FEDERAL REGISTER

Vol. 86 Wednesday

No. 233 December 8, 2021

Pages 69575–69974

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 86 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Printed on recycled paper.

Contents

Federal Register

Vol. 86, No. 233

Wednesday, December 8, 2021

Agency for Healthcare Research and Quality
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69649–69651
Meetings, 69651

Bureau of Consumer Financial Protection
RULES
Facilitating the LIBOR Transition, 69716–69800

Census Bureau
NOTICES
Voting Rights Act Amendments, Determinations, 69611–69618

Centers for Disease Control and Prevention
NOTICES
Meetings:
Disease, Disability, and Injury Prevention and Control Special Emphasis Panel, 69651–69652

Civil Rights Commission
NOTICES
Meetings:
South Dakota Advisory Committee, 69611

Coast Guard
PROPOSED RULES
Special Local Regulations:
Sector Ohio Valley Annual and Recurring Special Local Regulations, Update, 69602–69607

Commerce Department
See Census Bureau
See International Trade Administration
See National Oceanic and Atmospheric Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Certification of Identity, 69618

Consumer Product Safety Commission
NOTICES
Meetings; Sunshine Act, 69633

Copyright Office, Library of Congress
PROPOSED RULES
Copyright Claims Board:
Active Proceedings and Evidence, 69890–69917

Drug Enforcement Administration
NOTICES
Decision and Order:
Tamika Mayo, M.D., 69681–69685

Education Department
PROPOSED RULES
Meetings:
Negotiated Rulemaking Committee; Negotiator Nominations, 69607–69609

Energy Department
See Federal Energy Regulatory Commission

Environmental Protection Agency
NOTICES
Privacy Act; Systems of Records, 69639–69643

Federal Aviation Administration
RULES
Airspace Designations and Reporting Points:
Rogers Field, CA, 69581–69582
Airworthiness Directives:
Daher Aerospace (Type Certificate Previously Held by SOCATA) Airplanes, 69579–69581

Federal Communications Commission
PROPOSED RULES
Resilient Networks; Disruptions to Communications; Disruptions to Communications, 69609–69610
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69643

Federal Energy Regulatory Commission
NOTICES
Application:
City of Abbeville, 69636–69637
Erie Boulevard Hydropower, L.P., 69638–69639
Combined Filings, 69635–69638
Initial Market-Based Rate Filings Including Requests for Blanket Section 204 Authorizations:
Indra Power Business DC, LLC, 69638
Institution of Section 206 Proceedings and Refund Effective Date:
Seneca Generation, LLC, Yards Creek Energy, LLC, 69637
Request Under Blanket Authorization and Establishing Intervention and Protest Deadline:
Florida Gas Transmission, LLC, 69633–69635

Federal Reserve System
RULES
Federal Reserve Bank Capital Stock, 69578–69579
Reserve Requirements of Depository Institutions, 69577–69578
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69643–69648
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 69648

Federal Trade Commission
RULES
Automotive Fuel Ratings, Certification and Posting, 69582–69583

Federal Transit Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69712–69713

Financial Crimes Enforcement Network
PROPOSED RULES
Anti-Money Laundering Regulations for Real Estate Transactions, 69589–69602
Beneficial Ownership Information Reporting Requirements, 69920–69974

Fish and Wildlife Service
NOTICES
Incidental Take Permit Application; Habitat Conservation Plan:
Montana Department of Natural Resources Lazy-Swift Addition and Wolf Creek Land Exchange; Flathead and Lincoln Counties, MT, 69676–69677
Permit Application:
Endangered and Threatened Species; Recovery, 69678–69679

Food and Drug Administration
RULES
Medical Devices; Exemption from Premarket Notification:
Powered Patient Transport, All Other Powered Patient Transport, 69583–69586
NOTICES
Investigational New Drug Application Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases:
Chemistry, Manufacturing, and Controls Recommendations, Guidance for Sponsor-Investigators; Draft Guidance for Industry; Availability, 69653–69655
Clinical Recommendations; Draft Guidance for Sponsor-Investigators; Availability, 69652–69653

Gulf Coast Ecosystem Restoration Council
NOTICES
Senior Executive Service Performance Review Board Membership, 69649

Health and Human Services Department
See Agency for Healthcare Research and Quality
See Centers for Disease Control and Prevention
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health
NOTICES
Meetings:
Health Information Technology Advisory Committee, 69658–69659

Health Resources and Services Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
COVID–19 Provider Relief Programs Application and Attestation Portal, and Claims Reimbursement Submission Activities, 69657–69658
Environmental Information and Documentation, 69655
Rural Communities Opioid Response Program Performance Measures, 69655–69657

Homeland Security Department
See Coast Guard
See Transportation Security Administration
See U.S. Customs and Border Protection
PROPOSED RULES
Privacy Act; Implementation, 69587–69589
NOTICES
Privacy Act; Matching Program, 69669–69670
Privacy Act; Systems of Records, 69663–69668

Housing and Urban Development Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Energy Efficient Mortgages, 69672
Operating Fund Shortfall Program Financial Reporting and Monitoring, 69673
Privacy Act; Systems of Records, 69673–69676

Interior Department
See Fish and Wildlife Service
See Land Management Bureau

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Circular Welded Carbon Steel Pipes and Tubes from Thailand, 69620–69622
Large Residential Washers from Mexico, 69618–69619
Scope Rulings, 69619–69620

International Trade Commission
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Optical Enclosures, Components Thereof, and Products Containing the Same, 69680
Hot-Rolled Steel Flat Products from Turkey; Correction, 69680

Joint Board for Enrollment of Actuaries
NOTICES
Meetings, 69681

Justice Department
See Drug Enforcement Administration
RULES
Registration Requirements under the Sex Offender Registration and Notification Act, 69856–69887
NOTICES
Proposed Consent Decree:
Clean Air Act, 69685–69686
Clean Water Act, 69686

Labor Department
See Occupational Safety and Health Administration

Land Management Bureau
NOTICES
Plats of Survey:
Idaho, 69679–69680

Library of Congress
See Copyright Office, Library of Congress

Maritime Administration
NOTICES
Coastwise Endorsement Eligibility Determination for a Foreign-built Vessel:
IT'S ENOUGH (Motor), 69713–69714

National Foundation on the Arts and the Humanities
RULES
Claims Collection; correction, 69586

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 69659

National Cancer Institute, 69660–69661
National Center for Complementary and Integrative Health, 69659
National Institute on Deafness and Other Communication Disorders, 69661
National Library of Medicine, 69659–69660

National Oceanic and Atmospheric Administration
NOTICES
Meetings:
Pacific Fishery Management Council, 69626–69627
Permit Application:
Marine Mammals; File No. 25900, 69622
Marine Mammals; File No. 26024, 69632–69633
Takes of Marine Mammals Incidental to Specified Activities:
Commercial Fishing Operations; Permits, 69627–69632
Taking and Importing Marine Mammals:
Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico, 69622–69626

Nuclear Regulatory Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Insider Threat Program for Licensees and Others Requiring Access to Classified Information, 69686–69687

Occupational Safety and Health Administration
RULES
COVID–19 Vaccination and Testing:
Emergency Temporary Standard, 69586

Presidential Documents
PROCLAMATIONS
Special Observances:
National Pearl Harbor Remembrance Day (Proc. 10319), 69575–69576

Securities and Exchange Commission
PROPOSED RULES
Reporting of Securities Loans, 69802–69853
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 69695–69697
Application:
Apollo Investment Corporation, et al., 69703–69712
Self-Regulatory Organizations; Proposed Rule Changes:
ICE Clear Credit, LLC, 69699–69703
MEMX, LLC, 69697–69699
National Securities Clearing Corp., 69687–69695

Transportation Department
See Federal Aviation Administration
See Federal Transit Administration
See Maritime Administration

Transportation Security Administration
NOTICES
Enforcement Actions Summary, 69670–69672

Treasury Department
See Financial Crimes Enforcement Network
NOTICES
Survey of United States Ownership of Foreign Securities, 69714

U.S. Customs and Border Protection
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Trusted Traveler Programs and United States APEC Business Travel Card, 69661–69663

Separate Parts In This Issue

Part II
Bureau of Consumer Financial Protection, 69716–69800

Part III
Securities and Exchange Commission, 69802–69853

Part IV
Justice Department, 69856–69887

Part V
Library of Congress, Copyright Office, Library of Congress, 69890–69917

Part VI
Treasury Department, Financial Crimes Enforcement Network, 69920–69974

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR
Proclamations:
10319....69575
6 CFR
Proposed Rules:
5....69587
12 CFR
204....69577
209....69578
1026....69716
14 CFR
39....69579
71....69581
16 CFR
306....69582
17 CFR
Proposed Rules:
240....69802
21 CFR
890....69583
28 CFR
72....69856
29 CFR
1910....69583
1915....69583
1917....69583
1918....69583
1926....69583
1928....69583
31 CFR
Proposed Rules:
Ch. X....69589
1010....69920
33 CFR
Proposed Rules:
100....69602
34 CFR
Proposed Rules:
Ch. VI....69607
37 CFR
Proposed Rules:
201....69890
220....69890
222....69890
225....69890
226....69890
227....69890
228....69890
229....69890
230....69890
231....69890
232....69890
233....69890
45 CFR
1117....69583
47 CFR
Proposed Rules:
4....69609

Federal Register
Vol. 86, No. 233
Wednesday, December 8, 2021

Presidential Documents

Title 3—

The President

Proclamation 10319 of December 3, 2021

National Pearl Harbor Remembrance Day, 2021

By the President of the United States of America

A Proclamation

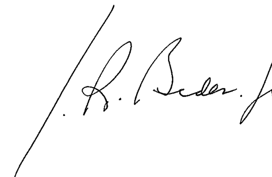
On December 7, 1941, the Imperial Japanese Navy attacked our forces at Pearl Harbor and other locations in Hawaii, taking the lives of 2,403 service members and civilians and leading the United States to declare its entrance into World War II. It was a day that still lives in infamy 80 years later. As we mark National Pearl Harbor Remembrance Day, we honor the patriots who perished, commemorate the valor of all those who defended our Nation, and recommit ourselves to carrying forth the ensuing peace and reconciliation that brought a better future for our world. Today, we give thanks to the Greatest Generation, who guided our Nation through some of our darkest moments and laid the foundations of an international system that has transformed former adversaries into allies.

A decade ago, I paid my respects at the USS Arizona Memorial—where 1,177 crewmen lost their lives on that terrible December day. To this day, beads of oil still rise to the surface of the water—metaphorical ''Black Tears'' shed for those lost in the attack. Reading those names etched in marble was a mournful reminder of the sacrifices and the human cost of protecting our Nation and the ideals this great country represents. Our Nation remains forever indebted to all those who gave their last full measure of devotion eight decades ago. We will never forget those who perished, and we will always honor our sacred obligation to care for our service members, veterans, and their families, caregivers, and survivors.

The Congress, by Public Law 103–308, as amended, has designated December 7 of each year as ''National Pearl Harbor Remembrance Day.''

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, do hereby proclaim December 7, 2021, as National Pearl Harbor Remembrance Day. I encourage all Americans to reflect on the courage shown by our brave warriors that day and remember their sacrifices. I ask us all to give sincere thanks and appreciation to the survivors of that unthinkable day. I urge all Federal agencies, interested organizations, groups, and individuals to fly the flag of the United States at half-staff on December 7, 2021, in honor of those American patriots who died as a result of their service at Pearl Harbor.

IN WITNESS WHEREOF, I have hereunto set my hand this third day of December, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-sixth.



[FR Doc. 2021–26695
Filed 12–7–21; 8:45 am]
Billing code 3395–F2–P

Rules and Regulations

Federal Register

Vol. 86, No. 233

Wednesday, December 8, 2021

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.

FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Regulation D; Docket No. R–1762]

RIN 7100–AG 24

Reserve Requirements of Depository Institutions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation D, Reserve Requirements of Depository Institutions, to reflect the annual indexing of the reserve requirement exemption amount and the low reserve tranche for 2022. The annual indexation of these amounts is required notwithstanding the Board's action in March 2020 setting all reserve requirement ratios to zero. The Regulation D amendments set the reserve requirement exemption amount for 2022 at $32.4 million (increased from $21.1 million in 2021) and the amount of the low reserve tranche at $640.6 million (increased from $182.9 million in 2021). The adjustments to both of these amounts are derived using statutory formulas specified in the Federal Reserve Act (the ''Act''). The increases in the exemption amount and low reserve tranche for 2022 are larger than in previous years, primarily reflecting the one-time effects of the Regulation D amendments that eliminated the six convenient transfer limit from the definition of a savings deposit and recognized savings deposits as a type of transaction account. The annual indexation of the reserve requirement exemption amount and low reserve tranche, though required by statute, will not affect depository institutions' reserve requirements, which will remain zero.

DATES: Effective January 7, 2022.

Compliance dates: The new low reserve tranche and reserve requirement exemption amount will apply beginning January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Sophia H. Allison, Senior Special Counsel (202/452–3565), Kristen Payne, Lead Financial Institution and Policy Analyst (202/452–2872), or Francis A. Martinez, Lead Financial Institution and Policy Analyst (202/245–4217), Division of Monetary Affairs; Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Section 19(b)(2) of the Act (12 U.S.C. 461(b)(2)) requires each depository institution to maintain reserves against its transaction accounts and nonpersonal time deposits, as prescribed by Board regulations, for the purpose of implementing monetary policy. The Board's actions with respect to this provision is discussed below.

I. Reserve Requirements

Section 19(b) of the Act authorizes different ranges of reserve requirement ratios depending on the amount of transaction account balances at a depository institution. Section 19(b)(11)(A) of the Act (12 U.S.C. 461(b)(11)(A)) provides that a zero percent reserve requirement ratio shall apply at each depository institution to total reservable liabilities that do not exceed a certain amount, known as the reserve requirement exemption amount. Section 19(b)(11)(B) provides that, before December 31 of each year, the Board shall issue a regulation adjusting the reserve requirement exemption amount for the next calendar year if total reservable liabilities held at all depository institutions increase from one year to the next. No adjustment is made to the reserve requirement exemption amount if total reservable liabilities held at all depository institutions should decrease during the applicable time period. The Act requires the percentage increase in the reserve requirement exemption amount to be 80 percent of the increase in total reservable liabilities of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

Total reservable liabilities of all depository institutions increased by 67.0 percent, from $10,901 billion to $18,204 billion, between June 30, 2020, and June 30, 2021. Accordingly, the Board is amending Regulation D to set the reserve requirement exemption amount for 2022 at $32.4 million, an increase of $11.3 million from its level in 2021.[1]

Pursuant to Section 19(b)(2) of the Act (12 U.S.C. 461(b)(2)), transaction account balances maintained at each depository institution over the reserve requirement exemption amount and up to a certain amount, known as the low reserve tranche, may be subject to a reserve requirement ratio of not more than 3 percent (and which may be zero). Transaction account balances over the low reserve tranche may be subject to a reserve requirement ratio of not more than 14 percent (and which may be zero). Section 19(b)(2) also provides that, before December 31 of each year, the Board shall issue a regulation adjusting the low reserve tranche for the next calendar year. The Act requires the adjustment in the low reserve tranche to be 80 percent of the percentage increase or decrease in total transaction accounts of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

Net transaction accounts of all depository institutions increased 312.8 percent, from $3,866 billion to $15,961 billion, between June 30, 2020, and June 30, 2021. Accordingly, the Board is amending Regulation D to set the low reserve tranche for net transaction accounts for 2022 at $640.6 million, an increase of $457.7 million from 2021. The new reserve requirement exemption amount and low reserve tranche will be effective for all depository institutions beginning January 1, 2022.

Effective March 26, 2020, the Board reduced reserve requirement ratios on all net transaction accounts to zero percent, eliminating reserve requirements for all depository institutions. The annual indexation of the reserve requirement exemption amount and the low reserve tranche for 2022 is required by statute but will not affect depository institutions' reserve requirements, which will remain zero.

II. Regulatory Analysis

Administrative Procedure Act

The provisions of 5 U.S.C. 553(b) relating to notice of proposed rulemaking have not been followed in

[1] Consistent with Board practice, the low reserve tranche and reserve requirement exemption amounts have been rounded to the nearest $0.1 million.

connection with the adoption of these amendments. The amendments involve expected, ministerial adjustments prescribed by statute and by the Board's policy concerning reporting practices. The adjustments in the reserve requirement exemption amount and the low reserve tranche serve to reduce regulatory burdens on depository institutions. Accordingly, the Board finds good cause for determining, and so determines, that notice in accordance with 5 U.S.C. 553(b) is unnecessary.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where a general notice of proposed rulemaking is not required.[2] As noted previously, the Board has determined that it is unnecessary to publish a general notice of proposed rulemaking for this final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995,[3] the Board reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

List of Subjects in 12 CFR Part 204

Banks, banking, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, the Board is amends 12 CFR part 204 as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

■ 1. The authority citation for part 204 continues to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 461, 601, 611, and 3105.

■ 2. Section 204.4 is amended by revising paragraph (f) to read as follows:

§ 204.4 Computation of required reserves.

* * * * *

(f) For all depository institutions, Edge and Agreement corporations, and United States branches and agencies of foreign banks, required reserves are computed by applying the reserve requirement ratios in table 1 to this paragraph (f) to net transaction accounts, nonpersonal time deposits, and Eurocurrency liabilities of the institution during the computation period.

TABLE 1 TO PARAGRAPH (f)

Reservable liability	Reserve requirement
Net Transaction Accounts:	
$0 to reserve requirement exemption amount ($32.4 million)	0 percent of amount.
Over reserve requirement exemption amount ($32.4 million) and up to low reserve tranche ($640.6 million).	0 percent of amount.
Over low reserve tranche ($640.6 million)	$0 plus 0 percent of amount over $640.6 million.
Nonpersonal time deposits	0 percent.
Eurocurrency liabilities	0 percent.

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Monetary Affairs under delegated authority, December 3, 2021.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2021–26568 Filed 12–7–21; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 209

[Regulation I; Docket No. R–1761]

RIN 7100–AG 23

Federal Reserve Bank Capital Stock

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors (Board) is publishing a final rule that applies an inflation adjustment to the threshold for total consolidated assets in Regulation I. Federal Reserve Bank (Reserve Bank) stockholders that have total consolidated assets above the threshold receive a different dividend rate on their Reserve Bank stock than stockholders with total consolidated assets at or below the threshold. The Federal Reserve Act requires that the Board annually adjust the total consolidated asset threshold to reflect the change in the Gross Domestic Product Price Index, published by the Bureau of Economic Analysis (BEA). Based on the change in the Gross Domestic Product Price Index as of October 28, 2021, the total consolidated asset threshold will be $11,229,000,000 through December 31, 2022.

DATES: This final rule is effective January 7, 2022.

FOR FURTHER INFORMATION CONTACT: Evan Winerman, Senior Counsel (202–872–7578), Legal Division; or Rebecca Rider, Senior Financial Institutions Policy Analyst (202–736–1926), Reserve Bank Operations and Payments Systems Division.

SUPPLEMENTARY INFORMATION:

I. Background

Regulation I governs the issuance and cancellation of capital stock by the Reserve Banks. Under section 5 of the Federal Reserve Act[1] and Regulation I,[2] a member bank must subscribe to capital stock of the Reserve Bank of its district in an amount equal to six percent of the member bank's capital and surplus. The member bank must pay for one-half of this subscription on the date that the Reserve Bank approves its application for capital stock, while the remaining half of the subscription shall be subject to call by the Board.[3]

Section 7(a)(1) of the Federal Reserve Act[4] provides that Reserve Bank stockholders with $10 billion or less in total consolidated assets shall receive a six percent dividend on paid-in capital stock, while stockholders with more than $10 billion in total consolidated assets shall receive a dividend on paid-in capital stock equal to the *lesser* of six percent and ''the rate equal to the high yield of the 10-year Treasury note auctioned at the last auction held prior

[2] 5 U.S.C. 603 and 604.

[3] 44 U.S.C. 3506; 5 CFR 1320.

[1] 12 U.S.C. 287.

[2] 12 CFR 209.4(a).

[3] 12 U.S.C. 287 and 12 CFR 209.4(c)(2).

[4] 12 U.S.C. 289(a)(1).

to the payment of such dividend.'' Section 7(a)(1) requires that the Board adjust the threshold for total consolidated assets annually to reflect the change in the Gross Domestic Product Price Index, published by the BEA.

Regulation I implements section 7(a)(1) of the Federal Reserve Act by (1) defining the term ''total consolidated assets,'' [5] (2) incorporating the statutory dividend rates for Reserve Bank stockholders,[6] and (3) providing that the Board shall adjust the threshold for total consolidated assets annually to reflect the change in the Gross Domestic Product Price Index.[7] The Board has explained that it ''expects to make this adjustment [to the threshold for total consolidated assets] using the final second quarter estimate of the Gross Domestic Product Price Index for each year, published by the Bureau of Economic Analysis.'' [8]

II. Adjustment

The Board annually adjusts the $10 billion total consolidated asset threshold based on the change in the Gross Domestic Product Price Index between the second quarter of 2015 (the baseline year) and the second quarter of the current year.[9] The second quarter 2021 Gross Domestic Product Price Index estimate published by the BEA in October 2021 (117.546) is 12.29 percent higher than the second quarter 2015 Gross Domestic Product Price Index estimate published by the BEA in October 2021 (104.683). Based on this change in the Gross Domestic Product Price Index, the threshold for total consolidated assets in Regulation I will be $11,229,000,000 as of January 7, 2022.

[5] 12 CFR 209.1(d)(3) (''Total consolidated assets means the total assets on the stockholder's balance sheet as reported by the stockholder on its Consolidated Report of Condition and Income (Call Report) as of the most recent December 31, except in the case of a new member or the surviving stockholder after a merger 'total consolidated assets' means (until the next December 31 Call Report becomes available) the total consolidated assets of the new member or the surviving stockholder at the time of its application for capital stock'').

[6] 12 CFR 209.4(e), (c)(1)(ii), and (d)(1)(ii); 209.2(a); and 209.3(d)(3).

[7] 12 CFR 209.4(f).

[8] 81 FR 84415, 84417 (Nov. 23, 2016).

[9] The BEA makes ongoing revisions to its estimates of the Gross Domestic Product Price Index for historical calendar quarters. The Board calculates annual adjustments from the baseline year (rather than from the prior-year total consolidated asset threshold) to ensure that the adjusted total consolidated asset threshold accurately reflects the cumulative change in the BEA's most recent estimates of the Gross Domestic Product Price Index.

