated time to create and retain each demurrage or detention invoice to be six minutes or 0.1 hours.

Total Annual Burden: The Commission estimates a one-time burden for respondents to integrate the additional billing information elements, required by OSRA 2022 and by the proposed rule, into their existing invoicing system to be 8,850 person-hours and \$882,522. After this initial integration, the Commission estimates the total annual burden to provide demurrage and detention invoices and to ensure accuracy to be 113,500–227,000 person-hours and \$6,339,020–\$12,678,040.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted a copy of this rule to the Office of Management

²⁹⁷ FMC–2022–0066–0162.

²⁹⁸ FMC–2022–0066–0278.

and Budget (OMB) for its review of the collection of information. Before the Commission may enforce the collection of information requirements in this rule, OMB must approve FMC's request to collect this information. You need not respond to a collection of information unless it displays a currently valid control number from OMB.

E. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards in E.O. 12988, "Civil Justice Reform," (61 FR 4729, Feb. 7, 1996) to minimize litigation, eliminate ambiguity, and reduce burden.

List of Subjects in 46 CFR Part 541

Demurrage and detention; Common carriers; Exports; Imports; Marine terminal operators.

For the reasons set forth in the preamble, the Federal Maritime Commission amends title 46 of the CFR by adding part 541 to read as follows:

■ 1. Add part 541 to read as follows:

PART 541—DEMURRAGE AND DETENTION

Sec.

Subpart A—Billing Requirements and Practices

- 541.1 Purpose.
- 541.2 Scope and applicability.
- 541.3 Definitions.
- 541.4 Properly issued invoice.
- 541.5 Failure to include required information.
- 541.6 [Reserved]
- 541.7 Issuance of demurrage and detention invoice.
- 541.8 Requests for fee mitigation, refund, or waiver.
- 541.9–541.99 [Reserved]

Subpart B [Reserved]

Authority: 5 U.S.C. 553; 46 U.S.C. 40101, 40102, 40307, 40501–40503, 41101–41106, 40901–40904, and 46105; and 46 CFR 515.23.

Subpart A—Billing Requirements and Practices

§ 541.1 Purpose.

This part establishes the minimum information that must be included on or with demurrage and detention invoices. It also establishes procedures that must be adhered to when invoicing for demurrage or detention.

§ 541.2 Scope and applicability.

(a) This part sets forth regulations governing any invoice issued by an ocean common carrier, marine terminal operator, or non-vessel-operating common carrier for the collection of demurrage or detention charges.

(b) This part does not govern the billing relationships among and between ocean common carriers and marine terminal operators.

§ 541.3 Definitions.

In addition to the definitions set forth in 46 U.S.C. 40102, when used in this part:

Billed party means the person receiving the demurrage or detention invoice and who is responsible for the payment of any incurred demurrage or detention charge.

Billing party means the ocean common carrier, marine terminal operator, or non-vessel-operating common carrier who issues a demurrage or detention invoice.

Consignee means the ultimate recipient of the cargo; the person to whom final delivery of the cargo is to be made.

Demurrage or detention mean any charges, including "per diem" charges, assessed by ocean common carriers, marine terminal operators, or non-vessel-operating common carriers related to the use of marine terminal space (e.g., land) or shipping containers, but not including freight charges.

Demurrage or detention invoice means any statement of charges printed, written, or accessible online that documents an assessment of demurrage or detention charges.

Person means an individual, corporation, or company, including a limited liability company, association, firm, partnership, society, or joint stock company existing under or authorized by the laws of the United States or of a foreign country.

§ 541.4 Properly issued invoices.

(a) A properly issued invoice is a demurrage or detention invoice issued by a billing party to:

(1) The person for whose account the billing party provided ocean transportation or storage of cargo and who contracted with the billing party for the ocean transportation or storage of cargo; or

(2) The consignee.

(b) If a billing party issues a demurrage or detention invoice to the person identified in paragraph (a)(1) of this section, it cannot also issue a demurrage or detention invoice to the person identified in paragraph (a)(2) of this section.

(c) A billing party cannot issue an invoice to any other person.

§ 541.5 Failure to include required information.

Failure to include any of the required minimum information in this part in a

demurrage or detention invoice eliminates any obligation of the billed party to pay the applicable charge.

§ 541.6 [Reserved]

§ 541.7 Issuance of demurrage and detention invoices.

(a) A billing party must issue a demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred. If the billing party does not issue a demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred, then the billed party is not required to pay the charge.

(b) If the billing party is a non-vessel-operating common carrier, then it must issue a demurrage or detention invoice within thirty (30) calendar days from the issuance date of the demurrage or detention invoice it received. If such a billing party does not issue a demurrage or detention invoice within thirty (30) calendar days from the issuance date of the demurrage or detention invoice it received, then the billed party is not required to pay the charge.