III. Administrative Law Matters

Administrative Procedure Act

The provisions of 5 U.S.C. 553(b) relating to notice of proposed rulemaking have not been followed in connection with the adoption of these amendments. The amendments involve expected, ministerial adjustments that are required by statute and Regulation I and are consistent with a method previously set forth by the Board.[10] Accordingly, the Board finds good cause for determining, and so determines, that notice in accordance with 5 U.S.C. 553(b) is unnecessary.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where a general notice of proposed rulemaking is not required.[11] As noted previously, the Board has determined that it is unnecessary to publish a general notice of proposed rulemaking for this final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995,[12] the Board has reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

List of Subjects in 12 CFR Part 209

Banks and banking, Federal Reserve System, Reporting and recordkeeping requirements, Securities.

Authority and Issuance

For the reasons set forth in the preamble, the Board amends Regulation I, 12 CFR part 209, as follows:

PART 209—ISSUE AND CANCELLATION OF FEDERAL RESERVE BANK CAPITAL STOCK (REGULATION I)

■ 1. The authority citation for part 209 continues to read as follows:

Authority: 12 U.S.C. 12 U.S.C. 222, 248, 282, 286–288, 289, 321, 323, 327–328, and 466.

■ 2. In part 209, remove all references to ''$10,785,000,000'' and add in their place ''$11,229,000,000'' wherever they appear.

[10] *See* 12 CFR 209.4(f) and n. 8 and accompanying text, *supra.*

[11] 5 U.S.C. 603 and 604.

[12] 44 U.S.C. 3506; 5 CFR 1320.

By order of the Board of Governors of the Federal Reserve System, under delegated authority, December 2, 2021.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2021–26542 Filed 12–7–21; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–0778; Project Identifier 2019–CE–062–AD; Amendment 39–21834; AD 2021–24–13]

RIN 2120–AA64

Airworthiness Directives; Daher Aerospace (Type Certificate Previously Held by SOCATA) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Daher Aerospace (type certificate previously held by SOCATA) Model TBM 700 airplanes. This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as a non-conforming dump switch ejecting from its slot. This AD requires modifying certain dump switches. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 12, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 12, 2022.

ADDRESSES: For service information identified in this final rule, contact Daher Aerospace Inc., Pompano Beach Airpark, 601 NE 10 Street, Pompano Beach, FL 33060; phone: (954) 893–1400; website: *https://www.tbm.aero.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0778.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0778; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the MCAI, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:
Gregory Johnson, Aviation Safety Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901 Locust, Room 301, Kansas City, MO 64106; phone: (720) 626–5462; fax: (816) 329–4090; email: *gregory.johnson@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain serial-numbered Daher Aerospace (type certificate previously held by SOCATA) Model TBM 700 airplanes. The NPRM published in the **Federal Register** on September 14, 2021 (86 FR 51033). The NPRM was prompted by MCAI originated by the European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union. EASA issued AD 2019–0306, dated December 18, 2019 (referred to after this as ''the MCAI''), to address the unsafe condition on certain serial-numbered Daher Aerospace (formerly SOCATA) Model TBM 700 airplanes. The MCAI states:

> It has been determined that, in certain conditions, an affected switch [dump switch part number 7388475012 without a seal] may eject from its slot. Investigations identified the root cause in a non-conformity of the affected switch.
>
> This condition, if not corrected, could, in case of smoke/fumes in the cabin, prevent evacuation of the smoke/fumes, possibly resulting in excessive flight crew workload and/or injury to aeroplane occupants.
>
> To address this potential unsafe condition, DAHER AEROSPACE issued the [service bulletin] SB to provide modification instructions.
>
> For the reasons described above, this [EASA] AD requires modification of the affected parts by installation of a seal, and introduces requirements for installation of a dump switch.

You may examine the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0778.

Discussion of Final Airworthiness Directive

Comments

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

Conclusion

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed Daher Aerospace Service Bulletin SB 70–271–21, Revision 1, dated November 2019. The service information contains procedures for modifying each dump switch part number 7388475012 by removing the two indicator light units, installing a seal, installing a thin layer of grease, and installing the two indicator lights. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 150 airplanes of U.S. registry. The FAA also estimates that it would take about 1 work-hour per airplane and require parts costing $800 to comply with the modification required by this AD. The average labor rate is $85 per work-hour.

Based on these figures, the FAA estimates the inspection cost of this AD on U.S. operators to be $132,750 or $885 per airplane.

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–24–13 Daher Aerospace (Type Certificate Previously Held by SOCATA): Amendment 39–21834; Docket No. FAA–2021–0778; Project Identifier 2019–CE–062–AD.

(a) Effective Date

This airworthiness directive (AD) is effective January 12, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Daher Aerospace (type certificate previously held by SOCATA) Model TBM 700 airplanes, serial numbers 1106 and larger, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 2130, Cabin Pressure Control System.

(e) Unsafe Condition

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as a non-confirming dump switch ejecting from its slot. The FAA is issuing this AD to prevent dump switches ejecting from their slots, which, in case of smoke/fumes in the cabin, could prevent evacuation of the smoke/fumes. The unsafe condition, if not addressed, could result in excessive flight crew workload and injury to airplane occupants.

(f) Compliance

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

(g) Required Actions

Within 12 months after the effective date of this AD, inspect each dump switch part number (P/N) 7388475012 to determine if a seal is installed, as depicted in Figure 3 of Daher Aerospace Service Bulletin SB 70–271–21, Revision 1, dated November 2019.

(1) If a seal is installed, no further action is required by this paragraph.

(2) If a seal is not installed, within 12 months after the effective date of this AD, modify the dump switch in accordance with steps (2) through (5) of the Description of Accomplishment Instructions in Daher Aerospace Service Bulletin SB 70–271–21, Revision 1, dated November 2019.

(h) Parts Installation Provision

As of the effective date of this AD, do not install a dump switch P/N 7388475012 on any airplane unless the switch has been modified as described in Daher Aerospace Service Bulletin SB 70–271–21, Revision 1, dated November 2019. Removal of a dump switch from an airplane and re-installation of that dump switch on the same airplane within the same maintenance visit is not an installation for purposes of this paragraph.

(i) Alternative Methods of Compliance (AMOCs)

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

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

(j) Related Information

(1) For more information about this AD, contact Gregory Johnson, Aviation Safety Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901 Locust, Room 301, Kansas City, MO 64106; phone: (720) 626–5462; fax: (816) 329–4090; email: *gregory.johnson@faa.gov.*

(2) Refer to European Union Aviation Safety Agency (EASA) AD 2019–0306, dated December 18, 2019, for more information. You may examine the EASA AD in the AD docket at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2021–0778.

(k) Material Incorporated by Reference

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

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

(i) Daher Aerospace Service Bulletin SB 70–271–21, Revision 1, dated November 2019.

(ii) [Reserved]

(3) For service information identified in this AD, contact Daher Aerospace Inc., Pompano Beach Airpark, 601 NE 10 Street, Pompano Beach, FL 33060; phone: (954) 893–1400; website: *https://www.tbm.aero.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

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

Issued on November 17, 2021.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–26527 Filed 12–7–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2021–0557; Airspace Docket No. 21–AWP–2]

RIN 2120–AA66

Establishment of Class E Airspace; Rogers Field, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace extending upward from 700 feet above the surface of the earth at Rogers Field, Chester, CA. This action would accommodate a new area navigation (RNAV) procedure and ensure the safety and management of instrument flight rule (IFR) operations within the National Airspace System.

DATES: Effective 0901 UTC, March 24, 2022. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11F, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov//air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. FAA Order JO 7400.11F is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order JO 7400.11F at NARA, email *fr.inspection@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Richard Roberts, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–2245.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority

described in Subtitle VII, part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish Class E airspace extending upward from 700 feet above ground level to support IFR operations at Rogers Field, Chester, CA.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (86 FR 43456; August 9, 2021) for Docket No. FAA–2021–0557 to establish Class E airspace at Rogers Field, Chester, CA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. One comment in support of the action was received.

Class E airspace designations are published in paragraphs 6005 of FAA Order JO 7400.11F, dated August 10, 2021, and effective September 15, 2021, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021. FAA Order JO 7400.11F is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11F lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

The FAA is amending 14 CFR part 71 by establishing Class E airspace extending upward from 700 feet above the surface of the earth at Rogers Field, Chester, CA.

The Class E airspace will be established extending upward from 700 feet above ground level (AGL) within a 4-mile radius of the airport. In addition, airspace extending upward from 700 feet AGL will be established within an area 2 miles each side of the approach course to runway 34, extending 3.3 miles south from the 4-mile radius parallel to the extended center line of runway 16, then proceeding southeast 7 miles on a course of 131°. This will form a dog leg that provides controlled airspace for aircraft as they descend below 1500 feet AGL on approach to runway 34. The airspace extending upward from 700 feet AGL will also include an area 2 miles each side of the 330° bearing from the airport extending from the 4-mile radius northwest to 5.5 miles from the airport. This area will provide controlled airspace for the departure and missed approach procedures.

FAA Order JO 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial, and unlikely to result in adverse or negative comments. 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 rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021, 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 Chester, CA [NEW]

Rogers Field Airport, CA
(Lat. 40°16′57″ N, long. 121°14′28″ W)

That airspace extending upward from 700 feet within a 4-mile radius of the airport and that area bounded by a line beginning at the point the 202° bearing intersects the 4-mile radius to lat. 40°08′35.96″ N, long. 121°15′41.59″ W; to lat. 40°3′58.22″ N, long. 121°08′45.53″ W; to lat. 40°07′0.09″ N, long. 121°05′18.56″ W; to lat. 40°10′9.68″ N, long. 121°9′57.89″ W; to lat. 40°11′32.19″ N, long. 121°10′51.97″ W; to the point the 144° bearing intersects the 4-mile radius thence clockwise along the 4-mile radius to the point of beginning, and that airspace 2 miles each side of the 330° bearing extending from the 4-mile radius to 5.5 miles northwest of the airport.

Issued in Des Moines, Washington, on November 30, 2021.

B.G. Chew,
Acting Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2021–26481 Filed 12–7–21; 8:45 am]
BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 306

RIN 3084–AB39

Automotive Fuel Ratings, Certification and Posting

AGENCY: Federal Trade Commission.

ACTION: Final rule; conforming amendment.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is updating a reference in its rule for Automotive Fuel Ratings, Certification and Posting (''Fuel Rating Rule'' or ''Rule'') to reflect the Environmental Protection Agency's (''EPA'') recent

reorganization of its fuel-related regulations.

DATES: These rule revisions are effective on December 8, 2021.

FOR FURTHER INFORMATION CONTACT: Hampton Newsome (202–326–2889), Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room CC–9528, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Conforming Amendment

Recently, EPA issued amendments streamlining its fuel quality regulations (85 FR 78412 (Dec. 4, 2020)). As part of this process, EPA transferred regulations that are cross-referenced in the FTC's Fuel Rating Rule from 40 CFR part 80 to a new 40 CFR part 1090. To conform to these changes, the FTC amends § 306.10 of its Fuel Rating Rule to update a reference to EPA's ethanol labeling requirements in paragraph (a). Specifically, in 16 CFR 306.10(a), the amendment removes the reference to 40 CFR 80.1501 and adds, in its place, a reference to 40 CFR 1090.1510 (the new location of those same EPA requirements).

II. Procedural Requirements

There is good cause for adopting this final rule without advance public notice or an opportunity for public comment.[1] The amendment published in this document merely updates a cross reference to an EPA fuel quality rule referenced in the Commission's Rule. This minor technical revision does not change any substantive obligations under the Rule or create new requirements. In addition, under the Administrative Procedure Act, a final rule may be made effective without 30 days advance publication in the **Federal Register** if an agency finds good cause. Prompt adoption of this amendment is necessary to avoid confusion by updating the Rule's reference to EPA's ethanol labeling requirement. Therefore, this final rule is effective upon publication in the **Federal Register**.

The Office of Management and Budget (''OMB'') has approved the information collections contained in the Rule through September 30, 2023 (OMB Control No. 3084–0068). Since this amendment only updates a cross-reference to existing EPA requirements, it does not change the Rule's information collection requirements and does not require further OMB clearance. The requirements of the Regulatory Flexibility Act also do not apply.[2]

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

List of Subjects in 16 CFR Part 306

Fuel, Fuel ratings, Gasoline, Trade practices.

For the reasons discussed in the preamble, the Federal Trade Commission amends part 306 of Title 16 of the Code of Federal Regulations as follows:

PART 306—AUTOMOTIVE FUEL RATINGS, CERTIFICATION AND POSTING

■ 1. The authority citation for part 306 continues to read as follows:

Authority: 15 U.S.C. 2801 *et seq.;* 42 U.S.C. 17021.

§ 306.10 [Amended]

■ 2. In § 306.10, in paragraph (a), remove ''40 CFR 80.1501'' and add in its place ''40 CFR 1090.1510''.

April J. Tabor,

Secretary.

[FR Doc. 2021–26558 Filed 12–7–21; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 890

[Docket No. FDA–2021–P–0424]

Medical Devices; Exemption From Premarket Notification: Powered Patient Transport, All Other Powered Patient Transport

AGENCY: Food and Drug Administration, HHS.

ACTION: Final amendment; final order.

SUMMARY: The Food and Drug Administration (FDA or Agency) is publishing an order setting forth the final determination of a petition requesting exemption from premarket notification (510(k)) requirements for the generic device type, powered patient transport, all other powered patient transport (product code ILK), classified as class II devices. These devices are motorized devices used to mitigate mobility impairment caused by injury or other disease by moving a person from one location or level to another, such as up and down flights of stairs. These devices do not include motorized three-wheeled vehicles or wheelchairs, and are distinct from the device type, powered patient transport, powered patient stairway chair lifts, which is classified separately within the same regulation (product code PCD). FDA is publishing this order in accordance with procedures established in the Federal Food, Drug, and Cosmetic Act (FD&C Act).

DATES: This order is effective December 8, 2021.

FOR FURTHER INFORMATION CONTACT: Dan Reed, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm.1526, Silver Spring, MD 20993–0002, 240–402–4717.

SUPPLEMENTARY INFORMATION:

I. Statutory Background

Section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and its implementing regulations in part 807, subpart E (21 CFR part 807, subpart E) require persons who propose to begin the introduction or delivery for introduction into interstate commerce for commercial distribution of a device intended for human use to submit a 510(k) to FDA. The device may not be marketed until FDA finds it ''substantially equivalent'' within the meaning of section 513(i) of the FD&C Act (21 U.S.C. 360c(i)) to a legally marketed device that does not require premarket approval.

On November 21, 1997, the President signed into law the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115), section 206 of which added section 510(m) to the FD&C Act, which was amended on December 13, 2016, by the 21st Century Cures Act (Cures Act) (Pub. L. 114–255). Section 510(m)(1) of the FD&C Act, requires FDA to publish in the **Federal Register** a list of each type of class II device that does not require a report under section 510(k) of the FD&C Act to provide reasonable assurance of safety and effectiveness. Section 510(m) of the FD&C Act further provides that a 510(k) will no longer be required for these devices upon the date of publication of the list in the **Federal Register**. FDA published the required lists in accordance with FDAMA and the Cures Act, in the **Federal Register** of January 21, 1998 (63 FR 3142), and July 11, 2017 (82 FR 31976), respectively.

---

[1] Notice and comment are not required ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore 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)(3)(B).

[2] A regulatory flexibility analysis under the RFA is required only when an agency must publish a notice of proposed rulemaking for comment. *See* 5 U.S.C. 603.

Section 510(m)(2) of the FD&C Act provides that FDA may exempt a device from 510(k) requirements on its own initiative, or upon petition of an interested person, if FDA determines that a 510(k) is not necessary to provide assurance of the safety and effectiveness of the device. This section requires FDA to publish in the **Federal Register** a notice of intent to exempt a device, or of the petition, and to provide a 60-day period for public comment. Within 120 days after the issuance of the notice, FDA shall publish an order in the **Federal Register** setting forth the final determination regarding the exemption of the device that was the subject of the notice. If FDA fails to respond to a petition under this section within 180 days of receiving it, the petition shall be deemed granted.

FDA classified powered patient transport devices into class II effective December 23, 1983 (48 FR 53032, November 23, 1983). All powered patient transport devices were class II devices regulated under § 890.5150 (21 CFR 890.5150), product code ILK. In 2013, FDA amended § 890.5150 in response to a citizen petition requesting the Agency exempt permanently mounted stairway chair lifts from premarket notification requirements (78 FR 14015, March 4, 2013). In granting this request, FDA defined a subset of powered patient transport devices classified under new § 890.5150(a), identified as ''powered patient stairway chair lifts,'' product code PCD, and exempted this subset of devices from 510(k) premarket notification requirements provided certain conditions are met. The exemption did not affect ''all other powered patient transport devices'' identified under new § 890.5150(b), product code ILK. Under § 890.5150(b), a powered patient transport is a motorized device intended for use in mitigating mobility impairment caused by injury or other disease by moving a person from one location or level to another, such as up and down flights of stairs (*e.g.,* attendant-operated portable stair-climbing chairs). This generic type of device does not include motorized three-wheeled vehicles or wheelchairs.

II. Criteria for Exemption

There are a number of factors FDA may consider in order to determine whether a 510(k) is necessary to provide reasonable assurance of the safety and effectiveness of a class II device. FDA generally considers the following factors to determine whether premarket notification is necessary: (1) The device does not have a significant history of false or misleading claims or risks associated with inherent characteristics of the device (when making these determinations, FDA has considered the risks associated with false or misleading claims, and the frequency, persistence, cause or seriousness of the inherent risks of the device); (2) characteristics of the device necessary for its safe and effective performance are well established; (3) changes in the device that could affect safety and effectiveness will either (a) be readily detectable by users by visual examination or other means such as routine testing, before causing harm, or (b) not materially increase the risk of injury, incorrect diagnosis, or ineffective treatment; and (4) any changes to the device would not be likely to result in a change in the device's classification. FDA may also consider that, even when exempting devices, these devices would still be subject to the limitations on exemptions.

These factors are discussed in the guidance that the Agency issued on February 19, 1998, entitled ''Procedures for Class II Device Exemptions from Premarket Notification, Guidance for Industry and CDRH Staff'' (Class II 510(k) Exemption Guidance). That guidance can be obtained through the internet at *https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM080199.pdf* or by sending an email request to *CDRH-Guidance@fda.hhs.gov* to receive a copy of the document. Please use the document number 159 to identify the guidance you are requesting.

III. Petition

On April 30, 2021, FDA received a petition requesting an exemption from premarket notification for powered patient transport, all other powered patient transport (see Docket No. FDA–2021–P–0424). These devices are currently classified under § 890.5150(b), powered patient transport, all other powered patient transport. The classification regulation is split into paragraphs (a) and (b) with stairway chair lifts classified under § 890.5150(a) (product code PCD), exempt from premarket notification requirements provided certain conditions are met, while all other powered patient transport devices are classified in § 890.5150(b) (product code ILK) and remain subject to premarket notification requirements. Importantly, many different devices are classified under the generic device-type within § 890.5150(b). The FDA review focused on ''all other powered patient transport'' devices identified under § 890.5150(b), and specifically, powered portable stair-climbing chairs as described in the petition (see Docket No. FDA–2021–P–0424).

In the **Federal Register** of June 15, 2021 (86 FR 31722), FDA published a notice announcing that this petition had been received and provided opportunity for interested persons to submit comments on the petition by August 16, 2021. In the **Federal Register** of June 30, 2021 (86 FR 34770), FDA published a correction to the docket number, and, in the **Federal Register** of July 23, 2021 (86 FR 39047), subsequently extended the opportunity to submit comments on the petition to August 30, 2021. FDA received one comment that is unrelated to the petition and, thus, outside the scope of this final order.

FDA completed review of the petition and assessed the need for 510(k) clearance for this type of device against the criteria laid out in the Class II 510(k) Exemption Guidance. Based on this review, and for the reasons described in section IV, FDA has determined that premarket notification is necessary to provide a reasonable assurance of the safety and effectiveness of powered patient transport, all other powered patient transport, § 890.5150(b)(2) (product code ILK). Accordingly, FDA responded to the petition by letter dated October 19, 2021, denying the petition within the 180-day timeframe under section 510(m)(2) of the FD&C Act (see Docket No. FDA–2021–P–0424).

IV. Order

After reviewing the petition, FDA has determined that the petition failed to provide information to demonstrate that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. FDA analyzed the petition against the criteria laid out in the Class II 510(k) Exemption Guidance.

A. The Device Does Not Have a Significant History of False or Misleading Claims or Risks Associated With Inherent Characteristics of the Device

The petition included a 5-year look at FDA medical device reports (MDRs), the FDA medical device recall database, and the FDA warning letter database using § 890.5150, product code ILK and other product codes for other device classifications, which are listed as comparable device classifications to powered patient transport, all other powered patient transport. While FDA does not have a concern related to the absence of warning letters or recalls nor, more generally, to a significant history of false or misleading claims, we do not agree that the use of the device is well

established without any reports of patient or user injury or that the device does not have a significant history of risks associated with inherent characteristics of the device solely based on a non-substantial number of MDR reports of patient or user injury. Although there have been no MDRs submitted to the Agency in the past 5 years for powered portable stair-climbing chairs under product code ILK, since September 15, 1998, FDA has received four MDRs related to powered patient transport devices including two involving serious injury to the patient, one of which involved both patient and operator injury.

The petition includes a comparison to other devices, but because these other devices and powered portable stair-climbing chairs differ in technological characteristics and safety profiles, a comparison of the number of MDRs does not provide relevant information regarding the history of risks associated with the inherent characteristics of powered patient transports under § 890.5150(b), or powered portable stair-climbing chairs more specifically.

The petition also does not consider risks associated with powered wheelchairs, which must also be analyzed given that the FDA-cleared powered portable stair-climbing chairs adhere to wheelchair consensus standards, and the unique stair-climbing functionality of the powered portable stair-climbing chair can entail a higher degree of risk related to stability concern during stair climbing and greater possiblity of human/operator error.

Additionally, analysis of MDRs for purposes of determining risks associated with inherent characteristics of the device should be viewed in light of the intended population and environment for use. As compared to other powered patient-transport devices that are used more regularly, portable stair-climbing chairs are a less common option used to transport patients, used more frequently for emergencies or when a conventional elevator is not an option. In this case, there have only been three powered portable stair-climbing chairs cleared since 1990. Thus, the risks associated with the inherent characteristics of the device, as analyzed through infrequent premarket submissions spanning over the last 30 years, cannot be proved or disapproved with reasonable certainty from the MDR system due to the lack of information about prevalence and frequency of use. Therefore, this device, as compared to the other referenced exempted devices, does not present a lower risk and a premarket review is required to provide reasonable assurance of safety and effectivenss for this device type.

B. Characteristics of the Device Necessary for Its Safe and Effective Performance Are Well Established

The petition states that characteristics of the devices necessary for their safe and effective performance are well established as demonstrated by adherence to the Quality System Regulation (QSR) (21 CFR part 820) and FDA-recognized consensus standards. To illustrate, the petition compares certain features of the subject devices to other referenced devices exempt from premarket notification. FDA does not agree that adherence to the QSR and FDA-recognized consensus standards or that industry familiarity with characteristics of the subject device alone are adequate to provide assurance of safety and effectiveness of the devices or that the features of the referenced devices exempt from premarket notification are relevant to key characteristics of the subject devices.

The consensus standards referenced in the petition apply to devices classified under § 890.5150(b), and not just the subject device, powered portable stair-climbing chair. Adherence to consensus standards, as applicable to powered portable stair-climbing devices, would not be sufficient to ensure the devices are safe and effective throughout their lifecycle because existing standards do not cover important aspects of design (*e.g.,* lift mechanism), maintenance, alteration, and repair. There are certain key design characteristics, including the stair-climbing function, that can differ and would need to be reviewed on a case-by-case basis. Additionally, FDA has only cleared three portable stair-climbing chair devices with a different design of the stair-climbing function among the manufacturers, for instance one uses a climbing foot on each of the rear wheels while another uses a motor and chain driven lifting frame mechanism. Similarly, the other devices used as comparisons have designs that differ significantly from the cleared portable stair-climbing chair devices. The petition does not provide any information to address how the safety and effectiveness of these devices, despite their design differences, can be assured through adherence to QSR and FDA recognized consensus standards even where industry may be familiar with characteristics of the subject device. Due to the small volume of devices cleared under the subject regulation and lack of an FDA-recognized consensus standards covering all the design, maintenance, alteration, and repair features of these devices, the characteristics of the devices necessary for their safe and effective performance currently are not well established through existing clearances or comparison to other device types that are currently exempt from premarket notification.

C. Changes in the Device That Could Affect Safety and Effectiveness Will Either Be Readily Detectable by Users by Visual Examination or Other Means Such as Routine Testing, Before Causing Harm or Not Materially Increase the Risk of Injury, Incorrect Diagnosis, or Ineffective Treatment

The petition states that changes in the devices that could affect safety and effectiveness will either be readily detectable by users or not materially increase the risk of injury, incorrect diagnosis, or ineffective treatment. This statement is supported by referencing how adequate adherence to control processes under 21 CFR 820.30 and risk management under FDA recognized consensus standard International Organization for Standards (ISO 14971 will adequately control safety and effectiveness. The petition also references the general labeling requirements under 21 CFR part 801 and FDA recognized consensus standard ISO 15223–1 for labeling symbols as effective management of changes in the device that could affect safety and effectiveness detectability for users.

FDA does not agree that changes in these devices that could affect safety and effectiveness will either be readily detectable by users or not materially increase the risk of injury. Based on the powered and portable nature of these devices, and based on the designs of the three devices FDA has cleared in this category, FDA is aware of certain design characteristics that could be changed without being readily detectable by users and could increase risk of injury. For example, changes that would not necessarily be apparent to an end user could include, but would not be limited to, the device's motor, battery power source, and internal electrical and nonelectrical components. Such changes may not be fully addressed by control processes, risk management, and labeling alone in providing readily apparent detectability for device users, especially for less visible changes. Risks of injury that could be affected by changes to these characteristics include, but are not limited to, inadequate battery performance and safety, electromagnetic incompatibility (emissions and immunity) and other electrical safety, reduced resistance to ignition of upholstered parts, users

falling out of the device, and insufficient mechanical strength of the device and stair-climbing mechanism.

D. Any Changes to the Device Would Not Be Likely to Result in a Change in the Device's Classification

Lastly, the petition states that any changes to the devices would not be likely to result in a change in the device's classification. Specifically, the petition states that the ''device has been on the market for several decades and is well characterized and understood by manufacturers and healthcare professionals.'' The petition then cites to section 513(g) of the FD&C Act as a mechanism to obtain the Agency's views about the classification and applicable regulatory requirements for a device that has been significantly changed. As noted above, FDA does not agree with petitioner that the subject devices are well characterized at this time, thus we cannot foresee whether, or what, changes will result in the devices' classification. While FDA agrees that section 513(g) is an appropriate mechanism to obtain the Agency's views about the classification and applicable regulatory requirements of a device, the mere fact that such an optional feedback mechanism exists may only contribute to, but would not guarantee, the reasonable assurance of safety and effectiveness of any particular device. Additionally, because FDA believes that a change to the device would be likely to result in a change in classification, FDA did not evaluate petitioner's contention that the limitations on exemption under 21 CFR 890.9 would apply to any changes that do not result in a change in classification. Thus, the petitioner's response to this factor does not weigh in favor of exemption from the requirements of premarket notification.

For all the foregoing reasons, the petition failed to demonstrate that premarket notification is not necessary to provide reasonable assurance of safety and effectiveness for the subject device type. Therefore, FDA denied the petition request for exemption from premarket notification requirements for powered patient transport, all other powered patient transport, and is issuing this order setting forth the final determination. Manufacturers of this device type must continue to submit and receive FDA clearance of a 510(k) submission before marketing their device, as well as comply with all other applicable requirements under the FD&C Act.

V. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Paperwork Reduction Act of 1995

While this final order contains no new collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) is not required for this final order. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 820, regarding quality system regulation, have been approved under OMB control number 0910–0073; the collections of information in 21 CFR part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control number 0910–0120; and the collections of information in 21 CFR parts 800, 801, and 809, regarding labeling, have been approved under OMB control number 0910–0485.

Dated: December 3, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–26636 Filed 12–7–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918, 1926, and 1928

[Docket No. OSHA–2021–0007]

RIN 1218–AD42

COVID–19 Vaccination and Testing; Emergency Temporary Standard

Correction

In rule document 2021–26268, appearing on page 68560 in the issue of Friday, December 3, 2021, make the following correction:

On page 68560, in the first column, in the **DATES** section, on the third and fourth lines, ''86 FR 6140'' should read, ''86 FR 61402''.

[FR Doc. C1–2021–26268 Filed 12–7–21; 8:45 am]

BILLING CODE 0099–10–D

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

National Endowment for the Humanities

45 CFR Part 1177

RIN 3136–AA38

Claims Collection; Correction

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Direct final rule; correction.

SUMMARY: The National Endowment for the Humanities (NEH) is correcting a direct final rule that published November 24, 2021, in the **Federal Register**. The final rule revised the NEH Claims Collection regulation in accordance with the Debt Collection Improvement Act of 1996 (DCIA), as implemented by the Department of Justice (DOJ) and the Department of Treasury (Treasury) in the revised Federal Claims Collection Standards (FCCS). NEH discovered two errors after publications that could cause confusion and is correcting those errors in this document.

DATES: Effective February 22, 2022.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Deputy General Counsel, Office of the General Counsel, National Endowment for the Humanities, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *gencounsel@neh.gov.*

SUPPLEMENTARY INFORMATION: In FR Doc. 2021–23742, appearing in the **Federal Register** of November 24, 2021, starting on page 66964, make the following corrections:

§ 1177.9 [Corrected]

■ 1. On page 66967, in the second column, designate the second paragraph (e) as paragraph (f).

§ 1177.24 [Corrected]

■ 2. On page 66973 in the first column, correct the paragraph designations ''a.'' and ''b.'' to read as ''(a)'' and ''(b)''.

Authority: 31 U.S.C. 3711, 3716–3719; Pub. L. 104–134; 31 CFR 900–904.

Dated: December 3, 2021.

Samuel Roth,

Attorney-Advisor, National Endowment for the Humanities.

[FR Doc. 2021–26606 Filed 12–7–21; 8:45 am]

BILLING CODE 7536–01–P

Proposed Rules

Federal Register

Vol. 86, No. 233

Wednesday, December 8, 2021

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 HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. ICEB–2020–0010]

Privacy Act of 1974: Implementation of Exemptions; U.S. Department of Homeland Security U.S. Immigrations and Customs Enforcement, DHS/ICE–001 Student and Exchange Visitor Program System of Records, Formerly Known as the Student and Exchange Visitor Information System of Records

AGENCY: U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Homeland Security (DHS) is giving concurrent notice of an updated and reissued system of records pursuant to the Privacy Act of 1974 for the ''DHS/ U.S. Immigrations and Customs Enforcement (ICE)–001 Student and Exchange Visitor Program System of Records'' and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: Comments must be received on or before January 7, 2022.

ADDRESSES: You may submit comments, identified by docket number ICEB–2020–0010, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Lynn Parker Dupree, Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528–0655.

Instructions: All submissions received must include the agency name and docket number ICEB–2020–0010. All comments received will be posted without change to *https://www.regulations.gov/,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov/.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Jordan Holz, (202) 732–3300, Privacy Officer, *ICEPrivacy@ice.dhs.gov,* U.S. Immigration and Customs Enforcement, 500 12th SW, Washington, DC 20536. For privacy issues please contact: Lynn Parker Dupree, (202) 343–1717, Chief Privacy Officer, *Privacy@hq.dhs.gov,* Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528–0655.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE) proposes to modify, rename, and reissue a current DHS system of records notice (SORN) titled, ''DHS/ICE–001 Student and Exchange Visitor Information System (SEVIS),'' 75 FR 412 (January 5, 2010). ICE had previously reissued a Final Rule for this SORN on October 23, 2008, published at 73 FR 63057. As a result of the modifications to this SORN, DHS/ICE is proposing to issue this new rule.

The DHS/ICE update to SEVIS includes several changes. First, the system of records is being renamed ''Student and Exchange Visitor Program (SEVP)'' to better align with the purpose of the program. The system of records contains records on nonimmigrant students and exchange visitors and their dependents admitted to the United States under the F, M, or J class of admission (hereinafter, ''F/M/J nonimmigrants''), and the schools and program sponsors that enroll F/M nonimmigrants and host J nonimmigrants in the United States, to ensure compliance with immigration laws and regulations and to ensure such persons' nonimmigrant status is maintained. In addition, this system of records contains records on the certification of academic and vocational schools to authorize the enrollment of F and M nonimmigrant students based on federal regulations, and provides guidance and training to school officials about the SEVP certification requirements to which schools must adhere to and the requirements that nonimmigrant students must follow to maintain their nonimmigrant status.

Second, DHS is clarifying the types of individuals and entities contained in this expanded system of records. Some items in the categories of individuals section have been reorganized and edited to more clearly identify the individuals, as well as expanded to include new categories of individuals, such as employers, financial support providers, government bodies and personnel, host families, members of the public, school employees, school partners, and school and exchange visitor program officials.

Third, DHS is modifying and expanding the categories of records section to better identify the types of information contained in the system of records. The new categories of records include education, employment, financial, travel, immigration-related information, school, program sponsor, case-related information, auditing and training, reporting, and inquiries and data corrections.

Fourth, DHS is modifying Routine Use E and adding Routine Use F to conform to Office of Management and Budget (OMB) Memorandum M–17–12, ''Preparing for and Responding to a Breach of Personally Identifiable Information'' (Jan. 3, 2017). All the following routine uses are being renumbered to account for the additional routine uses.

Finally, DHS is proposing to eliminate several routine uses, modify several routine uses, and add two new routine uses that would allow ICE to share information from the SEVP system of records with the specified recipients for the specified purpose. Below is a summary of those routine uses and their corresponding letter.

(J) Routine Use J is being updated to include disclosures to parties to an administrative proceeding where DHS has an interest in the outcome. This modification eliminates the need for two routine uses previously identified as Routine Uses K and L, and subsequent routine uses are being relettered to account for this change.

(O) Existing Routine Use P is being updated and relettered as Routine Use O

to clarify that information may be shared about nonimmigrants between certified schools or programs as part of the transfer process from one school or program to another.

(R) Existing Routine Use S is being updated to be consistent with the DHS standard routine use for technology and is now Routine Use R. The modification eliminates the need for one routine use previously identified as Routine Use T, and subsequent routine uses are being re-lettered to account for this change.

(V) Routine Use V is being added to permit sharing identifying information with accrediting agencies, recognized by the Department of Education (ED), to facilitate the inspection and validation of schools and exchange visitor programs in adherence to laws and regulations, and subsequent routine uses are being re-lettered to account for this additional routine use.

(W) Routine Use W is being added to clarify the sharing and disclosure of information to federal, state, local, and other government and public agencies, including foreign or international agencies when the information is relevant and necessary to DHS or a requesting agency's decision concerning the hiring or retention of an individual, or the issuance, grant, renewal, suspension or revocation of a security clearance, license, contract, grant or other benefit.

Information in the SEVP system of records may be shared with other DHS Components that have a need to know the information to carry out their national security, law enforcement, immigration, intelligence, or other homeland security functions. In addition, DHS/ICE may share information with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies consistent with the routine uses set forth in this SORN. This modified system of records will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies Fair Information Practice Principles in a statutory framework that governs the means by which federal government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A system of records is a group of records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other matched identifiers assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. Further, those persons who do not currently fall under the definition of individuals may naturalize or adjust status, thus becoming Privacy Act-covered individuals, over the course of this system's records retention schedule.

Additionally, the Judicial Redress Act (JRA) provides covered persons with a statutory right to make requests for access and amendment to covered records, as defined by the JRA, along with judicial review for denials of such requests. The JRA also prohibits disclosures of covered records, except as otherwise permitted by the Privacy Act.

The Privacy Act allows government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/ICE–001 SEVP System of Records. Some information in the DHS/ICE–001 SEVP System of Records relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

In appropriate circumstances, when compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case-by-case basis.

A notice of System of Records for DHS/ICE–001 SEVP is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS proposes to amend chapter I of title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for Part 5 continues to read as follows:

Authority: 6 U.S.C. 101 *et seq.;* Pub. L. 107–296, 116 Stat. 2135; 5 U.S.C. 301.

■ 2. In Appendix C to Part 5, revise paragraph 10 to read as follows:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

10. The DHS/ICE–001 Student and Exchange Visitor Program System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/ICE–001 Student and Exchange Visitor Program System of Records is a repository of information held by DHS in connection with collecting and maintaining pertinent information on nonimmigrant students and exchange visitors, schools and exchange visitor programs, school officials and exchange visitor sponsors that host exchange visitors while in the United States. In addition, SEVP maintains and collects information pertinent to the certification and oversight of academic and vocational schools (U.S.-based schools) that seek to enroll F and M nonimmigrant students to ensure compliance with federal laws and regulations. Failure to comply will result in the withdrawal of the school's certification, prohibiting the school from enrolling F and M nonimmigrant students.

This system of records permits DHS to monitor compliance by these persons with the terms of their admission to the United States, and assists DHS with its several and varied missions and functions, including, but not limited to, the enforcement of civil and criminal laws, and the investigations, inquiries, and proceedings thereunder, and national security and intelligence activities. The DHS/ICE–001 Student and Exchange Visitor Program System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies.

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2) has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8); (f); and (g)(1). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(1) and (k)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f).

Where a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions set forth here.

Exemptions from these particular subsections are justified, on a case-by-case

basis, to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process. When an investigation has been completed, information on disclosures made may continue to be exempted if the fact that an investigation occurred remains sensitive after completion.

(b) From subsection (d) (Access and Amendment to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interest of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(f) From subsections (e)(4)(G) through (I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to the existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because, with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in the disclosure of investigative techniques, procedures, and evidence.

(j) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

* * * * *

Lynn Parker Dupree,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2021–26478 Filed 12–7–21; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Chapter X

RIN 1506–AB54

Anti-Money Laundering Regulations for Real Estate Transactions

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: FinCEN is issuing this advance notice of proposed rulemaking (ANPRM) to solicit public comment on potential requirements under the Bank Secrecy Act (BSA) for certain persons involved in real estate transactions to collect, report, and retain information. The systemic money laundering vulnerabilities presented by the U.S. real estate sector, and consequently, the ability of illicit actors to launder criminal proceeds through the purchase of real estate, threatens U.S. national security and the integrity of the U.S. financial system. Accordingly, FinCEN intends to begin the rulemaking process to address such vulnerabilities. As a first step in this rulemaking process, FinCEN is issuing this ANPRM to seek initial public comment on questions that will assist FinCEN in the consideration and preparation of a proposed rule.

DATES: Written comments on this advance notice of proposed rulemaking may be submitted on or before February 7, 2022.

ADDRESSES: Comments may be submitted, identified by Regulatory Identification Number (RIN) 1506–AB54, by any of the following methods:

Federal E-rulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. Include 1506–AB54 in the submission. Refer to Docket Number FINCEN–2021–0007.

Mail: Financial Crimes Enforcement Network, Global Investigations Division, P.O. Box 39, Vienna, VA 22183. Include 1506–AB54 in the body of the text. Refer to Docket Number FINCEN–2021–0007.

Please submit comments by one method only.

FOR FURTHER INFORMATION CONTACT: FinCEN: The FinCEN Regulatory Support Section at 1–800–767–2825 or electronically at *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The goal of this rulemaking process is to implement an effective system to collect and permit authorized uses of information concerning potential money laundering associated with non-financed transactions [1] in the United States real estate market. FinCEN expects that doing so will strengthen the United States' national security and the integrity of the U.S. financial system. With this ANPRM, FinCEN seeks input on how it should implement such a system, consistent with the Bank Secrecy Act (BSA), to maximize benefits while minimizing burdens on reporting financial institutions and nonfinancial trades or businesses.

[1] For the purposes of this ANPRM, the terms ''non-financed purchase,'' ''non-financed transaction,'' ''all-cash purchase,'' and ''all-cash transaction'' refer to any real estate purchase or transaction that is not financed via a loan, mortgage, or other similar instrument, issued by a bank or non-bank residential mortgage lender or originator, and that is made, at least in part, using currency or value that substitutes for currency (including convertible virtual currency (CVC)), or a cashier's check, a certified check, a traveler's check, a personal check, a business check, a money order in any form, or a funds transfer.

Money laundering vulnerabilities exist throughout the United States real estate market. These vulnerabilities are not limited to any particular sector. Although in recent years FinCEN has focused its information collection efforts on non-financed purchases of residential real estate by shell companies, FinCEN believes that other areas of the real estate market, such as commercial real estate and certain real estate purchases by natural persons, may merit regulatory coverage.

For this rulemaking process, FinCEN is considering how best to focus its regulatory attention on residential and commercial real estate transactions. FinCEN notes that money laundering risks stem from transactions in both the commercial and residential real estate sectors, and both merit appropriate regulatory treatment. At the same time, FinCEN recognizes that an iterative approach may be warranted given the complexities and differences between different market sectors and the potential burdens that new reporting and recordkeeping requirements may have for businesses. If an iterative approach is warranted, FinCEN could initially focus on residential real estate followed by additional action to promulgate regulations covering the commercial real estate sector, as well as any other regulatory gaps that may exist with money laundering vulnerabilities involving real estate. FinCEN invites comments regarding the approach that it should take with respect to regulatory treatment of residential and commercial real estate and the money laundering threats presented by these sectors.

This ANPRM seeks comment to assist FinCEN in preparing a potential proposed rule that would seek to impose nationwide recordkeeping and reporting requirements on certain persons participating in transactions involving non-financed purchases of real estate. FinCEN has not previously imposed the BSA's general recordkeeping and reporting requirements on businesses involved in non-financed real estate transactions, but FinCEN has imposed more specific transaction reporting requirements on title insurance companies in the form of time-limited Geographic Targeting Orders under 31 U.S.C. 5326(a). This ANPRM seeks public comment on whether FinCEN should impose a similar, ongoing, and expanded reporting requirement through regulations. Such a rule could be promulgated under 31 U.S.C. 5318(a)(2). FinCEN invites comments on alternative approaches to address the risk of money laundering in non-financed real estate transactions, including, for example, potentially promulgating general BSA recordkeeping and reporting requirements for ''persons involved in real estate settlements and closings'' under 31 U.S.C. 5318(g)(1) and related program requirements under 31 CFR 5318(h).[2]

FinCEN seeks comment on the potential scope of any such regulations, including, among other things: The persons who should be subject to the requirements; which types of real estate purchases should be covered; what information should be reported and retained; the geographic scope of such a requirement; and the appropriate reporting dollar-value threshold. FinCEN also invites general comments regarding the risk of money laundering and other illicit financial activities in the real estate market and the extent to which any reporting requirements would address that risk.

II. Money Laundering in Real Estate

Treasury, working with law enforcement partners, has highlighted the money laundering risks and typologies associated with the U.S. real estate market. As Treasury explained in its 2020 National Strategy for Combating Terrorist and Other Illicit Financing, ''[c]riminals with widely divergent levels of financial sophistication use real estate at all price levels to store, launder, or benefit from illicit funds.'' In that report Treasury identified the risks of the laundering of illicit proceeds through real estate purchases as a main vulnerability and key action item for strengthening the U.S. Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) framework. Law enforcement actions—including complaints, indictments, and prosecuted cases—confirm the conclusions in the report on the linkages between real estate transactions and money laundering and other illicit activities.[3]

Indeed, as the Congressional Research Service recently noted, real estate money laundering ''schemes can involve a wide range of conventional domestic criminals, as well as transnational criminals, including drug cartels and human traffickers, international terrorists, and foreign kleptocrats (corrupt high-level officials).'' [4] As such, ''[t]he purchase of real estate, often combined with methods to conceal a purchaser's identity and source of funds, can allow criminals to integrate ill-gotten proceeds into the legal economy[.]'' [5]

Reports by foreign governments, international standard setters, and a variety of reports by non-governmental organizations (NGOs), inter-governmental organizations, academics, trade organizations, media, and other members of civil society confirm the substantial risk that the real estate market presents for the money laundering problem.

In January 2007, for example, the Financial Action Task Force (FATF), as the global standard setter for combatting money laundering, terrorism financing, and proliferation finance, published a wide-ranging report and series of recommendations that highlighted the vast scope of the money laundering problem in the real estate sector. The FATF has issued guidance—most recently in June 2021—recommending AML/CFT requirements for certain entities involved in real estate transactions.[6] Further, in the FATF's 2016 Mutual Evaluation Report (MER) of the United States, the FATF identified numerous money laundering vulnerabilities in the U.S. real estate sector, noting that ''purchasers often use legal persons to hold real estate and the opaqueness of legal persons . . . is a

---

[2] 31 U.S.C. 5312(a)(2)(U).