(c) A non-vessel-operating common carrier (NVOCC) can be both a billing and billed party in relation to the same charge. When an NVOCC is acting in both roles, it can inform its billing party that the charge has been disputed by the NVOCC's billed party. The NVOCC's billing party must then provide an additional thirty (30) calendar days for the NVOCC to dispute the charge upon this notice.

(d) If the billing party invoices an incorrect person, the billing party may issue an invoice to the correct billed party provided that such issuance is within thirty (30) calendar days from the date on which the charge was last incurred. If the billing party does not issue this corrected demurrage or detention invoice within thirty (30) calendar days from the date on which the charge was last incurred, then the billed party is not required to pay the charge.

§ 541.8 Requests for fee mitigation, refund, or waiver.

(a) The billing party must allow the billed party at least thirty (30) calendar days from the invoice issuance date to request mitigation, refund, or waiver of fees from the billing party.

(b) If a billing party receives a fee mitigation, refund, or waiver request from a billed party, the billing party must attempt to resolve the request within thirty (30) calendar days of receiving such a request or at a later date as agreed upon by both parties.

§ 541.9–541.99 [Reserved]

■ 2. Delayed indefinitely, add § 541.6 to read as follows:

§ 541.6 Contents of invoice.

(a) *Identifying information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to identify the container(s) to which the charges apply and at a minimum must include:

- (1) The Bill of Lading number(s);
- (2) The container number(s);
- (3) For imports, the port(s) of discharge; and
- (4) The basis for why the billed party is the proper party of interest and thus liable for the charge.

(b) *Timing information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to identify the relevant time for which the charges apply and the applicable due date for invoiced charges and at a minimum must include:

- (1) The invoice date;
- (2) The invoice due date;
- (3) The allowed free time in days;
- (4) The start date of free time;
- (5) The end date of free time;
- (6) For imports, the container availability date;
- (7) For exports, the earliest return date; and
- (8) The specific date(s) for which demurrage and/or detention were charged.

(c) *Rate information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to identify the amount due and readily ascertain how that amount was calculated and must include at a minimum:

- (1) The total amount due;
- (2) The applicable detention or demurrage rule (e.g., the tariff name and rule number, terminal schedule, applicable service contract number and section, or applicable negotiated arrangement) on which the daily rate is based; and
- (3) The specific rate or rates per the applicable tariff rule or service contract.

(d) *Dispute information.* A demurrage or detention invoice must be accurate and contain sufficient information to enable the billed party to readily identify a contact to whom they may direct questions or concerns related to the invoice and understand the process to request fee mitigation, refund, or waiver, and at a minimum must include:

- (1) The email, telephone number, or other appropriate contact information for questions or request for fee mitigation, refund, or waiver;
- (2) Digital means, such as a URL address, QR code, or digital watermark, that directs the billed party to a publicly accessible website that provides a detailed description of information or documentation that the billed party must provide to successfully request fee mitigation, refund, or waiver; and

(3) Defined timeframes that comply with the billing practices in this part, during which the billed party must request a fee mitigation, refund, or waiver and within which the billing party will resolve such requests.

(e) *Certifications.* A demurrage or detention invoice must be accurate and contain statements from the billing party that:

- (1) The charges are consistent with any of the Federal Maritime Commission's rules related to demurrage and detention, including, but not limited to, this part and 46 CFR 545.5; and
- (2) The billing party's performance did not cause or contribute to the underlying invoiced charges.

■ 3. Delayed indefinitely, add § 541.99 to read as follows:

§ 541.99 OMB control number assigned pursuant to the Paperwork Reduction Act.

The Commission has received Office of Management and Budget approval for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. The valid control number for this collection of information is 3072–XXXX.

Subpart B [Reserved]

By the Commission.

David Eng,
Secretary.

[FR Doc. 2024–02926 Filed 2–23–24; 8:45 am]

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Part IV

The President

Memorandum of February 8, 2024—Delegation of Authority Under Section 1(j)(4) of the State Department Basic Authorities Act of 1956

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Title 3—

Memorandum of February 8, 2024

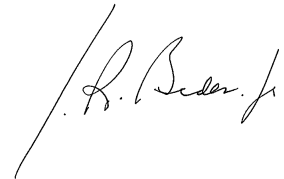
The President

Delegation of Authority Under Section 1(j)(4) of the State Department Basic Authorities Act of 1956

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby delegate to the Secretary of State the functions and authority vested in the President by section 1(j)(4) of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2651a(j)(4)) to submit to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives the justification required in conjunction with the renewal of a temporary appointment pursuant to section 1(j)(3) of such Act (22 U.S.C. 2651a(j)(3)).

You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, February 8, 2024

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