[3] *See, e.g., United States* v. *Real Property Located in Potomac, Maryland, Commonly Known as 9908 Bentcross Drive, Potomac, MD 20854,* Case No. 20–cv–02071, Doc. 1 (D. MD Jul. 15, 2020); *United States* v. *Raul Torres,* Case No. 1:19CR390, Doc. 30 (N.D. Ohio Mar. 30, 2020); *United States* v. *Bradley,* No. 3:15–cr–00037–2, 2019 U.S. Dist. LEXIS 141157 (M.D. Tenn. Aug. 20, 2019); *United States* v. *Paul Manafort,* Case 1:18–cr-00083–TSE, Doc. 14 (E.D. Va. Feb. 26, 2018); *United States* v. *Miller,* 295 F. Supp. 3d 690 (E.D. Va. 2018); *United States* v. *Patrick Ifediba, et al.,* Case No. 2:18–cr–00103–RDP–JEO, Doc. 1 (N.D. Alabama Mar. 29, 2018); *Atty. Griev. Comm'n of Md.* v. *Blair,* 188 A.3d 1009 (MD Ct. App. 2018); *United States* v. *Coffman,* 859 F. Supp. 2d 871 (E.D. Ky. 2012); *United States* v. *Delgado,* 653 F.3d 729 (8th Cir. 2011); *United States* v. *Fernandez,* 559 F.3d 303 (5th Cir. 2009); *United States* v. *10.10 Acres Located on Squires Rd.,* 386 F. Supp. 2d 613 (M.D.N.C. 2005); *State* v. *Harris,* 861 A.2d 165 (Super. Ct. App. Div. 2004); ''United States Reaches Settlement to Recover More Than $700 Million in Assets Allegedly Traceable to Corruption Involving Malaysian Sovereign Wealth Fund,'' Press Release, Department of Justice (Oct. 30, 2019), *https://www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-700-million-assets-allegedly-traceable;* ''Acting Manhattan U.S. Attorney Announces $5.9 Million Settlement of Civil Money Laundering And Forfeiture Claims Against Real Estate Corporations Alleged to Have Laundered Proceeds of Russian Tax Fraud,'' Press Release, Department of Justice (May 12, 2017), *https://www.justice.gov/usao-sdny/pr/acting-manhattan-usattorney-announces-59-million-settlement-civil-money-laundering-and.*

[4] ''Money Laundering in the U.S. Real Estate Sector,'' Congressional Research Service (Nov. 9, 2021).

[5] Id.

[6] *See generally* ''Money Laundering & Terrorist Financing through the Real Estate Sector,'' Financial Action Task Force (Jun. 29, 2007); *see* ''International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations,'' Financial Action Task Force, pp. 19–20 (Jun. 2021).

vulnerability which can be exploited by illicit actors.'' [7] Of note, the FATF found the United States' failure to regulate real estate transactions in line with the FATF standards to be a significant deficiency in the U.S. AML/CFT regime.

The European Union has regulated real estate transactions for the purposes of AML/CFT efforts since 2001.[8] In 2019, the European Parliament Research Service (EPRS), the European Parliament's in-house research service, published a briefing indicating the widespread use of real estate in money laundering, and in particular, highlighted the necessity of identifying purchasers of real estate and proper regulatory coverage of professionals involved in such transactions via AML reporting mechanisms.[9]

Concerns about the abuse of the real estate market have also been extensively reported by the press, academia, and civil society organizations. For example, in February 2015, *The New York Times* published a series of articles entitled ''Towers of Secrecy'' on the use of shell companies to purchase high-value residential real estate in New York City.[10] The *Times* also found that shell companies purchased nearly half of the most expensive residential properties in the United States.[11] The articles identified a specific set of real estate transactions as a high potential money laundering risk: The use of shell companies to pay for residential properties in cash at the time of closing, without a corresponding mortgage.[12]

In February 2021, the National Association of Realtors (NAR), an industry trade organization, issued voluntary guidelines for real estate professionals that highlighted the vulnerability of the U.S. real estate market to money laundering, stating that ''many non-financial businesses and professions are also vulnerable to potential money laundering schemes'' and ''[r]eal estate is believed to be used in money laundering schemes, making real estate professionals likely to encounter money laundering activities in the course of their business.'' [13]

In August 2021, Global Financial Integrity (GFI),[14] an NGO, published a study finding that an estimated $2.3 billion had been laundered through the U.S. real estate market over the previous five years. The study further noted that among the cases it reviewed, over 50% involved Politically Exposed Persons (PEPs).[15] Moreover, the study found that the ''use of anonymous shell companies and complex corporate structures continue[d] to be the number one money laundering typology'' involving real estate.[16]

And most recently, in November 2021, The Sentry,[17] an NGO, published a report detailing the use of real estate purchases in the United States and elsewhere by PEPs to launder proceeds from political corruption. According to this report, these PEPs used a network of shell companies to move funds abroad and purchase millions of dollars of real estate, including 17 properties for a total of $6.6 million in Washington, DC, and Johannesburg, South Africa. The report further highlighted the use of shell companies and trusts to obscure the true owners of the properties.[18]

Several key factors contribute to the systemic vulnerability of the U.S. real estate market to money laundering. Those factors include, but are not limited to, lack of transparency, attractiveness of the U.S. real estate market as an investment vehicle, and the lack of industry regulation.

First, the lack of transparency in the real estate market contributes to its vulnerability to money laundering activity. Real estate may be held directly or indirectly through nominees, legal entities (such as one or more shell holding companies), or through various investment vehicles. Buyers may use shell companies in many legitimate circumstances, such as when buyers use legal entities to shield themselves and their assets from liability related to the purchase of real property or as a means of protecting their privacy. Illicit actors, however, can take advantage of the opacity of shell companies or other legal entities or arrangements to mask their identity as the true beneficial owners of the property and their involvement in real estate transactions.

Second, the attractiveness of the U.S. real estate market as a stable vehicle for maintaining and increasing investment value also contributes to its vulnerability to money laundering activity. Illicit actors seek to conceal the origins of their illicit funds in a way that grows as an investment, ''cleans'' as much money as possible with each transaction, and allows them to enjoy the fruits of their illicit activity while minimizing potential losses from market instability and fluctuating exchange rates. Consequently, real estate—especially in a relatively stable market with strong private property protections such as in the United States—is an attractive asset to facilitate money laundering.

Third, the lack of industry regulation for non-financed transactions exacerbates the money laundering vulnerabilities of the U.S. real estate market. Non-financed purchases of real

[7] ''Anti-money laundering and counter-terrorist financing measures in the United States—2016,'' Mutual Evaluation Report, Financial Action Task Force, p. 120 (Dec. 2016).

[8] *See* ''Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering,'' OJ. L. 344, pp. 76–82 (Dec. 28, 2001).

[9] *See* Cécile Remeur, ''Understanding money laundering through real estate transactions,'' European Parliament Research Service, PE 633.154, pp. 5–7 (Feb. 2019).

[10] *See generally* Louise Story, et al., ''Towers of Secrecy,'' Parts 1–7, N.Y. Times, (Feb. 7–Dec. 14, 2015), *https://www.nytimes.com/news-event/shell-company-towers-of-secrecy-real-estate.*

[11] *See* Louise Story & Stephanie Saul, ''Stream of Foreign Wealth Flows to Elite New York Real Estate,'' N.Y. Times (Feb. 7, 2015), *https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html.*

[12] *See also, e.g.,* Vandana Ajay Kumar, ''Money Laundering: Concept, Significance and its Impact,'' European Journal of Business and Management, p. 117 (Vol 4 No. 2 2012) (''The real estate sector is the largest and most vulnerable sector for money laundering. Real estate is important for money laundering, because it is a non-transparent market where the values of the objects are often difficult to estimate and where big value increases can happen and is an efficient method to place large amounts of money.''); *see also generally* ''Money Laundering in Real Estate,'' Conference Report, Terrorism, Transnational Crime and Corruption Center, Schar School of Policy and Government, George Mason University (Mar. 25, 2018).

[13] ''Anti-Money Laundering Voluntary Guidelines for Real Estate Professionals,'' National Association of Realtors, p. 1 (Feb. 21, 2021).

[14] According to its website, GFI is ''a Washington, DC-based think tank focused on illicit financial flows, corruption, illicit trade and money laundering.'' ''About us,'' Global Financial Integrity, *https://gfintegrity.org/about/.*

[15] The term ''PEP'' generally includes a current or former senior foreign political figure, their immediate family, and their close associates. ''Politically Exposed Persons—Overview,'' FFIEC BSA/AML Examination Manual, p. 290 (V5 2015); *see also* ''Joint Statement on Bank Secrecy Act Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons,'' Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, National Credit Union Administration, Office of the Comptroller of the Currency (Aug. 21, 2020). For a clear example of the vulnerabilities of the U.S. residential real estate sector for use to conceal funds by corrupt PEPs, a 2020 forfeiture complaint filed by the Department of Justice states that the former president of The Gambia, Yayha Jammeh, and his spouse, used funds derived from corruption to purchase residential properties in the United States. *See United States* v. *Real Property Located in Potomac, Maryland, Commonly Known as 9908 Bentcross Drive, Potomac, MD 20854,* Case No. 20–cv–02071, Doc. 1 (D. MD Jul. 15, 2020).

[16] Lakshmi Kumar & Kaisa de Bel, ''Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream,'' Global Financial Integrity, p. 4 (Aug. 2021).

[17] According to its website, The Sentry ''is an investigative and policy team that follows the dirty money connected to African war criminals and transnational war profiteers and seeks to shut those benefiting from violence out of the international financial system.'' ''About The Sentry,'' The Sentry, *https://thesentry.org/about/.*

[18] ''Embezzled Empire: How Kabila's Brother Stashed Millions in Overseas Properties,'' The Sentry, p. 3 (Nov. 2021).

estate currently are not subject to AML/CFT regulatory requirements because they do not involve financing underwritten by a financial institution subject to BSA requirements. This leaves a substantial portion of the real estate market without the same AML/CFT protections and safeguards as those applicable to banks, casinos, or other financial institutions. Moreover, data on real estate purchases is held in a patchwork of different state and county databases, making investigation and analysis difficult.

FinCEN recognizes the efforts by trade organizations for real estate professionals, such as the NAR (real estate agents and brokers) and the American Bar Association (settlement attorneys), to establish voluntary AML/CFT guidelines that their members may consider implementing to protect against illicit actors seeking to launder illicit funds.[19] FinCEN considers the issuance of such guidelines as a positive step and indicative of the commitment of the vast majority of real estate professionals to protecting the U.S. real estate sector from illicit activity. Such guidelines, however, are not mandatory or subject to oversight or enforcement and may therefore be avoided by illicit actors. There is also limited information concerning how widely the industry has implemented such best practices and voluntary guidelines, or what other measures are in place to combat money laundering in the real estate sector. In view of this, FinCEN believes that there is a need for regulatory action notwithstanding industry efforts. FinCEN welcomes comments, however, on how the industry has implemented these voluntary guidelines, any challenges in implementation, their effectiveness, and whether FinCEN should consider including elements of existing voluntary guidelines in any potential rule.

In sum, the U.S. real estate market can be an effective vehicle for money laundering and can involve businesses and professions that facilitate (even if unwittingly) acquisitions of real estate in the money laundering process. Accordingly, FinCEN views the structure of the U.S. real estate market to present money laundering vulnerabilities and considers that regulatory action is warranted to collect information from businesses and professions operating in the real estate sector in order to protect U.S. national security and the U.S. financial system.

[19] *See generally* ''Anti-Money Laundering Guidelines for Real Estate Professionals,'' https://www.nar.realtor/articles/anti-money-laundering-guidelines-for-real-estate-professionals.

III. Current Law

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''), the Anti-Money Laundering Act of 2020 (''AML Act''), and other legislation, is the legislative framework commonly referred to as the BSA.[20] The Secretary of the Treasury (''Secretary'') has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations.[21] The purposes of the BSA include requiring certain reports or records that ''are highly useful . . . in criminal, tax, or regulatory investigations, risk assessments, or proceedings,'' or ''in intelligence or counterintelligence activities, including analysis, to protect against international terrorism.'' [22]

Under the BSA, the Secretary may require any financial institution, including ''persons involved in real estate closings and settlements,'' to report any suspicious transaction relevant to a possible violation of law or regulation (a ''suspicious activity report,'' or ''SAR'').[23] The BSA also requires each financial institution to establish AML/CFT programs, including, at a minimum, ''(A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs.'' [24] The Secretary may prescribe minimum standards for such programs, and may exempt any financial institution from the application of such standards.[25] Under the BSA, as amended by Section 6102(c) of the AML Act, the Secretary is also authorized to ''require a class of domestic financial institutions or nonfinancial trades or businesses to maintain appropriate procedures, including the collection and reporting of certain information as the Secretary of the Treasury may prescribe by regulation, to . . . guard against money laundering, the financing of terrorism, or other forms of illicit finance.'' [26]

[20] The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1960, 31 U.S.C. 5311–5314 and 5316–5336, and includes notes thereto, with implementing regulations at 31 CFR chapter X.

[21] Treasury Order 180–01 (Jan. 14, 2020).

[22] 31 U.S.C. 5311. Section 5311 was amended by Section 6002 of the AML Act to add the following additional purposes of the BSA: To prevent the laundering of money and the financing of terrorism through the establishment by financial institutions of reasonably designed risk-based programs to combat money laundering and the financing of terrorism; facilitate the tracking of money that has been sourced through criminal activity or is intended to promote criminal or terrorist activity; assess the money laundering, terrorism finance, tax evasion, and fraud risks to financial institutions, products, or services to protect the financial system of the United States from criminal abuse; and safeguard the national security of the United States; and establish appropriate frameworks for information sharing among financial institutions, their agents and service providers, their regulatory authorities, associations of financial institutions, the Department of the Treasury, and law enforcement authorities to identify, stop, and apprehend money launderers and those who finance terrorists.

[23] 31 U.S.C. 5318(g), 5312(a)(2)(U).

[24] 31 U.S.C. 5318(h)(1)(A)–(D).

FinCEN's regulations implementing the BSA require banks, non-bank residential mortgage lenders and originators (''RMLOs''), and housing-related Government Sponsored Enterprises (''GSEs'') to file SARs and establish AML/CFT programs,[27] but FinCEN's regulations exempt other persons involved in real estate closings and settlements from the requirement to establish AML/CFT programs, and the regulations do not impose a SAR filing requirement on such persons.[28]

IV. Prior Rulemakings

In 2002, FinCEN temporarily exempted certain financial institutions, including ''persons involved in real estate closings and settlements'' and ''loan and finance companies,'' from the requirement to establish an AML/CFT program. FinCEN explained that it would ''continue studying the money laundering risks posed by these institutions in order to develop appropriate anti-money laundering program requirements,'' but that additional time was needed to consider the businesses that would be subject to such requirements, as well as the nature and scope of the AML/CFT risks associated with those businesses.[29] FinCEN also explained its concern that many of these financial institutions were sole proprietors or small businesses, and FinCEN intended to avoid imposing ''unreasonable regulatory burdens with little or no corresponding anti-money laundering benefits.'' [30]

In 2003, FinCEN issued an ANPRM regarding the AML/CFT program

[25] 31 U.S.C. 5318(h)(2)(A), 5318(a)(6). Public Law 107–56, Title III, Sec. 352(c), 115 Stat. 322 (Oct. 26, 2001); 31 U.S.C. 5318(h)(2)(B)(i)–(iii).

[26] 31 U.S.C. 5318(a)(2) (as amended by Section 6102(c) of the AML Act).

[27] 31 CFR parts 1020, 1029, 1030.

[28] 31 CFR 1010.205(b)(1)(v).

[29] 67 FR 21110–21112 (Apr. 29, 2002). FinCEN initially exempted persons involved in closings and settlements for six months, and then subsequently extended the temporary exemption indefinitely. 67 FR 67547 (Nov. 6, 2002).

[30] Id.

requirement for ''persons involved in real estate closings and settlements'' (''2003 ANPRM''). The 2003 ANPRM solicited comments on the money laundering risks in real estate closings and settlements, how to define ''persons involved in real estate closings and settlements,'' whether any persons involved in real estate closings and settlements should be exempted from the AML/CFT program requirement, and how to structure the requirement in light of the size, location, and activities of persons in the real estate industry.[31] FinCEN received 52 comments on the 2003 ANPRM from individuals, various institutions and associations of interested parties, law firms, state bar associations, an office within the Department of Justice (DOJ), and an office within the Internal Revenue Service (IRS).[32] Many comments suggested that the threat of money laundering through real estate warranted appropriate regulation, but commenters disagreed over the specific businesses that should be covered. FinCEN did not propose regulations in response to these comments, and persons involved in real estate closings and settlements continue to be exempt from the AML/CFT program requirement.

FinCEN subsequently focused on the money laundering vulnerabilities in financed real estate transactions, as approximately 80% of real estate transactions are financed by a loan from a financial institution.[33] FinCEN published a number of reports tracking the rise of mortgage fraud SARs covering geographic trends and fraud typologies. These SARs, which were filed by banks and other financial institutions, underscored the illicit activity that can occur in the primary and secondary residential mortgage markets.[34]

In a 2012 final rule, FinCEN eliminated the exemption for ''loan and finance companies,'' and required such companies—defined as non-bank residential mortgage lenders and originators (''RMLOs'')—to file SARs and comply with AML/CFT program obligations.[35] In a 2014 final rule, FinCEN extended similar requirements to the housing-related Government Sponsored Enterprises (''GSEs'')—Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.[36] FinCEN explained that these entities were involved in providing financing to the residential mortgage market, making them vulnerable to fraud and other financial crimes.[37] By purchasing mortgage loans, extending loans secured by mortgages and other real estate-related collateral, and engaging in a variety of related financial activities, these entities are in a unique position to provide information on suspected mortgage fraud and money laundering that has proven valuable to law enforcement and regulators in the investigation and prosecution of mortgage fraud and other financial crimes.[38]

In a 2020 final rule, FinCEN also imposed additional AML/CFT obligations on banks lacking a federal functional regulator, ensuring that such entities would be subject to requirements to have an AML/CFT program, meet Customer Identification Program (CIP) and Customer Due Diligence (CDD) requirements, including the verification of beneficial owners of legal entity accounts, in addition to their existing SAR obligations (which would include reporting on transactions involving suspicious real estate transactions).[39]

Each of those regulations helped to ensure that many participants in financed real estate transactions were subject to AML/CFT program and reporting requirements, including to evaluate and protect against AML/CFT risks and identify and report suspicious activity.

V. Real Estate Geographic Targeting Orders

FinCEN has taken a different approach to all-cash real estate transactions (*i.e.,* real estate transactions without financing by a bank, RMLO, or GSE), which represent approximately 20% of real estate sales. When property is purchased without financing, the transaction generally does not involve a bank or other financial institution subject to AML/CFT program requirements. Instead, all-cash real estate transactions may involve only relatively small businesses or individuals involved in closing and settlement, and the participants may lack financial incentives to closely monitor the nature of the transactions. Consequently, there exists a vulnerability that illicit actors can exploit to launder the proceeds of criminal activity by purchasing real estate through all-cash transactions.

In addition, all-cash real estate transactions in which individuals use shell companies to purchase high-value residential real estate, primarily in certain large U.S. cities, are a particular concern. FinCEN identified money laundering typologies associated with such transactions and uncovered numerous specific examples of all-cash purchases of residential real estate that potentially involved money laundering activities.[40]

According to the NAR and the U.S. Census Bureau,[41] in 2020, 5.64 million existing residential homes and 822,000 new homes were sold in the United States, for a total of 6.46 million transactions.[42] It is projected that existing and new home sales will total 5.88 million and 740,000, respectively, in 2021.[43] With a median sale price of

[31] 68 FR 17569 (Apr. 10, 2003).

[32] *See* FinCEN's website to review comments submitted, at *https://www.fincen.gov/comments-advance-notice-proposed-rule-anti-money-laundering-programs-persons-involved-real-estate.*

[33] The 80% coverage noted here is an estimate based on industry sources discussed below. *See* Note 45 infra.

[34] *See, e.g.,* ''Mortgage Loan Fraud: An Industry Assessment Based on Suspicious Activity Report Analysis,'' Financial Crimes Enforcement Network (Nov. 2006); ''Suspicious Activity Related to Mortgage Loan Fraud,'' Financial Crimes Enforcement Network, Advisory, FIN–2012–A009 (Aug. 16, 2012).

[35] 77 FR 8148 (Feb. 14, 2012) (codified at 31 CFR part 1029).

[36] 79 FR 10365 (Feb. 25, 2014) (codified at 31 CFR part 1030).

[37] Id.

[38] Id.

[39] 85 FR 57129 (Sep. 15, 2020) (codified at 31 CFR 1020.210).

[40] *See, e.g.,* ''Advisory to Financial Institutions and Real Estate Firms and Professionals,'' Financial Crimes Enforcement Network, FIN–2017–A003 (Aug. 22, 2017).

[41] Statistics regarding residential real estate transactions are normally divided between new and existing home sales. Generally, the Census Bureau tracks new home sales, while the most accurate data for existing home sales is generated by NAR. Existing home sales constitute approximately 90% of the residential real estate transaction market. *See* ''New Home Sales vs. Existing Home Sales,'' U.S. Census Bureau, *https://www.census.gov/construction/nrs/newvsexisting.html.*

[42] ''Quick Real Estate Statistics,'' National Association of Realtors (Nov. 11, 2020), *https://www.nar.realtor/research-and-statistics/quick-real-estate-statistics*; ''Existing-Home Sales Recede 2.0% in August,'' National Association of Realtors (Sep. 22, 2021), *https://www.nar.realtor/newsroom/existing-home-sales-recede-2-0-in-august*; ''Summary of August 2021 Existing Home Sales Statistics,'' National Association of Realtors (Sep. 22, 2021); Lawrence Yun, ''2021 International Transactions in U.S. Residential Real Estate,'' National Association of Realtors (Jul. 21, 2021), *https://cdn.nar.realtor/sites/default/files/documents/2021-07-26-nar-real-estate-forecast-summit-international-transactions-in-us-residential-real-estate-lawrence-yun-presentation-slides-07-26-2021.pdf*; ''New Houses Sold by Sales Price: United States (Q1),'' U.S. Census Bureau (2021), *https://www.census.gov/construction/nrs/pdf/quarterlysales.pdf.*

[43] ''Existing-Home Sales Recede 2.0% in August,'' National Association of Realtors (Sep. 22, 2021), *https://www.nar.realtor/newsroom/existing-home-sales-recede-2-0-in-august*; ''Summary of August 2021 Existing Home Sales Statistics,'' National Association of Realtors (Sep. 22, 2021); Lawrence Yun, ''2021 International Transactions in U.S. Residential Real Estate,'' National Association of Realtors (Jul. 21, 2021), *https://cdn.nar.realtor/sites/default/files/documents/2021-07-26-nar-real-estate-*

Continued

approximately $350,000 for both new and existing homes as of July 2021,[44] the total value of U.S. residential real estate sales is expected to exceed approximately $2.31 trillion in 2021.

Although a significant portion of those residential real estate transactions are financed by regulated RMLOs, GSEs, and depository institutions, non-financed real estate transactions can largely avoid financial institutions that are subject to AML/CFT requirements. As previously noted, other businesses and professions involved in real estate transactions, such as real estate brokers and agents, title company representatives, and closing agents (including attorneys when involved), currently are not subject to AML/CFT reporting obligations, and some of these, such as title insurance and real estate agents, are not mandatory in many transactions.

According to figures published by NAR, in both 2020 and 2021, approximately 19% of existing residential home sale were non-financed transactions.[45] The Census Bureau has further estimated that approximately 4.4% of new home sales are non-financed transactions.[46] Given that existing home sales comprise approximately 90% of the residential real estate market in the United States, FinCEN estimates that the all-cash purchase rate of real estate transactions in the United States is approximately 18.5%. Based on the NAR estimates of total home sales and median sale prices, this means that approximately 1.21 million residential real estate transactions, with an approximate value of $463 billion, likely proceed without any AML reporting obligations.[47]

The types of AML/CFT vulnerabilities in these reports led FinCEN to begin issuing Geographic Targeting Orders (GTOs) in January 2016 (''Real Estate GTOs''). The Real Estate GTOs required title insurance companies to file reports and maintain records concerning all-cash purchases of residential real estate above a certain threshold in select metropolitan areas of the United States. Under 31 U.S.C. 5326, FinCEN may issue such GTOs that impose additional reporting or recordkeeping requirements on financial institutions and nonfinancial trades or businesses in a geographic area for a limited period of time, if FinCEN has reasonable grounds to conclude that such requirements are necessary to carry out the purposes of the BSA or to prevent evasions thereof.[48] The Real Estate GTOs initially required some of the largest title insurance companies in the United States to report ''beneficial ownership'' [49] information on ''legal entities'' [50] used to purchase ''residential real property'' [51] in Manhattan and Miami in ''Covered Transactions''.[52] The information that the GTOs required the title insurance companies to report included: (i) Information about the transaction, including the price and address of the real estate purchased; and (ii) beneficial ownership information—such as name, social security number, and ID number and type—for the beneficial owners of certain legal entities purchasing property in Covered Transactions. The responsibility for reporting information to FinCEN was placed on title insurance companies because the title insurance industry is concentrated among a limited number of participants and title insurance companies play a central role in the vast majority of real estate transactions. This allowed FinCEN to streamline implementation of the GTOs and the collection of information.[53]

The Real Estate GTOs issued in 2016 provided FinCEN and law enforcement with new data that connected non-financed residential property purchases with the individuals who were the beneficial owners of the legal entities making those purchases. FinCEN began to receive feedback from law enforcement partners that the information was useful for generating new investigative leads, identifying new subjects in ongoing cases, and informing forfeiture efforts, among other things. To further understand the links between opaque transactions and individuals engaged in potentially illicit activity, and to give law enforcement more time to analyze and use the newly collected data, FinCEN renewed the initial GTOs and included additional metropolitan areas.

Since 2016, and most recently in October 2021, FinCEN has renewed the Real Estate GTOs multiple times (collectively, the Real Estate GTO program) and made modifications to their terms to address perceived gaps in the data collected. The number of

---

forecast-summit-international-transactions-in-us-residential-real-estate-lawrence-yun-presentation-slides-07-26-2021.pdf; ''Monthly New Residential Sales,'' U.S. Census Bureau, Release CB21–155 (Sep. 24, 2021), *https://www.census.gov/construction/nrs/pdf/newressales.pdf.*

[44] ''Existing-Home Sales Climb 2.0% in July,'' National Association of Realtors, (Aug. 23, 2021), *https://www.nar.realtor/newsroom/existing-home-sales-climb-2-0-in-july*; ''Monthly New Residential Sales, August 2021,'' U.S. Census Bureau, Release CB21–155 (Sep. 24, 2021), *https://www.census.gov/construction/nrs/pdf/newressales.pdf*; *see also* ''Summary of August 2021 Existing Home Sales Statistics,'' National Association of Realtors (Sep. 22, 2021), *https://cdn.nar.realtor/sites/default/files/documents/ehs-08-2021-summary-2021-09-22.pdf.*

[45] Lawrence Yun, ''2021 International Transactions in U.S. Residential Real Estate,'' National Association of Realtors (Jul. 21, 2021), *https://cdn.nar.realtor/sites/default/files/documents/2021-07-26-nar-real-estate-forecast-summit-international-transactions-in-us-residential-real-estate-lawrence-yun-presentation-slides-07-26-2021.pdf.*

[46] ''New Houses Sold by Type of Financing (Table Q7),'' U.S. Census Bureau (2021), *https://www.census.gov/construction/nrs/pdf/quarterlysales.pdf.*

[47] Other businesses in the real estate industry have estimated even higher rates of non-financed transactions. For instance, Redfin, a nationwide real estate brokerage, reported that 30% of home sales were all-cash transactions between January and April 2021. ''Share of Homes Bought With All Cash Hits 30% for First Time Since 2014,'' *Redfin.com* (Jul. 15, 2021), *https://www.redfin.com/news/all-cash-home-purchases-2021/*; *see also* ''Buying a house? Here's where all-cash deals are most competitive,'' *CNBC.com* (Dec. 12, 2020), *https://www.cnbc.com/2020/12/11/buying-a-house-heres-where-all-cash-deals-are-most-competitive.html* (reporting that *Realtor.com,* a nationwide real estate listing website, indicated that 36 percent of home sales in the U.S. were non-financed). Accordingly, the use of the NAR and Census Bureau estimates are therefore conservative, and if anything, the scope of the money laundering vulnerability they create is much worse.

[48] *See* 31 U.S.C. 5326; 86 FR 62914 (Nov. 15, 2021).

[49] For the GTO, ''beneficial owner'' has been defined as an individual who, directly, or indirectly, owns 25 percent or more of the equity interests of the legal entity that purchased the residential property. For the purposes of this ANPRM the term ''beneficial owner'' refers to that term as defined in the Real Estate GTOs and not the term as defined by the Corporate Transparency Act, Title LXIV of the AML Act.

[50] For the purposes of the 2016 Real Estate GTO, ''legal entity'' meant a corporation, limited liability company, partnership, or other similar business entity, whether formed under the laws of a state or of the United States or a foreign jurisdiction. In later Real Estate GTOs, FinCEN excluded from the definition of legal entity any entity for which the shares are publicly traded on a U.S. stock exchange.

[51] For purposes of the Real Estate GTOs, ''residential real property'' means real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families.

[52] Here, ''Covered Transaction'' means a transaction reportable under the GTO. The 2016 GTO defined Covered Transactions as transactions involving a covered business where: (i) A legal entity; (ii) purchased residential real property; (iii) located in the Borough of Manhattan in NY, or Miami-Dade County in Florida; (iv) for a total purchase price of $1,000,000 or more in Miami, or $3,000,000 or more in Manhattan; (v) the purchase was made without a bank loan or other similar financing; and (vi) the purchase was made, at least in part, using a monetary instrument (*e.g.,* a cashier's check, currency or a money order). Later Real Estate GTOs changed the parameters of Covered Transactions to include new geographic areas, modify the reporting threshold, and cover additional payment methods.

[53] Such reports were made to FinCEN by submitting existing BSA reporting forms. Initially title insurances companies reported GTO information to FinCEN via FinCEN Form 8300 (Report of Cash Payments Over $10,000 Received in a Trade or Business). Later iterations of the Real Estate GTO required the GTO information to be reported via FinCEN Form 104 (Currency Transaction Report).

covered jurisdictions has expanded from two to nine metropolitan areas,[54] and the orders now cover all U.S. title insurance companies operating in those areas. Subsequent GTO renewals have expanded the types of reportable all-cash transactions to include those involving additional monetary instruments, such as personal and business checks, and those involving wire transfers.[55] Over the course of the Real Estate GTO program, FinCEN lowered the reporting transaction threshold from $3 million to $300,000 in order to better understand the risks of transactions in the non-luxury market.[56] Lastly, real estate transactions involving purchases by publicly traded companies have been exempted.[57]

Evidence of money laundering via U.S. real estate transactions has increased over the last several decades, including during the period when the Real Estate GTO program has been in place. FinCEN understands from various law enforcement agencies that the Real Estate GTO data has been highly useful to the investigation of money laundering and financial crimes.

In evaluating reporting from the Real Estate GTOs issued since 2016, FinCEN and law enforcement agencies believe that a substantial proportion of the reported transactions for the purchase of property involved a beneficial owner who was also the subject of a SAR.[58] For example, a FinCEN advisory published in May 2017 stated that the proportion of such overlap was more than 30%.[59] In other words, a significant number of the beneficial owners of the legal entities engaged in non-financed real estate purchases reported under the GTOs have a nexus to reported suspicious activity. The overlap between subjects of GTO reports and SARs suggests a link between all-cash purchases of residential real estate and individuals determined by financial institutions to have been engaged in suspicious activity. These connections between Real Estate GTO reports and other illicit activity have proven highly useful for FinCEN and law enforcement in identifying patterns of criminal activity and links between various illicit enterprises to support investigations.

Law enforcement input and actions further indicate that residential real estate presents significant money laundering risk. Federal and State law enforcement agencies have informed FinCEN that both SARs and GTO reports related to real estate transactions have provided greater insight regarding assets held by persons of investigative interest, have resulted in asset forfeiture actions, and have helped generate leads and identify new subjects for investigation. Additionally, beyond the investigations that have been described above, a review of complaints, indictments, and prosecuted cases provides numerous examples of the linkages between real estate transactions and money laundering, as well as other illicit activities.[60] Accordingly, the usefulness of the Real Estate GTO reporting data to law enforcement suggests that a regulatory requirement to ensure consistent reporting on a nationwide basis would facilitate law enforcement and national security agency efforts to combat illicit activity in this sector.[61]

VI. Commercial Real Estate

In contrast to FinCEN's use of Real Estate GTOs to focus on all-cash transactions involving residential real estate, FinCEN decided at the time not to impose a reporting requirement on all cash commercial real estate transactions. The commercial real estate market is both more diverse and complicated than the residential real estate market and presents unique challenges to applying the same reporting requirements or methods as residential transactions. In commercial real estate, possible payments structures are more complex than in the residential real estate market. For example, while the line between financed and non-financed transactions is relatively well-defined in the residential real estate market, this is not necessarily the case with commercial real estate transactions. An entity may, for example, finance the purchase of a large commercial property via the issuance of bonds. It is unclear whether such a transaction would be viewed to be a cash transaction from the point of view of the entities required to report such a transaction. A commercial real estate ''transaction'' may also involve many transactions. In some cases, such as the development of a large commercial real estate project, there may be many transactions involved in the development and conveyance of a commercial real estate property over the course of months or years.

In part due to such added complexity and opacity, the risks and vulnerabilities associated with the residential real estate sector covered by the GTOs may be compounded in transactions involving commercial real estate, as there are additional types of purchasing options and financing arrangements available for parties seeking to build or acquire property worth up to hundreds of millions of dollars.[62] Lawyers, accountants, and individuals in the private equity fields—all positions with minimal to no AML/CFT obligations under the BSA—often facilitate commercial real estate transactions, working at different stages of the transaction and operating with differing amounts of beneficial ownership and financial information related to buyers and sellers. Commercial real estate transactions also often involve purpose-built legal entities and indirect ownership chains as parties create tailored corporate entities to acquire or invest in a manner that limits their legal liability and financial exposure.[63] The result is an opaque field full of diverse foreign and U.S. domiciled legal entities associated with transactions worth hundreds of millions

---

[54] These areas are: (1) The Texas counties of Bexar (includes San Antonio), Tarrant, and Dallas; (2) the Florida counties of Miami-Dade, Broward, and Palm Beach; (3) all New York City boroughs: Brooklyn, Queens, Bronx, Staten Island, and Manhattan; (4) the California counties of San Diego, Los Angeles, San Francisco, San Mateo, and Santa Clara; (5) the City and County of Honolulu in Hawaii; (6) the Nevada county of Clark (includes Las Vegas); (7) the Washington county of King (includes Seattle); (8) the Massachusetts counties of Suffolk and Middlesex (includes Boston and Cambridge, respectively); and (9) the Illinois county of Cook (includes Chicago).

[55] This expansion of the GTOs to cover wire transfers was authorized by the Countering America's Adversaries through Sanctions Act (''CAATSA''), Public Law 115–44 (Aug. 2, 2017) (codified at 31 U.S.C. 5326).

[56] FinCEN found that money laundering risks existed at lower price thresholds, and thus the current GTO set a $300,000 threshold for all covered jurisdictions.

[57] FinCEN concluded that the beneficial owners of real estate purchases by publicly traded companies are identifiable through other regulatory filings.

[58] Notably, during the GTO program, independent of any GTO reports, SARs filed by banks related to suspected money laundering in residential real estate transactions increased.

[59] *See* ''Advisory to Financial Institutions and Real Estate Firms and Professionals,'' Financial Crimes Enforcement Network, FIN–2017–A003, p. 5 (Aug. 22, 2017).

[60] *See* Note 3 supra.

[61] Moreover, one study found that the Real Estate GTOs had the added ameliorative effect of decreasing anonymous capital flows into the U.S. housing markets, thereby lessening the overall likelihood of BSA evasion via the real estate sector. *See* Hundtofte, C. Sean and Rantala, Ville, ''Anonymous Capital Flows and U.S. Housing Markets,'' University of Miami Business School, p. 23 (May 28, 2018); *see also* Nicholas Nehemas & Rene Rodriguez, ''How dirty is Miami Real Estate? Secret home deals dried up when feds starting watching,'' Miami Herald (Jul. 18 2018), *https://www.miamiherald.com/news/business/real-estate-news/article213797269.html.*

[62] ''COVID–19 and the Future of Commercial Real Estate Finance,'' Congressional Research Service (Oct. 19, 2020).

[63] *See generally* Douglas E. Cornelius, Esq. Goodwin Procter LLP, John P. O'Neill, Esq. Holland & Knight, LLP, ''Closing Commercial Real Estate Transactions,'' (May 9, 1995).

of dollars that makes up one of the United States' most lucrative industries.

Broadly speaking, FinCEN has serious concerns with the money laundering risks associated with the commercial real estate sector. In its 2006 and 2011 reports, FinCEN detailed various types of suspicious transactions indicative of money laundering in the commercial real estate industry. In the 2006 report, FinCEN analyzed a random sampling of SARs involving commercial real estate-related transactions in which the SAR narratives described transactions or activities involving suspected money laundering and related illicit activity. The types of illicit activity found in that analysis included: Structuring, money laundering, international transfers, tax evasion, and other illicit activity. Among the report's key findings, FinCEN found that property management, real estate investment, realty, and real estate development companies were the most commonly reported entities associated with commercial real estate-related money laundering. The most suspicious activity highlighted in the report was money laundering to promote tax evasion. The report further noted that there appeared to be an increasing trend towards using commercial real estate-related accounts to launder money for PEPs.[64] In the 2011 report, which focused on commercial real estate financing fraud, FinCEN found that SAR filings involving such fraud almost tripled between 2007 and 2010. FinCEN's analysis found that the top four reported fraud categories were: False documents, misappropriation of funds, collusion-bank insider, and false statements.[65]

In 2018, the National Money Laundering Risk Assessment noted the vulnerability of commercial real estate to illicit activity, highlighting a 2013 case involving the laundering of drug proceeds by a real estate agent through real estate, including commercial properties.[66] More recently, DOJ actions have demonstrated that vulnerabilities associated with the commercial real estate sector are actively being exploited by criminals to launder a significant amount of funds. DOJ actions have exposed, for example, drug trafficking organizations funneling illicit proceeds into an investment firm and then using the proceeds to invest in commercial real estate ventures,[67] and corrupt Russian officials and organized crime figures defrauding the Russian Treasury and then transferring the fraud proceeds through shell corporations into Manhattan commercial real estate.[68]

Finally, in August 2021, the NGO GFI reported that based on its review of 125 cases from the United States, United Kingdom, and Canada involving real estate money laundering, more than 30% of the cases involved commercial real estate and those cases generally involved significantly higher property values than the residential real estate cases studied.[69]

In sum, while the Real Estate GTOs to date have not included commercial real estate transactions, FinCEN invites comments on the money laundering risks and structure of the commercial real estate sector so that it may proactively consider possible next steps with respect to reporting or other requirements in relation to commercial real estate transactions given the demonstrated vulnerability of the commercial real estate industry to exploitation. FinCEN is particularly interested in comment concerning the volume and/or type of money laundering vulnerabilities associated with commercial and with residential real estate, and any unique factors or complexities regarding non-financed transactions in each segment, to enable FinCEN to assess appropriate regulatory treatment for residential and commercial real estate purchases.

VII. Real Estate Purchases by Natural Persons

FinCEN recognizes the potential for non-financed purchases by natural persons to facilitate money laundering and other illicit activity. Indeed, the use of natural person nominees can facilitate money laundering involving domestic and foreign bribery and corruption schemes, sanctions evasion, tax evasion, drug trafficking, and fraud, among other types of offenses. As highlighted in the 2020 National Strategy for Combating Terrorist and Other Illicit Financing, a Treasury assessment of federal cases involving real properties forfeited to DOJ's Assets Forfeiture Fund between 2014 and June 2017 that were valued at over $150,000 identified that, in addition to the use of complicit professionals and misuse of legal entities, "criminals often attempted to conceal the true ownership of property by using nominee purchasers or title holders." [70] These individuals were sometimes another member of the criminal organization but were often a family member or personal associate of the criminal." [71] FinCEN is considering the extent to which these risks can be addressed. Accordingly, FinCEN solicits comments on money laundering risks associated with non-financed real estate transactions conducted by natural persons, the extent to which rules that apply to entities (which may still be involved in transactions by natural persons) would address those risks, and whether additional regulatory or statutory measures should be considered to close remaining gaps with regard to natural persons associated with real estate transactions.

VIII. Scope of Potential Rules

Given the vulnerabilities of the U.S. real estate sector to money laundering and other illicit activities, FinCEN believes that additional regulatory steps may be needed to ensure consistent reporting on a nationwide basis.

FinCEN therefore invites comment through this ANPRM on appropriate regulatory frameworks to do so, including possible nationwide recordkeeping and reporting requirements pursuant to 31 U.S.C. 5318(a)(2) or other potential mechanisms. FinCEN believes that any proposed regulation should require certain persons to collect, report, and retain information about specified non-financed purchases of real estate. FinCEN is considering proposing such a rule that would apply throughout the United States and would contain no lower reporting dollar threshold.

---

[64] *See generally* "FinCEN Sees Growth in Suspected Money Laundering in Commercial Real Estate Industry," Financial Crimes Enforcement Network (Dec. 05, 2006).

[65] *See* "Commercial Real Estate Financing Fraud: Suspicious Activity Reports by Depository Institutions from January 1, 2007–December 31, 2010," Financial Crimes Enforcement Network, p. 1 (Mar. 2011).

[66] "National Money Laundering Risk Assessment," p. 38 (2018).

[67] "Justice Department Seeks Forfeiture of Third Commercial Property Purchased with Funds Misappropriated from PrivatBank in Ukraine," Press Release, Department of Justice (Dec. 30, 2020), *https://www.justice.gov/opa/pr/justice-department-seeks-forfeiture-third-commercial-property-purchased-funds-misappropriated*; *U.S.* v. *Real Property at 7505 and 7171 Forest Lane, Dallas, Texas 75230,* Case No. 1:20–cv–23278, Doc. 1 (S.D. Fl. Aug. 6, 2020).

[68] "Acting Manhattan U.S. Attorney Announces $5.9 Million Settlement of Civil Money Laundering and Forfeiture Claims Against Real Estate Corporations Alleged to Have Laundered Proceeds of Russian Tax Fraud," Press Release, Department of Justice (May 12, 2017), *https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-59-million-settlement-civil-money-laundering-and.*

[69] "New Report Finds U.S. Real Estate Sector a Safe Haven for Money Laundering," Press Release, Global Financial Integrity (Aug. 9, 2021), *https://gfintegrity.org/press-release/new-report-finds-u-s-real-estate-sector-a-safe-haven-for-money-laundering/.*

[70] "National Strategy for Combatting Terrorist and Other Illicit Financing," pp. 17–18 (2020).

[71] Id.

A. Nature of Recordkeeping and Reporting Requirements

As explained above, FinCEN's existing regulations require banks, RMLOs, and GSEs to comply with the BSA's general recordkeeping and reporting requirements, including the requirement to file SARs and to establish AML/CFT programs. In contrast, FinCEN's GTOs have subjected title insurance companies in the non-financed real estate market to a more specific reporting requirement applicable to all covered transactions. FinCEN seeks comment on promulgating a similar specific reporting requirement, either as an alternative or addition to the BSA's general requirements. Such a specific reporting requirement could be imposed under 31 U.S.C. 5318(a)(2), as amended by Section 6102(a) of the AML Act, which authorizes the Secretary to ''require a class of domestic financial institutions . . . to maintain appropriate procedures, including the collection and reporting of certain information as the Secretary of the Treasury may prescribe by regulation, to . . . guard against money laundering, the financing of terrorism, or other forms of illicit finance.'' A specific reporting requirement issued under this authority may be an appropriately tailored way to increase the transparency of the non-financed sector of the real estate market and provide law enforcement, national security agencies, and financial institutions with highly useful information

In the alternative, FinCEN could promulgate more general requirements for certain persons involved in non-financed real estate closings and settlements by requiring such persons to file SARs pursuant to FinCEN's authority under 31 U.S.C. 5318(g)(1) and by requiring them to establish AML/CFT programs under 31 U.S.C. 5318(h)(1)–(2). Such an approach would involve the application of AML/CFT program rules that traditionally include four requirements—adoption of AML/CFT policies and procedures, designation of an AML/CFT compliance officer, establishment of an AML/CFT training program for appropriate employees, and independent testing of the program to ensure compliance.[72] FinCEN seeks comments on how such requirements, as well the fifth requirement, CDD rules[73] containing beneficial ownership requirements, would affect the real estate industry.[74] In evaluating any potential imposition of general AML/CFT requirements, FinCEN must consider the extent to which the standards for AML/CFT programs are commensurate with the size, location, and activities of persons in this industry. Accordingly, FinCEN is especially interested in comments that would allow it to consider such factors. FinCEN is also particularly interested in the costs, burdens, and benefits associated with the implementation of AML/CFT programs, SAR reporting, and other FinCEN regulatory requirements. Commenters are urged to address the ability of various real estate-related businesses to gather this information for greater transactional transparency, as well as to support the effective administration of a SAR reporting program.

FinCEN seeks comment on the approach that would most effectively address money laundering concerns and minimize burdens for persons involved in non-financed real estate transactions.

B. Scope of Persons Subject to a Reporting Requirement

FinCEN seeks comment on which persons should be required to collect information, maintain records, and report information regarding non-financed purchases of real estate. Thus far, the Real Estate GTOs have required reporting from title insurance companies. However, title insurance is not mandatory in every jurisdiction within the United States, and declining to purchase title insurance could enable evasion of a reporting requirement limited to title insurance companies. FinCEN therefore seeks comment on whether there are other persons involved in non-financed real estate closings and settlements who should be considered.

Typical closing transactions may involve several participants, performing distinct, but complementary, functions, in addition to the buyer and seller. A typical real estate transaction, for example, may involve real estate brokers and agents (representing sellers and buyers); one or more attorneys who represent the buyer or the seller; a title or title insurance company representative, which may include an attorney; a closing agent (title or escrow); an appraiser, who may assess the value of the real estate; and an inspector to identify code violations and needed repairs before closing.

Certain transaction participants may also be better positioned than others to understand the nature and purpose of the transaction, the source of funds, and the identity of the buyer, particularly natural persons or the beneficial owners behind any legal entity purchaser. Other transaction participants may have greater importance to the successful completion of a transaction or face different incentives, which may suggest that they could be well-positioned and motivated to identify owners behind legal entities in the transaction.

In addition, the participants and the nature of their involvement can vary depending on a variety of factors, including state and local laws, the contemplated use of the real estate, the location of the property, the location and nationality of the buyer, the nature of the rights to be acquired, and how such rights are to be held or transferred upon resale of the property or via terms of an investor agreement. Real estate may also be held directly, through one or more shell holding companies, through trusts, or through other investment vehicles. Real estate may be acquired for a number of purposes, including residential or commercial use, portfolio investment, or development purposes, among other reasons. As to the nature of the rights to be acquired, the real estate may be held in *fee simple,* under a lease agreement, or as security for indebtedness. In addition, real estate transactions can involve the transfer of title, legal ownership, or equitable ownership, or a combination thereof. Each of the variables may influence the participants involved in such real estate transactions.

Real estate professionals may have different roles in different transactions that affect their exposure to money laundering. Some professionals may be directly involved in marketing and structuring a real estate deal and are thus able to identify all relevant parties to the transaction. Other participants may have business roles that may not be customer-facing or may focus specifically on the details of the property without any knowledge of the financing (or lack thereof), and therefore are not in a position to identify parties for recordkeeping and reporting purposes. Finally, it may be relevant to identify those financial institutions or nonfinancial trades or businesses that are primarily involved in the transfer and presentation of purchase funds in exchange for title or other rights.

To address money laundering concerns, it may be necessary to ensure that a recordkeeping and reporting

[72] *See, e.g.,* ''Rules for Loan or Finance Companies,'' 31 CFR 1029.210.

[73] 81 FR 29398 (May 11, 2016) (codified at 31 CFR 1010.230 and other sections in chapter X). For certain categories of financial institutions, FinCEN has included explicit requirements to conduct customer due diligence and to identify and verify the identity of beneficial owners of legal entity customers, subject to certain exclusions and conditions. *See generally* id.

[74] *See generally* 86 FR 17557 (Apr. 5, 2021).

requirement attaches to some entity involved in every non-financed transaction. At the same time, FinCEN seeks to minimize the burden on reporting entities and to avoid unnecessary and duplicative reporting. FinCEN seeks comments on whether to assign a hierarchical, cascading reporting obligation on different entities depending on which are involved in a particular covered transaction, in a manner similar to the IRS's regulation for submitting Form 1099–S (''Proceeds from Real Estate Transactions'').[75] For that IRS regulation, the ''person responsible for closing the transaction,'' which may be a settlement agent or attorney, for instance, depending on the nature of the transaction, is required to file the Form 1099–S. And if there is no ''person responsible for closing the transaction,'' the reporting requirement then falls to other persons involved in the transaction, such as the purchaser's broker. In that way, the IRS regulation ensures that for every transaction, some entity involved is required to report. FinCEN is considering, and invites comments on, such an approach. FinCEN also solicits comments on whether and how to assign a reporting requirement to any or all of the following entities: Title insurance companies, title or escrow companies, real estate agents or brokers, real estate attorneys or law firms, settlement or closing agents, as well as other entities listed below in the comments section.

FinCEN also invites comments on any additional financial institutions or nonfinancial trades or businesses that should be covered by a proposed regulation. Finally, FinCEN is aware that there are substantial differences in practices, customs, and requirements for real estate transactions in different jurisdictions within the United States and invites comment on those differences and how to best design a rule that takes into account such jurisdictional differences.

C. Geographic Scope and Transaction Threshold

Although the Real Estate GTOs have been targeted at particular geographic locations within the United States, FinCEN's preliminary view is that fully addressing the money laundering vulnerabilities in the real estate market requires a nationwide rule. While money laundering activity in real estate transactions may be more common in some areas than others, it can occur in any location. Indeed, a survey of recent state and federal court indictments and prosecuted cases demonstrates that real estate money laundering is not limited to the jurisdictions covered by the Real Estate GTOs.[76] Because such activity can occur in any location, limiting the scope of the regulations by geography may simply push money laundering activity into other locations. A uniform national requirement would also provide consistency and predictability to businesses required to maintain records and make reports. FinCEN nevertheless invites comment on the geographic reach of any proposed regulation, whether the geographic coverage should be limited, and any underlying information to support such limitations. Commenters are invited to comment particularly on the differences in practices, customs, and requirements for real estate transactions in geographic areas of the United States that merit specific consideration because of their relevance to the potential for the abuse of real estate transactions by money launderers.

FinCEN also welcomes comment on the appropriate transaction threshold, if any, for a reporting requirement. FinCEN's GTOs contain a $300,000 threshold. Other BSA reporting requirements have other thresholds.[77] However, any transaction threshold may enable money launderers to structure their behavior to avoid a reporting requirement. A survey of court cases indicates that real estate used in money laundering is not limited to properties that sell for greater than $300,000, the current GTO threshold.[78] For these reasons, FinCEN is considering a reporting requirement with no transaction threshold. According to figures published by NAR, existing residential home sales of less than $100,000 constitute less than 5% of overall sales.[79] Therefore, not setting a minimum threshold appears unlikely to substantially increase the burden on entities required to report under any future regulation. FinCEN solicits comments, however, on whether a minimum threshold should be included.

D. Purchases by Certain Entities

Under the Real Estate GTOs, only cash purchases by the following ''legal entities'' are reportable transactions: ''a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state, or of the United States, or a foreign jurisdiction, other than a business whose common stock or analogous equity interests are listed on a securities exchange regulated by the Securities and Exchange Commission (''SEC'') or a self-regulatory organization registered with the SEC, or an entity solely owned by such a business.'' Given the known money laundering typology of using shell companies to obscure the ultimate owners of real estate, FinCEN believes these entities should likely be covered in any proposed regulation. FinCEN seeks comment on which ''legal entities'' should be included.

Additionally, FinCEN seeks specific comment on whether to include trusts—broadly defined as a legal ''relationship in which one person holds title to property, subject to an obligation to keep or use the property for the benefit of another''—within the reporting

[75] *See* 26 CFR 1.6045–4 (Information reporting on real estate transactions with dates of closing on or after January 1, 1991).

[76] *See, e.g., United States* v. *Real Property Located in Potomac, Maryland, Commonly Known as 9908 Bentcross Drive, Potomac, MD 20854,* Case No. 20–cv–02071, Doc. 1 (D. Md. Jul. 15, 2020) (purchase of property in Potomac, MD); *United States* v. *Raul Torres,* Case No. 1:19CR390, Doc. 30 (N.D. Ohio Mar. 30, 2020) (purchase of multiple properties in Cleveland, OH); *United States* v. *Bradley,* No. 3:15–cr–00037–2, 2019 U.S. Dist. LEXIS 141157 (M.D. Tenn. Aug. 20, 2019) (purchase of multiple properties in Wayne County, MI); *United States* v. *Coffman,* 859 F. Supp. 2d 871 (E.D. Ky. 2012) (purchases of properties in Kentucky and South Carolina); *United States* v. *Paul Manafort,* Case 1:18–cr–00083–TSE, Doc. 14 (E.D. Va. Feb. 26, 2018) (purchase of a property in Virginia); *United States* v. *Miller,* 295 F. Supp. 3d 690 (E.D. Va. 2018) (purchase of properties in Virginia and Delaware); *Atty. Griev. Comm'n of Md.* v. *Blair,* 188 A.3d 1009 (MD Ct. App. 2018) (purchase of properties in Washington, DC and Maryland); *United States* v. *Patrick Ifediba, et al.,* Case No. 2:18–cr–00103–RDP–JEO, Doc. 1 (N.D. Ala. Mar. 29, 2018) (purchase of multiple properties in Alabama); *United States* v. *Delgado,* 653 F.3d 729 (8th Cir. 2011) (purchase of multiple properties in Kansas City, MO), *United States* v. *Fernandez,* 559 F.3d 303 (5th Cir. 2009) (purchase of multiple properties in El Paso, TX); *United States* v. *10.10 Acres Located on Squires Rd.,* 386 F. Supp. 2d 613 (M.D.N.C. 2005) (purchase of two properties in North Carolina); *State* v. *Harris,* 861 A.2d 165 (Super. Ct. App. Div. 2004) (purchase of multiple properties in a non-GTO-covered jurisdiction in New Jersey); *see also* Lakshmi Kumar & Kaisa de Bel, ''Acres of Money Laundering: Why U.S. Real Estate is a Kleptocrat's Dream,'' Global Financial Integrity, p. 29 (Aug. 2021) (highlighting money laundering cases outside of jurisdictions covered by the Real Estate GTOs).

[77] *See, e.g.,* 31 U.S.C. 5316(a)(1)(requirement to report importing or exporting monetary instruments of more than $10,000 at one time); 31 CFR 1010.330(a)(requirement to report receipt of currency in excess of $10,000 in the course of trade or business).

[78] *See, e.g., United States* v. *Bradley,* No. 3:15–cr–00037–2, 2019 U.S. Dist. LEXIS 141157 (M.D. Tenn. Aug. 20, 2019) (multiple transactions under $10,000); *Atty. Griev. Comm'n of Md.* v. *Blair,* 188 A.3d 1009 (MD Ct. App. 2018) (several transactions under $20,000); *United States* v. *Coffman,* 859 F. Supp. 2d 871 (E.D. Ky. 2012) (purchases of property for under $150,000); *United States* v. *Delgado,* 653 F.3d 729 (8th Cir. 2011) (multiple transactions under $100,000); *United States* v. *10.10 Acres Located on Squires Rd.,* 386 F. Supp. 2d 613 (M.D.N.C. 2005) (transaction under $50,000).

[79] ''Summary of August 2021 Existing Home Sales Statistics,'' National Association of Realtors (Sep. 22, 2021).

requirement.[80] FinCEN notes that recent high profile DOJ enforcement actions, including a forfeiture action to recover an alleged $3.5 million in corrupt proceeds laundered through the purchase of a Potomac, Maryland, mansion via a trust, indicate that consideration of any proposed rule should also include the risks presented by U.S. and foreign trusts.[81]

Due to the inherent opacity of purchases by legal entities, the Real Estate GTOs focused on purchases by such entities. However, FinCEN is also concerned about real estate money laundering risks involving natural persons, such as the use of nominees or ''straw-man'' purchasers. FinCEN is thus considering the extent to which any proposed rule should address this issue. FinCEN is particularly interested in comments broadly addressing the most appropriate way to treat natural persons in regulations addressing money laundering in the real estate sector. Moreover, FinCEN seeks views on how the use of natural persons in money laundering schemes could be addressed by potential rules covering entities (which may still be involved in most transactions by natural persons).

E. Type of Real Estate

FinCEN is considering the best approach to extending reporting requirements or other regulatory treatment to both residential and commercial real estate given the important differences between the residential and commercial real estate markets. FinCEN is especially interested in how such a regulation might be structured to address the differences between commercial and residential real estate transactions and whether the risk in non-residential real estate is sufficient to justify the burdens that a reporting requirement for non-residential real estate could impose. FinCEN also invites comments on whether to address both commercial and residential real estate sectors in the same rule or to take an iterative approach.

IX. Request for Comment

FinCEN seeks comments on the questions listed below, but invites any other relevant comments as well. FinCEN encourages commenters to reference specific question numbers to facilitate FinCEN's review of comments.

A. General Information Regarding the Real Estate Market

FinCEN is issuing this ANPRM to solicit public comment on issues pertaining to potential BSA recordkeeping and reporting requirements. FinCEN invites the views of real estate businesses and professionals, trade organizations, law enforcement, federal agencies, state, local, and Tribal governments, NGOs, members of civil society, and any other interested parties. A variety of perspectives on the U.S. real estate market will provide FinCEN with the information essential for any future rulemaking.

1. Describe a typical residential real estate transaction.

2. Describe a typical commercial real estate transaction.

3. What are the products, services, activities, or affiliations associated with residential real estate transactions? Commercial real estate transactions?

4. What percentage of residential real estate transactions involve purchases by legal entities or trusts?

5. What kinds of professionals are most common in real estate transactions, such as real estate brokers, settlement agents, title insurers, attorneys, etc.? Does this differ for residential and commercial real estate? What kinds of professionals or participants are most able to request, verify, and report documentation related to purchasers? Is title insurance required in most of the transactions? If not, how common is the use of title insurance?

6. What are the typical transaction costs to close a residential real estate deal? For commercial real estate? Typically, what percentage of the sale price do these costs represent?

7. What sort of due diligence is normally conducted, before or at closing, regarding (i) the parties to a transaction (particularly of any natural persons who are the beneficial owners of the buyer or seller); (ii) the source of funds for any transaction; and (iii) other key aspects of the transaction? Does this process differ for commercial and residential transactions?

8. What sort of existing recordkeeping or reporting requirements, unrelated to BSA compliance, exist for real estate transactions? If so, what information must be recorded or reported, to whom, for how long, and what entity provides oversight and ensures compliance? Do these requirements differ for residential and commercial real estate transactions?

9. Please describe any ''best practices'' related to due diligence on the seller and buyer of residential or commercial real estate; confirmation of the legality of the transaction; inquiries as to the source of acquisition funding; and any other issues that may relate to the marketing, negotiation of terms, and closing of the transaction.

10. What percentage of residential real estate purchases are all-cash transactions?

11. What percentage of commercial real estate purchases are all-cash transactions?

12. Are the beneficial owners of legal entity purchasers involved in real estate transactions normally identified by some participant in a real estate transaction?

13. How do due diligence processes, if any, differ for commercial or residential properties?

14. What do persons involved in real estate transactions do if they have any suspicions about a transaction, customer, or source of funds?

15. How often are attorneys used in all-cash residential or commercial real estate transactions? Why are they used?

16. How often are real estate brokers or agents used in all-cash residential real estate transactions? Why are they used?

17. Is the decision to use real estate brokers, or agents, or attorneys different for all-cash real estate transactions?

18. Please describe when an escrow account must be used for a real estate transaction.

19. Please explain how payment is most often tendered for real estate purchases (*e.g.,* mortgage, domestic wires, foreign wires, checks, currency, CVC). Which of these categories of payment are higher-risk?

20. Please note any differences not already covered in provision of services for residential real estate transactions versus those for commercial real estate transactions.

B. What are the money laundering risks in real estate transactions?

FinCEN solicits comment on money laundering activities (in general terms, not identifying actual parties or properties involved) in connection with real estate transactions, the existence of any safeguards in the sector to prevent money laundering, and what additional steps may be necessary to protect the real estate industry from abuse by money launderers.

21. Describe the potential money laundering and illicit finance risks and vulnerabilities arising in the U.S. real estate market. Are these risks different for the residential and commercial real estate sectors?

22. Identify specific activities and services that present the highest and

[80] ''Definition of Trust,'' Internal Revenue Service, *https://www.irs.gov/charities-non-profits/definition-of-a-trust.*

[81] *See United States* v. *Real Property Located in Potomac, Maryland, Commonly Known as 9908 Bentcross Drive, Potomac, MD 20854,* Case No. 20–cv–02071, Doc. 1 (D. Md. Jul. 15, 2020).

lowest money laundering risks, as well as factors related to parties, the transaction, and the property, bearing on risk and its assessment. What kinds of transactions and customers are highest and lowest risk? How are those risks mitigated and what are the associated costs of that mitigation?

23. What are the money laundering risks associated with all-cash purchases of real estate by natural persons?

24. Is it possible to estimate the extent to which residential property values are affected by money laundering transactions? Is there a similar estimate for commercial real estate?

25. What are the money laundering risks of commercial versus residential transactions?

C. Which real estate transactions should FinCEN's rule cover?

The questions in Part IX, Sections C–E, may be most relevant for any proposed rule imposing a specific reporting requirement pursuant to 31 U.S.C. 5318(a)(2), as amended by Section 6102(c)of the AML Act, but commenters may examine these questions in the context of a proposed rule promulgating traditional AML/CFT requirements for ''persons involved in real estate closings and settlements.''

26. What general factors should FinCEN consider in determining which transactions to cover?

27. Should FinCEN's proposed rule be limited to residential real estate or should FinCEN cover transactions involving other forms of real estate (*e.g.,* commercial, farmland). If you believe FinCEN should cover other forms of real estate, should FinCEN do so in conjunction with the regulation of residential real estate transactions or separately?

28. How should FinCEN define ''residential real estate''? Is the definition used for the Real Estate GTOs either under- or over-inclusive?

29. How should FinCEN define ''commercial real estate''?

30. Should FinCEN's proposed rule be limited to transactions involving legal entities or should it cover natural persons as well? If not, why?

31. Assuming FinCEN's proposed rule is limited to purchases by legal entities, which legal entities should any rule cover? Is the definition of ''legal entity'' in the Real Estate GTOs too broad or too narrow? Should trusts be covered?

32. Should FinCEN's proposed rule be limited to non-financed transactions (all-cash)?

33. Assuming FinCEN's proposed rule is limited to non-financed transactions, how should FinCEN define the term ''non-financed transaction''?

34. Should FinCEN geographically limit the scope of any proposed regulation?

35. Are there any jurisdictions or geographic areas within the United States in which residential real estate transactions have unique customs or requirements that would make designing a rule to cover such jurisdictions in conjunction with the remainder of the country problematic?

36. Should FinCEN provide a lower limit or *de minimis* amount for the reporting threshold for transactions?

D. Which persons should be required to report information concerning real estate transactions to FinCEN?

37. Should FinCEN require any, a subset, or all of the following entities to report information regarding non-financed transactions: (i) Real estate lawyers and law firms; (ii) real estate agents/brokers/settlement agents; (iii) title insurance companies; (iv) title and escrow agents and companies; (v) real estate investment companies; (vi) real estate development companies; (vii) real estate property management companies; (viii) real estate auctions houses; (ix) investment advisers; (x) private money lenders; and (xi) money service businesses?

38. Which financial institutions and nonfinancial trades and businesses are in a position to ascertain and report: (i) The identity of the legal entity or legal arrangement purchaser of the real estate; (ii) the natural person(s) who are the direct or indirect owners of the legal entity or arrangement purchaser; (iii) the specific details of the transactions (*e.g.,* date of sale, location of property, sale price, and any other terms or conditions); (iv) the source of funds; (v) the form of payments (*e.g.,* wire transfer, check, currency, etc.); (vi) the purpose of the transaction; (vii) the intended use of the proceeds of a sale; and (viii) the businesses involved in the transfer of funds?

39. What are the potential benefits and costs of promulgating a transaction reporting requirement that covered real estate brokers and agents, title agencies and/or insurance companies, or attorneys? What burden (quantify if possible) would it places on such entities?

40. What would be the best way to assign reporting requirements to ensure a reporting requirement falls on at least one financial institution or nonfinancial trade or business for every non-financed transaction by a legal entity purchaser?

41. Should FinCEN require reports from multiple financial institutions or nonfinancial trades or businesses involved in a non-financed purchase of residential real estate, or should FinCEN propose a reporting requirement via a cascading hierarchy based on the types of entities involved in a particular transaction, as is the case for IRS Form 1099–S? [82]

42. What should FinCEN consider when assigning the reporting burden with respect to potential evasion of the reporting requirements?

E. What information should FinCEN require regarding real estate transactions covered by a proposed regulation?

43. What information should FinCEN require to be reported regarding the legal entity (or if applicable, natural person) purchasing real estate in a covered transaction?

44. Should FinCEN require information about the seller? If so, what information should FinCEN require regarding the seller?

45. What information should FinCEN require about the financial institution or nonfinancial trade or business reporting the transaction to FinCEN?

46. What information should FinCEN require regarding the real estate underlying the transaction?

47. Should FinCEN require information regarding the source of funds used to purchase real estate?

48. How can FinCEN craft the information required to avoid overly burdensome or duplicative reporting requirements?

49. How should FinCEN require reports under any potential regulation be filed? Should FinCEN utilize an existing BSA form or develop a new reporting form for any proposed regulation?

F. What are the potential burdens or implementation costs of a potential FinCEN regulation?

50. What would be the costs, burdens, and benefits associated with collecting, storing, and reporting real estate transactional information to FinCEN?

51. How would FinCEN's regulatory requirements be integrated into your current compliance program?

52. How much time will you need to successfully integrate these requirements into your current systems and procedures?

53. Estimate the initial projected cost of implementation and the projected long-term support costs for ongoing program maintenance. Do you anticipate being able to integrate implementation costs into your existing compliance-related budget?

54. Would certain financial institutions or nonfinancial trades or

[82] *See generally* 26 CFR 1.6045–4.

businesses incur higher costs compared to others? Why?

55. If program or other requirements were limited to purchases above a certain price threshold, how would this affect: (i) The burden of implementing such potential rules; and (ii) the utility of such potential rules for addressing money laundering issues in the real estate market?

56. What are the key benefits for a particular stakeholder (*e.g.,* a business, if the commenter is a business), if any, assuming issuance of the rules?

57. Are there alternative methods you believe FinCEN should consider as part of the overall rulemaking process that would effectively address the risk of money laundering in the all-cash real estate market? Please describe in detail.

58. What would be the costs, burdens, and benefits associated with requiring a new form that would report key elements of information deemed highly significant by FinCEN?

59. Please list any legislative, regulatory, judicial, corporate, or market-related developments that have transpired since FinCEN issued the 2003 ANPRM that you view as relevant to FinCEN's current proposed issuance of AML regulations.

G. Should FinCEN promulgate general AML/CFT recordkeeping and reporting requirements for ''persons involved in real estate closings and settlements''?

As explained above, FinCEN is considering promulgating a specific reporting requirement under 31 U.S.C. 5318(a)(2), as amended by Section 6102(c) of the AML Act, and the questions in Part XI, Sections C–E relate to such a requirement. The following questions for comment are generally intended to collect information about a potential rule that would instead apply traditional AML/CFT requirements to ''persons involved in real estate closings and settlements'' in lieu of a more specific requirement.

60. How should the term ''persons involved in real estate closings and settlements'' be defined?

61. What general factors should FinCEN consider in determining the scope of such a rule? That is, what businesses involved in residential or commercial real estate transactions should be required to comply with any potential rules, and what businesses should be excluded? What kinds of transactions, if any, should be excluded?

62. What are the potential benefits and costs to including real estate brokers and agents, title agencies and/or insurance companies, or real estate attorneys in the definition of ''persons involved in real estate closings or settlements''?

63. Describe any requirements that FinCEN could promulgate that adequately address these risks apart from typical AML/CFT programs, recordkeeping, and reporting obligations.

64. Describe your views on whether typical customer identification and verification, AML, SAR, and CTR rules would appropriately address risks in the real estate market and what burden they would entail. What specific factors or characteristics in your business model would justify deviating from the typical AML/CFT program, recordkeeping, and reporting obligations?

65. What are the benefits and drawbacks of a new form requirement to file key information deemed important by FinCEN versus full AML/CFT program requirements? Which would be better and why?

66. Are there particular concerns that smaller businesses may have regarding the implementation of an AML/CFT program?

67. Please describe any programs that persons involved in real estate closings and settlements may already have in place to meet existing legal obligations, in addition to the requirement to report on Form 8300 the receipt of over $10,000 in currency and certain monetary instruments. In addition, detail your views on any voluntary best practices or guidelines you adopted to prevent money laundering, fraud or other financial crimes, the effectiveness of those programs, and whether any such practices should be integrated into any AML/CFT or SAR rules.

68. Do you think it is appropriate for customer identification and verification requirements to be applied to persons purchasing and selling real estate? Would such requirements lead to a change in your business practices?

69. Please detail any aspects of possible FinCEN rules that may cause your business to operate at a competitive disadvantage compared to any businesses that offer similar services, if such businesses would be outside the scope of any FinCEN rules.

70. Should due diligence requirements, if any, apply equally with respect to buyers and sellers or should only buyers be included? Should it apply to all or should only certain types of buyers and sellers included?

71. Should AML/CFT programmatic requirements, if any, apply to residential transactions, commercial transactions, or both?

72. Should the rules be structured to require collection of information about only the most vulnerable or high-risk transactions? If so, how could FinCEN minimize the burdens of such a requirement?

73. Should FinCEN implement information collection requirements only for transactions meeting a specified cost or value threshold? Should other criteria or standards be included to trigger such collection requirements?

74. How might such a rule impact your business? What benefits, costs, and burdens does the commenter anticipate if all the AML/CFT requirements in the CDD rules are incorporated into any proposed rules?

75. Assuming FinCEN proposes to issue traditional AML requirements, please describe the major impacts the business expects upon issuance of final rules. What specific requirements in these regulations do you expect may have the greatest impact on your operations?

76. Assuming FinCEN proposed to issue a new form requirement, what information should be included, to what AML/CFT benefit, and would the ability to mitigate or prevent money laundering risk in the industry be reduced when compared to implementing traditional AML/CFT requirements?

77. How would FinCEN's regulatory requirements be integrated into your business' current compliance program?

78. How much time would a covered business need to successfully integrate AML/CFT requirements into current systems and procedures?

79. Estimate the initial projected cost of implementation, and the projected long-term support costs for ongoing program maintenance. Do you anticipate being able to integrate or share implementation costs into your existing compliance-related budget?

80. Would certain businesses incur higher costs compared to others? Why?

81. If program or other requirements were limited to purchases above a certain price threshold, how would this impact: (i) The burden of implementing such potential rules; and (ii) the utility of such potential rules for addressing money laundering issues in the real estate market?

82. What are the key benefits for your business, if any, assuming issuance of the rules?

X. Regulatory Planning and Review

This advance notice of proposed rulemaking is a substantive, non-significant regulatory action under Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

XI. Conclusion

With this ANPRM, FinCEN seeks input on the questions set forth above. FinCEN welcomes comments on all aspects of the ANPRM, and all interested parties are encouraged to provide their views.

By the Department of the Treasury.

Dated: December 2, 2021.

Himamauli Das,

Acting Director, Financial Crimes Enforcement Network.

[FR Doc. 2021–26549 Filed 12–7–21; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2021–0873]

RIN 1625–AA08

Special Local Regulations; Sector Ohio Valley Annual and Recurring Special Local Regulations, Update

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes amending and updating its special local regulations for recurring marine parades, regattas, and other events that take place in the Coast Guard Sector Ohio Valley's Area of Responsibility (AOR). This proposed rule would update the current list of recurring special local regulations with revisions, additions, and removals of events that no longer take place in the Sector Ohio Valley's AOR. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before January 7, 2022.

ADDRESSES: You may submit comments identified by docket number USCG–2021–0873 using the Federal Decision Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Petty Officer Christopher Roble, Sector Ohio Valley, U.S. Coast Guard; telephone (502) 779–5336, email *SECOHV-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Sector Ohio Valley
DHS Department of Homeland Security
E.O. Executive order
FR Federal Register
NPRM Notice of proposed rulemaking
Pub. L. Public Law
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

The Captain of the Port Sector Ohio Valley (COTP) proposes to update the current list of recurring special local regulations found in Table 1 of Title 33 of the Code of Federal Regulations (CFR) section 100.801 for events occurring within the Sector Ohio Valley's Area of Responsibility (AOR) within the Coast Guard's Eighth District.

This proposed rule would update the list of annually recurring special local regulations under 33 CFR 100.801, Table 1, for annual special local regulations in the Sector Ohio Valley's AOR. The Coast Guard will address all comments via the rulemaking process, including additional revisions to this regulatory section. Additionally, the public would be informed of these recurring events through local means and planned by the local communities. The current list of annual and recurring special local regulations occurring in Sector Ohio Valley's AOR is published in 33 CFR 100.801, Table 1 titled ''Annual Marine Events in the Eighth Coast Guard District''. The most recent list was published via the Notice of Proposed Rulemaking (86 FR 10894) on February 23, 2021.

The Coast Guard's authority for establishing a special local regulation is contained in 46 U.S.C. 70041(a). The Coast Guard proposes to amend and update the special local regulations in 33 CFR 100.801, Table 1, to include the most up to date list of recurring special local regulations for events held on or around the navigable waters within Sector Ohio Valley's AOR. These events would include marine parades, boat races, swim events, and other marine related events. The current list under 33 CFR 100.801, Table 1, requires amendment to provide new information on existing special local regulations, add new special local regulations expected to recur annually or biannually, and to remove special local regulations that no longer occur. Issuing individual regulations for each new special local regulation, amendment, or removal of an existing special local regulation creates unnecessary administrative costs and burdens. This single proposed rulemaking would considerably reduce administrative overhead and provide the public with notice through publication in the **Federal Register** of recurring special local regulations in the AOR.

III. Discussion of Proposed Rule

Part 100 of title 33 of the CFR contains regulations describing regattas and marine parades conducted on the U.S. navigable waters in order to ensure the safety of life in the regulated areas. Section 100.801 of the title provides the regulations applicable to events taking place in the Eighth Coast Guard District and also provides a table listing each event and special local regulations. This section requires amendment from time to time to properly reflect the recurring special local regulations. This proposed rule would update section 100.801, Table 1 titled ''Annual Marine Events in the Eighth Coast Guard District.''

This proposed rule would add 5 new recurring special local regulation to Table 1 to § 100.801 for Sector Ohio Valley, as follows:

Date	Event/sponsor	Ohio Valley location	Regulated area
10.3 Days in May	U.S. Rowing Southeast Youth Championship Regatta.	Oak Ridge, TN	Clinch River, Miles 48.5–52 (Tennessee).
30.1 Day in July	Three Rivers Regatta	Knoxville, TN	Tennessee River, Miles 642–653 (Tennessee).
31.1 Day in July	PADL	Cannelton, IN	Ohio River, Miles 719.0–727.0 (Kentucky).
84.1 day in October	Chattajack	Chattanooga, TN	Tennessee River, Miles 462.7–465.5 (Tennessee).
85.1 day in October	Outdoor Chattanooga/Swim the Suck.	Chattanooga, TN	Tennessee River, Miles 452.0–454.5 (Tennessee).

This proposed rule would amend 1 new recurring special local regulation to Table 1 to § 100.801 for Sector Ohio Valley, as follows:

Date	Event/sponsor	Ohio Valley location	Regulated area
69.3 days—One of the first three weekends in September.	Fleur de Lis Regatta	Louisville, KY	Ohio River, Miles 594.0.0–598.0 (Kentucky).

The effect of this proposed rule would be to restrict general navigation during these events. Vessels intending to transit the designated waterways during effective periods of the special local regulations would only be allowed to transit the area when the COTP or or designated representative, has deemed it would safe to do so or at the completion of the event.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

The Coast Guard expects the economic impact of this proposed rule to be minimal, therefore a full regulatory evaluation is unnecessary. This proposed rule would establish special local regulations limiting access to certain areas described in 33 CFR 100.801, Table 1. The effect of this proposed rulemaking would not be significant because these special local regulations are limited in scope and duration. Additionally, the public would be given advance notification through local forms of notice, the **Federal Register**, and/or Notices of Enforcement. Thus, the public would be able to plan their operations and activities around enforcement times of the special local regulations. The COTP would issue Broadcast Notices to Mariners, Local Notices to Mariners, and Safety Marine Information Broadcasts, as appropriate, to inform the community of these special local regulations. Vessel traffic would be permitted to request permission from the COTP or a designated representative to enter the restricted areas.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the regulated area may be small entities, for reasons stated in section IV.A. above, this proposed rule would not have a significant economic impact on any owner or operator because they are limited in scope and will be in effect for short periods of time.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination

that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. Normally such actions are categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. of the Instruction because it involves establishment of special local regulations related to marine event permits for marine parades, regattas, and other marine events. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2021–0873 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. In § 100.801, revise Table 1 to read as follows:

* * * * *

TABLE 1 TO § 100.801—SECTOR OHIO VALLEY ANNUAL AND RECURRING MARINE EVENTS

Date	Event/sponsor	Ohio Valley location	Regulated area
1. 3 days—Second or third weekend in March.	Oak Ridge Rowing Association/ Cardinal Invitational.	Oak Ridge, TN	Clinch River, Miles 48.5–52.0 (Tennessee).
2. 1 day—Third weekend in March.	Vanderbilt Rowing/Vanderbilt Invite.	Nashville, TN	Cumberland River, Miles 188.0–192.7 (Tennessee).
3. 2 days—Fourth weekend in March.	Oak Ridge Rowing Association/ Atomic City Turn and Burn.	Oak Ridge, TN	Clinch River, Miles 48.5–52.0 (Tennessee).
4. 3 days—One weekend in April	Big 10 Invitational Regatta	Oak Ridge, TN	Clinch River, Miles 48.5–52.0 (Tennessee).
5. 1 day—One weekend in April	Lindamood Cup	Marietta, OH	Muskingum River, Miles 0.5–1.5 (Ohio).
6. 3 days—Third weekend in April.	Oak Ridge Rowing Association/ SIRA Regatta.	Oak Ridge, TN	Clinch River, Miles 48.5–52.0 (Tennessee).
7. 2 days—Third Friday and Saturday in April.	Thunder Over Louisville	Louisville, KY	Ohio River, Miles 597.0–604.0 (Kentucky).
8. 1 day—During the last week of April or first week of May.	Great Steamboat Race	Louisville, KY	Ohio River, Miles 595.0–605.3 (Kentucky).
9. 3 days—Fourth weekend in April.	Oak Ridge Rowing Association/ Dogwood Junior Regatta.	Oak Ridge, TN	Clinch River, Miles 48.5–52.0 (Tennessee).
10. 3 Days in May	US Rowing Southeast Youth Championship Regatta.	Oak Ridge, TN	Clinch River, Miles 48.5–52 (Tennessee).
11. 3 days—Second weekend in May.	Vanderbilt Rowing/ACRA Henley	Nashville, TN	Cumberland River, Miles 188.0–194.0 (Tennessee).
12. 3 days—Second weekend in May.	Oak Ridge Rowing Association/ Big 12 Championships.	Oak Ridge, TN	Clinch River, Miles 48.5–52.0 (Tennessee).
13. 3 days—Third weekend in May.	Oak Ridge Rowing Association/ Dogwood Masters.	Oak Ridge, TN	Clinch River, Miles 48.5–52.0 (Tennessee).
14. 1 day—Third weekend in May.	World Triathlon Corporation/ IRONMAN 70.3.	Chattanooga, TN	Tennessee River, Miles 462.7–467.5 (Tennessee).
15. 1 day—During the last weekend in May or on Memorial Day.	Mayor's Hike, Bike and Paddle	Louisville, KY	Ohio River, Miles 601.0–604.5 (Kentucky).
16. 1 day—The last week in May	Chickamauga Dam Swim	Chattanooga, TN	Tennessee River, Miles 470.0–473.0 (Tennessee).

TABLE 1 TO § 100.801—SECTOR OHIO VALLEY ANNUAL AND RECURRING MARINE EVENTS—Continued

Date	Event/sponsor	Ohio Valley location	Regulated area
17. 2 days—Last weekend in May or first weekend in June.	Visit Knoxville/Racing on the Tennessee.	Knoxville, TN	Tennessee River, Miles 647.0–648.0 (Tennessee).
18. 2 days—Last weekend in May or one weekend in June.	Outdoor Chattanooga/Chattanooga Swim Festival.	Chattanooga, TN	Tennessee River, Miles 454.0–468.0 (Tennessee).
19. 2 days—First weekend of June.	Thunder on the Bay/KDBA	Pisgah Bay, KY	Tennessee River, Miles 30.0 (Kentucky).
20. 1 day—First weekend in June.	Visit Knoxville/Knoxville Powerboat Classic.	Knoxville, TN	Tennessee River, Miles 646.4–649.0 (Tennessee).
21. 1 day—One weekend in June.	Tri-Louisville	Louisville, KY	Ohio River, Miles 600.5–604.0 (Kentucky).
22. 2 days—One weekend in June.	New Martinsville Vintage Regatta.	New Martinsville,WV	Ohio River Miles 127.5–128.5 (West Virginia).
23. 3 days—One of the last three weekends in June.	Lawrenceburg Regatta/Whiskey City Regatta.	Lawrenceburg, IN	Ohio River, Miles 491.0–497.0 (Indiana).
24. 3 days—One of the last three weekends in June.	Hadi Shrine/Evansville Shriners Festival.	Evansville, IN	Ohio River, Miles 790.0–796.0 (Indiana).
25. 3 days—Third weekend in June.	TM Thunder LLC/Thunder on the Cumberland.	Nashville, TN	Cumberland River, Miles 189.6–192.3 (Tennessee).
26. 1 day—Third or fourth weekend in June.	Greater Morgantown Convention and Visitors Bureau/Mountaineer Triathlon.	Morgantown, WV	Monongahela River, Miles 101.0–102.0 (West Virginia).
27. 1 day—Fourth weekend in June.	Team Magic/Chattanooga Waterfront Triathlon.	Chattanooga, TN	Tennessee River, Miles 462.7–466.0 (Tennessee).
28. 1 day—One day in June	Guntersville Lake Hydrofest	Guntersville, AL	Tennessee River south of mile 357.0 in Browns Creek, starting at the AL–69 Bridge, 34°21′38″ N, 86°20′36″ W, to 34°21′14″ N, 86°19′4″ W, to the TVA power lines, 34°20′9″ N, 86°21′7″ W, to 34°19′37″ N, 86°20′13″ W, extending from bank to bank within the creek (Alabama).
29. 3 days—The last weekend in June or one of the first two weekends in July.	Madison Regatta	Madison, IN	Ohio River, Miles 554.0–561.0 (Indiana).
30. 1 Day in July	Three Rivers Regatta	Knoxville, TN	Tennessee River, Miles 642–653 (Tennessee).
31. 1 Day in July	PADL	Cannelton, IN	Ohio River, Miles 719.0–727.0 (Kentucky).
32. 1 day—During the first week of July.	Evansville Freedom Celebration/4th of July Freedom Celebration.	Evansville, IN	Ohio River, Miles 790.0–797.0 (Indiana).
33. First weekend in July	Eddyville Creek Marina/Thunder Over Eddy Bay.	Eddyville, KY	Cumberland River, Miles 46.0–47.0 (Kentucky).
34. 2 days—One of the first two weekends in July.	Thunder on the Bay/KDBA	Pisgah Bay, KY	Tennessee River, Miles 30.0 (Kentucky).
35. 1 day—Second weekend in July.	Bradley Dean/Renaissance Man Triathlon.	Florence, AL	Tennessee River, Miles 254.0–258.0 (Alabama).
36. 1 day—Third or fourth Sunday of July.	Tucson Racing/Cincinnati Triathlon.	Cincinnati, OH	Ohio River, Miles 468.3–471.2 (Ohio).
37. 2 days—One of the last three weekends in July.	Dare to Care/KFC Mayor's Cup Paddle Sports Races/Voyageur Canoe World Championships.	Louisville, KY	Ohio River, Miles 600.0–605.0 (Kentucky).
38. 2 days—Last two weeks in July or first three weeks of August.	Friends of the Riverfront Inc./Pittsburgh Triathlon and Adventure Races.	Pittsburgh, PA	Allegheny River, Miles 0.0–1.5 (Pennsylvania).
39. 1 day—Fourth weekend in July.	Team Magic/Music City Triathlon.	Nashville, TN	Cumberland River, Miles 189.7–192.3 (Tennessee).
40. 1 day—Last weekend in July	Maysville Paddlefest	Maysville, KY	Ohio River, Miles 408–409 (Kentucky).
41. 2 days—One weekend in July.	Huntington Classic Regatta	Huntington, WV	Ohio River, Miles 307.3–309.3 (West Virginia).
42. 2 days—One weekend in July.	Marietta Riverfront Roar Regatta	Marietta, OH	Ohio River, Miles 171.6–172.6 (Ohio).
43. 1 day—Last weekend in July or first weekend in August.	*HealthyTriState.org*/St. Marys Tri State Kayathalon.	Huntington, WV	Ohio River, Miles 305.1–308.3 (West Virginia).
44. 1 day—first Sunday in August.	Above the Fold Events/Riverbluff Triathlon.	Ashland City, TN	Cumberland River, Miles 157.0–159.5 (Tennessee).
45. 3 days—First week of August.	EQT Pittsburgh Three Rivers Regatta.	Pittsburgh, PA	Allegheny River Miles 0.0–1.0; Ohio River Miles 0.0–0.8; Monongahela River Miles 0.5 (Pennsylvania).
46. 2 days—First weekend of August.	Thunder on the Bay/KDBA	Pisgah Bay, KY	Tennessee River, Mile 30.0 (Kentucky).
47. 44. 1 day—First or second weekend in August.	Riverbluff Triathlon	Ashland City, TN	Cumberland River, Miles 157.0–159.0 (Tennessee).
48. 1 day—One of the first two weekends in August.	Green Umbrella/Ohio River Paddlefest.	Cincinnati, OH	Ohio River, Miles 458.5–476.4 (Ohio and Kentucky).

TABLE 1 TO § 100.801—SECTOR OHIO VALLEY ANNUAL AND RECURRING MARINE EVENTS—Continued

Date	Event/sponsor	Ohio Valley location	Regulated area
49. 2 days—Third full weekend (Saturday and Sunday) in August.	Ohio County Tourism/Rising Sun Boat Races.	Rising Sun, IN	Ohio River, Miles 504.0–508.0 (Indiana and Kentucky).
50. 3 days—Second or Third weekend in August.	Kittanning Riverbration Boat Races.	Kittanning, PA	Allegheny River Miles 42.0–46.0 (Pennsylvania).
51. 3 days—One of the last two weekends in August.	Thunder on the Green	Livermore, KY	Green River, Miles 69.0–72.5 (Kentucky).
52. 1 day—Fourth weekend in August.	Team Rocket Tri-Club/Rocketman Triathlon.	Huntsville, AL	Tennessee River, Miles 332.2–335.5 (Alabama).
53. 1 day—Last weekend in August.	Tennessee Clean Water Network/Downtown Dragon Boat Races.	Knoxville, TN	Tennessee River, Miles 646.3–648.7 (Tennessee).
54. 3 days—One weekend in August.	Pro Water Cross Championships.	Charleston, WV	Kanawha River, Miles 56.7–57.6 (West Virginia).
55. 2 days—One weekend in August.	Powerboat Nationals—Ravenswood Regatta.	Ravenswood, WV	Ohio River, Miles 220.5–221.5 (West Virginia).
56. 2 days—One weekend in August.	Powerboat Nationals—Parkersburg Regatta/Parkersburg Homecoming.	Parkersburg, WV	Ohio River Miles 183.5–285.5 (West Virginia).
57. 1 day—One weekend in August.	YMCA River Swim	Charleston, WV	Kanawha River, Miles 58.3–61.8 (West Virginia).
58. 3 days—One weekend in August.	Grand Prix of Louisville	Louisville, KY	Ohio River, Miles 601.0–605.0 (Kentucky).
59. 3 days—One weekend in August.	Evansville HydroFest	Evansville, IN	Ohio River, Miles 790.5–794.0 (Indiana).
60. 3 days—One weekend in the month of August..	Owensboro HydroFair	Owensboro, KY	Ohio River, Miles 794.0–760.0 (Kentucky).
61. 1 day—First or second weekend of September.	SUP3Rivers The Southside Outside.	Pittsburgh, PA	Monongahela River Miles 0.0–3.09; Allegheny River Miles 0.0–0.6 (Pennsylvania).
62. 1 day—First weekend in September or on Labor Day.	Mayor's Hike, Bike and Paddle	Louisville, KY	Ohio River, Miles 601.0–610.0 (Kentucky).
63. 2 days—Sunday before Labor Day and Labor Day.	Cincinnati Bell, WEBN, and Proctor and Gamble/Riverfest.	Cincinnati, OH	Ohio River, Miles 463.0–477.0 (Kentucky and Ohio) and Licking River Miles 0.0–3.0 (Kentucky).
64. 2 days—Labor Day weekend	Wheeling Vintage Race Boat Association Ohio/Wheeling Vintage Regatta.	Wheeling, WV	Ohio River, Miles 90.4–91.5 (West Virginia).
65. 3 days—The weekend of Labor Day.	Portsmouth Boat Race/Breakwater Powerboat Association.	Portsmouth, OH	Ohio River, Miles 355.5–356.8 (Ohio).
66. 2 days—One of the first three weekends in September.	Louisville Dragon Boat Festival	Louisville, KY	Ohio River, Miles 602.0–604.5 (Kentucky).
67. 1 day—One of the first three weekends in September.	Cumberland River Compact/Cumberland River Dragon Boat Festival.	Nashville, TN	Cumberland River, Miles 189.7–192.1 (Tennessee).
68. 2 days—One of the first three weekends in September.	State Dock/Cumberland Poker Run.	Jamestown, KY	Lake Cumberland (Kentucky).
69. 3 days—One of the first three weekends in September.	Fleur de Lis Regatta	Louisville, KY	Ohio River, Miles 594.0.0–598.0 (Kentucky).
70. 1 day—Second weekend in September.	City of Clarksville/Clarksville Riverfest Cardboard Boat Regatta.	Clarksville, TN	Cumberland River, Miles 125.0–126.0 (Tennessee).
71. 1 day—One Sunday in September.	Ohio River Sternwheel Festival Committee Sternwheel race reenactment.	Marietta, OH	Ohio River, Miles 170.5–172.5 (Ohio).
72. 1 Day—One weekend in September.	Parkesburg Paddle Fest	Parkersburg, WV	Ohio River, Miles 184.3–188 (West Virginia).
73. 1 day—One weekend in September.	Shoals Dragon Boat Festival	Florence, AL	Tennessee River, Miles 255.0–257.0 (Alabama).
74. 2 days—One of the last three weekends in September.	Madison Vintage Thunder	Madison, IN	Ohio River, Miles 556.5–559.5 (Indiana).
75. 1 day—Third Sunday in September.	Team Rocket Tri Club/Swim Hobbs Island.	Huntsville, AL	Tennessee River, Miles 332.3–338.0 (Alabama).
76. 1 day—Fourth or fifth weekend in September.	Knoxville Open Water Swimmers/Bridges to Bluffs.	Knoxville, TN	Tennessee River, Miles 641.0–648.0 (Tennessee).
77. 1 day—Fourth or fifth Sunday in September.	Green Umbrella/Great Ohio River Swim.	Cincinnati, OH	Ohio River, Miles 468.8–471.2 (Ohio and Kentucky).
78. 1 day—One of the last two weekends in September.	Ohio River Open Water Swim	Prospect, KY	Ohio River, Miles 587.0–591.0 (Kentucky).
79. 2 days—One of the last three weekends in September or the first weekend in October.	Captain Quarters Regatta	Louisville, KY	Ohio River, Miles 594.0–598.0 (Kentucky).

TABLE 1 TO § 100.801—SECTOR OHIO VALLEY ANNUAL AND RECURRING MARINE EVENTS—Continued

Date	Event/sponsor	Ohio Valley location	Regulated area
80. 3 days—One of the last three weekends in September or one of the first two weekends in October.	Owensboro Air Show	Owensboro, KY	Ohio River, Miles 754.0–760.0 (Kentucky).
81. 1 day—Last weekend in September.	World Triathlon Corporation/IRONMAN Chattanooga.	Chattanooga, TN	Tennessee River, Miles 462.7–467.5 (Tennessee).
82. 3 days—Last weekend of September and/or first weekend in October.	New Martinsville Records and Regatta Challenge Committee.	New Martinsville, WV	Ohio River, Miles 128–129 (West Virginia).
83. 2 days—First weekend of October.	Three Rivers Rowing Association/Head of the Ohio Regatta.	Pittsburgh, PA	Allegheny River Miles 0.0–5.0 (Pennsylvania).
84. 1 day in October	Chattajack	Chattanooga, TN	Tennessee River, Miles 462.7–465.5 (Tennessee).
85. 1 day in October	Outdoor Chattanooga/Swim the Suck.	Chattanooga, TN	Tennessee River, Miles 452.0–454.5 (Tennessee).
86. 1 day—First or second weekend in October.	Lookout Rowing Club/Chattanooga Head Race.	Chattanooga, TN	Tennessee River, Miles 463.0–468.0 (Tennessee).
87. 3 days—First or Second weekend in October.	Vanderbilt Rowing/Music City Head Race.	Nashville, TN	Cumberland River, Miles 189.5–196.0 (Tennessee).
88. 2 days—First or second week of October.	Head of the Ohio Rowing Race	Pittsburgh, PA	Allegheny River, Miles 0.0–3.0 (Pennsylvania).
89. 2 days—One of the first three weekends in October.	Norton Healthcare/Ironman Triathlon.	Louisville, KY	Ohio River, Miles 600.5–605.5 (Kentucky).
90. 2 days—Two days in October.	Secret City Head Race Regatta	Oak Ridge, TN	Clinch River, Miles 49.0–54.0 (Tennessee).
91. 3 days—First weekend in November.	Atlanta Rowing Club/Head of the Hooch Rowing Regatta.	Chattanooga, TN	Tennessee River, Mile 463.0–468.0 (Tennessee).
92. 1 day—One weekend in November or December.	Charleston Lighted Boat Parade	Charleston, WV	Kanawha River, Miles 54.3–60.3 (West Virginia).

* * * * *

Dated: November 30, 2021.

A.M. Beach,

Captain, U. S. Coast Guard, Captain of the Port Sector Ohio Valley.

[FR Doc. 2021–26486 Filed 12–7–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Chapter VI

[Docket ID ED–2021–OPE–0077]

Negotiated Rulemaking Committee; Negotiator Nominations and Schedule of Committee Meetings

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Intent to establish rulemaking committee.

SUMMARY: We announce our intention to establish a negotiated rulemaking committee to prepare proposed regulations for the Federal Student Aid programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA). The committee will include representatives of organizations or groups with interests that are significantly affected by the subject matter of the proposed regulations. We request nominations for individual negotiators who represent key stakeholder constituencies for the issues to be negotiated to serve on the committee and request nominations for advisors to the committee. The Department has also set a schedule for committee meetings.

DATES: We must receive your nominations for negotiators to serve on the committee seven days from the date of publication. The dates and times of the committee meetings are set out in the *Schedule for Negotiations* section in the **SUPPLEMENTARY INFORMATION** section. All meetings will be virtual.

ADDRESSES: Please email your nominations for negotiators to *negregnominations@ed.gov.* If you are unable to email your nomination, send it to Vanessa Gomez, U.S. Department of Education, 400 Maryland Ave. SW, Room 2C179, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: For information about negotiated rulemaking, see ''The Negotiated Rulemaking Process for Title IV Regulations—Frequently Asked Questions'' at *https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html.* For information about the content of this document, including additional information about the negotiated rulemaking process or the nomination submission process, contact: Vanessa Gomez, U.S. Department of Education, 400 Maryland Ave. SW, Room 2C179, Washington, DC 20202. Telephone: (202) 452–6708. Email: *vanessa.gomez@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or text phone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

On May 26, 2021, we published an announcement of our intent to establish negotiated rulemaking committees under section 492 of the HEA to develop proposed regulations related to a number of higher education practices and issues in the **Federal Register** (86 FR 28299) (Negotiated Rulemaking Committee Notice). We also announced three public hearings at which interested parties could comment on the topics suggested by the Department and suggest additional topics for consideration for action by the negotiated rulemaking committees. Those hearings took place virtually on June 21, June 23, and June 24, 2021.

On August 10, 2021, the Department published a **Federal Register** notice (86 FR 43609) announcing our intent to establish the Affordability and Student Loans Committee. That committee is currently meeting to address issues that include borrower defense to repayment; closed school, false certification, and total and permanent disability Federal

student loan discharges; income-driven repayment; Public Service Loan Forgiveness; pre-dispute arbitration and required class action waivers; interest capitalization; and Pell Grants for people who are enrolled in prison education programs.

On October 4, 2021, we published an announcement in the **Federal Register** (86 FR 54666) of our intent to establish a negotiated rulemaking committee under section 492 of the HEA to develop proposed regulations related to the 90/10 rule. Section 2013 of the American Rescue Plan Act of 2021 (ARP) amended HEA section 487(a)(24) to make changes to the statutory provision that requires a proprietary institution to derive at least 10 percent of its revenues from sources that are not Federal education assistance funds. Federal education assistance funds are ''Federal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution.'' We then held two additional public hearings on the topic of 90/10 on October 26 and October 27, 2021. We invited parties to comment in writing as well. Recordings and transcripts from the public hearings are available at *https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.*

You may view written comments submitted in response to the aforementioned **Federal Register** notices through the Federal eRulemaking Portal at *www.regulations.gov.* Instructions for finding comments are available on the site under ''FAQ.'' Enter Docket ID ED–2021–OPE–0077 in the search box to locate the appropriate docket.

Committee Topics

After considering the information received at the public hearings and the written comments, we have decided to establish the Institutional and Programmatic Eligibility Committee to address the following topics:

(1) 90/10 under 34 CFR 668.28;

(2) Ability to benefit under 34 CFR 668.156;

(3) Certification procedures for participation in title IV, HEA programs under 34 CFR 668.13;

(4) Change of ownership and change in control of institutions of higher education under 34 CFR 600.31;

(5) Financial responsibility for participating institutions of higher education under 34 CFR 668.15 and 34 CFR part 668, subpart L, such as events that indicate heightened financial risk;

(6) Gainful employment (formerly located in 34 CFR part 668, subpart Q); and

(7) Standards of administrative capability under 34 CFR 668.16.

We intend to select negotiators for the Institutional and Programmatic Eligibility Committee who represent the interests of those significantly affected by the topics proposed for negotiation. In so doing, we will comply with the requirement in section 492(b)(1) of the HEA that the individuals selected must have demonstrated expertise or experience in the relevant topics proposed for negotiations. We will also select individual negotiators who reflect the diversity among program participants, in accordance with section 492(b)(1) of the HEA. Our goal is to establish a committee that will allow significantly affected parties to be represented while keeping the committee size manageable.

We generally select a primary and alternate negotiator for each constituency represented on a committee. The primary negotiator participates for the purpose of determining consensus. The alternate participates for the purpose of determining consensus in the absence of the primary negotiator. The Department will provide more detailed information to both primary and alternate negotiators selected to participate on the committee about the logistics and protocols of the meetings.

Members of the public may observe the committee meetings, will have access to individuals representing their constituencies, and may be able to participate in informal working groups on issues between the meetings.

Constituencies for Negotiator Nominations

We have identified the following constituencies as having interests that are significantly affected by the topics proposed for negotiation. We plan to include as negotiators individuals from organizations or groups representing these constituencies and/or individuals who are a part of the constituency. We particularly encourage organizations representing the interests of historically underserved and/or low-income communities to submit their nominations. We also encourage nominations for individuals who have expertise in formal or State-approved career pathways programs. Nominations should include evidence of the nominee's specific knowledge in these areas, citing specific topics outlined in the *Committee Topics* section. The Department strongly encourages nominees to list all constituencies under which they would like to be considered. The Department reserves the discretion to place a nominee in a constituency based upon their background and experience even if the individual was not nominated for that specific category. Constituencies for the Institutional and Programmatic Eligibility Committee are:

(1) Students and student loan borrowers.

(2) U.S. military service members, veterans, or groups representing them.

(3) Legal assistance organizations that represent students and/or borrowers.

(4) Civil rights organizations and consumer advocacy organizations.

(5) State Attorneys General.

(6) State higher education executive officers, State authorizing agencies, and/or State regulators of institutions of higher education and/or loan servicers.

(7) Financial aid administrators at postsecondary institutions.

(8) Two-year public institutions of higher education.

(9) Four-year public institutions of higher education.

(10) Private nonprofit institutions of higher education.

(11) Proprietary institutions.

(12) Minority-serving institutions—institutions of higher education eligible to receive Federal assistance under title III, parts A, B, and F, and title V of the HEA, which include Historically Black Colleges and Universities, Hispanic-Serving Institutions, American Indian Tribally Controlled Colleges and Universities, Alaska Native and Native Hawaiian-Serving Institutions, Predominantly Black Institutions, Native American-Serving Nontribal Institutions, and Asian American and Native American Pacific Islander-Serving Institutions.

(13) Accrediting agencies.

The goal of the committee is to develop proposed regulations that reflect a final consensus of the committee. Consensus means that there is no dissent by any member of a negotiating committee, including the committee member representing the Department.

An individual selected as a negotiator is expected to represent the interests of their organization or group and to participate in the negotiations in a manner consistent with the goal of developing proposed regulations on which the committee will reach consensus. If consensus is reached, all members of the organization or group represented by a negotiator are bound by the consensus and are prohibited from commenting negatively on the resulting proposed regulations. The Department will not consider any such negative comments on the proposed regulations that are submitted by a member of such an organization.

Advisors

The Department also invites nominations for two advisors who will

serve as a resource to the committee. These advisors will not be members of the committee and will not impact consensus. We seek an advisor from each of the following categories:

(1) A labor economist or an individual with experience in policy research, accountability, and/or analysis of higher education data.

(2) A compliance auditor with experience auditing institutions that participate in the title IV, HEA programs.

The advisors will be expected to be available throughout the duration of the Institutional and Programmatic Eligibility Committee meetings.

Nominations

We request that nominations include the information described in this section.

(1) The name of the nominee;

(2) The name of the constituency, constituencies, or advisor category for which the nominee is being nominated (see *Constituencies for Negotiator Nominations*);

(3) The nominee's place of employment or institution at which they are or were enrolled and, if different, the organization the nominee represents;

(4) A resume or evidence of the nominee's expertise and experience in the topics proposed for negotiations or in the advisor subject matter categories; and

(5) The nominee's contact information, including the nominee's email address, telephone number, and mailing address.

Please see the **ADDRESSES** section for submission information. We will confirm receipt of nominations to the submitter. The Department will provide additional information to those we select to serve as negotiators. Once complete, a list of negotiators will be posted here: *www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.* If a constituency does not have a qualifying nominee, the Department will also provide information at that site about how any vacancies can be filled at the beginning of the January 18, 2022, committee meeting.

Schedule for Negotiations

The Institutional and Programmatic Eligibility Committee will meet for three sessions on the following dates:

Session 1: January 18–21, 2022, 10:00 a.m. to 12:30 p.m. and 1:00 p.m. to 4:30 p.m. with a public comment period from approximately 4:00 p.m. to 4:30 p.m. (Eastern time).

Session 2: February 14–18, 2022, 10:00 a.m. to 12:00 p.m. and 1:00 p.m. to 4:00 p.m. with a public comment period from approximately 3:30 p.m. to 4:00 p.m. (Eastern time).

Session 3: March 14–18, 2022, 10:00 a.m. to 12:00 p.m. and 1:00 p.m. to 4:00 p.m. with a public comment period from approximately 3:30 p.m. to 4:00 p.m. (Eastern time).

All sessions will be conducted virtually and available for the public to view. Individuals who wish to observe the committee meetings will be required to register for each day they would like to observe. We will post registration links closer to the start of negotiations on our website at *www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.* The Department will also post recordings and transcripts of the meetings on that site.

At the end of each day (except for the final day of Session 3), the Department will reserve 30 minutes for public comment. We will provide information on how to request time to speak on our website at *www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.*

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to this Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register,** in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site. You may also access the documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Program authority: 20 U.S.C. 1098a.

Michelle Asha Cooper,

Deputy Assistant Secretary for Higher Education Programs Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary, Office of Postsecondary Education.

[FR Doc. 2021–26571 Filed 12–7–21; 8:45 am]

BILLING CODE 4000–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 4

[PS Docket No. 21–346; PS Docket No. 15–80; ET Docket No. 04–35; FR ID 60757]

Resilient Networks; Disruptions to Communications; Disruptions to Communications

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment and reply comment period.

SUMMARY: In this document, the Federal Communications Commission extends the comment and reply comment period of the notice of the proposed rulemaking (NPRM) in PS Docket Nos. 21–346 and 15–80 and ET Docket No. 04–35 that was released on October 1, 2021.

DATES: The comment period and reply comment period for the proposed rule published at 86 FR 61103 (November 5, 2021) are extended. The deadline for filing comments is extended to December 16, 2021, and the deadline for filing reply comments is extended to January 14, 2022.

ADDRESSES: You may submit comments, identified by PS Docket Nos. 21–346 and 15–80 and ET Docket No. 04–35, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the Electronic Comment Filing System (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.

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail

and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19.
- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

People With Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

FOR FURTHER INFORMATION CONTACT: Saswat Misra of the Public Safety and Homeland Security Bureau, Cybersecurity and Communications Reliability Division, at (202) 418–0944 or *Saswat.Misra@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communication Commission's (Commission's) *Order* in PS Docket Nos. 21–346 and 15–80 and ET Docket No. 04–35; DA 21–1483, adopted and released on November 30, 2021. For the full text of this document, visit FCC's website at *https://www.fcc.gov/document/pshsb-extends-comment-deadlines-resiliency-proceeding* or obtain access via the FCC's ECFS website at *http://www.fcc.gov/*ecfs. (Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.) Alternative formats are available for people with disabilities (braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

I. Synopsis

1. The Public Safety and Homeland Security Bureau (PSHSB) grants a Motion filed by the Edison Electric Institute (EEI) seeking an extension of 10 days to file comments and reply comments in response to the notice of proposed rulemaking in PS Docket Nos. 21–346 and 15–80 and ET Docket No. 04–35 that was released on October 1, 2021 (NPRM), and published in the **Federal Register** on November 5, 2021. *See* Motion of Edison Electric Institute for Extension of Time, PS Docket Nos. 21–346 and 15–80, ET Docket No. 04–35 (filed Nov. 19, 2021) (Motion). For the reasons stated below, PSHSB finds that EEI's request is warranted and thus extends the comment and reply comment dates to December 16, 2021 and January 14, 2022, respectively.

2. On September 30, 2021, the Commission adopted the NPRM seeking comment on proposed rules to improve communications reliability during disasters. 86 FR 61103 (Nov. 5, 2021) (summarizing the NPRM). The NPRM seeks comment on the wireless industry's disaster response framework, the Commission's network outage reporting rules, and strategies to reduce the impact of power outages on communications networks. The summary of the NPRM, published in the **Federal Register** on November 5, 2021, indicates that comments must be filed on or before December 6, 2021, and reply comments must be filed on or before January 4, 2022. *Id.*

3. On November 19, 2021, EEI filed the Motion to request a 10-day extension of the comment and reply comment filing deadlines, to December 16, 2021, and January 14, 2022, respectively. EEI states that these deadlines should be extended ''to ensure that there is sufficient time to conduct consultations with respective member companies to prepare reasoned comments and reply comments that meaningfully address the broad range of issues presented by the NPRM.'' EEI notes that November 25th was the Thanksgiving holiday and that that the Christmas and New Year's holidays are on December 25th and January 1st, respectively, and that ''this is a period when many organizations are closed and vacations are taken.'' EEI states that, without an extension, it would be challenging to ''build industry consensus before submitting comments.'' EEI contends that an extension of 10 days will not result in any meaningful delay in the proceeding and will result in more focused and better reasoned comments. EEI represents that CTIA, NCTA—The internet and Television Association, and USTelecom—The Broadband Association support the Motion and that the National Association of Broadcasters has no objections to it. No opposition to the Motion has been filed.

4. The Commission grants a 10-day extension of time to file comments and reply comments in this proceeding. As set forth in § 1.46 of the Commission's rules, 47 CFR 1.46, the Commission does not routinely grant extensions of time for filing comments. In this case, however, the extension is unopposed, limited to only ten days, and will allow commenters sufficient time to file meaningful comment and reply comments given the intervening holidays. The Commission therefore grants EEI's unopposed Motion and extends the comment and reply comment deadlines to December 16, 2021, and January 14, 2022, respectively.

II. Ordering Clauses

5. Accordingly, *it is ordered* that, pursuant to section 4(i)–(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i)–(j), and §§ 0.204, 0.392, and 1.46 of the Commission's rules, 47 CFR 0.204, 0.392, 1.46, the Motion for Extension of Time filed by EEI is *granted.*

6. *It is further ordered* that the date to file comments and reply comments in response to the NPRM *are extended* to December 16, 2021, and January 14, 2022, respectively.

Federal Communications Commission.

David Furth,

Deputy Chief, Public Safety and Homeland Security Bureau.

[FR Doc. 2021–26587 Filed 12–6–21; 11:15 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 86, No. 233

Wednesday, December 8, 2021

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.

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the South Dakota Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of public meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that the South Dakota State Advisory Committee to the Commission will convene meetings on the 2nd Mondays of the following months: December 13, 2021, at 3:30 p.m. (CT) and January 10 and February 14, 2022, at 3:30 p.m. (CT). The purpose of the meetings for project planning.

DATES: Mondays: December 13, 2021; January 10, 2022; February 14, 2022; all meetings are at 3:30 p.m. (CT).

ADDRESSES:

Public Web Conference Registration Link for All Meetings (Video and Audio): https://bit.ly/3AnTnxv; password, if needed: USCCR

If Joining by Phone Only, Dial: 1–800–360–9505; access code: 2762 840 3606#.

FOR FURTHER INFORMATION CONTACT: Mallory Trachtenberg at *mtrachtenberg@usccr.gov* or by phone at (202) 809–9618.

SUPPLEMENTARY INFORMATION: The meetings are available to the public through the web link above. If joining only via phone, callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with conference details found through registering at the web link above. To request other accommodations, please email *mtrachtenberg@usccr.gov* at least 7 days prior to each meeting for which accommodations are requested.

Members of the public are entitled to make comments during the open period at the end of each meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meetings. Written comments may be emailed to Mallory Trachtenberg at *mtrachtenberg@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (202) 809–9618. Records and documents discussed during the meeting will be available for public viewing as they become available at *www.facadatabase.gov.* Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Regional Programs Unit at the above phone number or email address.

Agenda: Mondays: December 13, 2021; January 10, 2022; February 14, 2022; at 3:30 p.m. (CT).

I. Welcome and Roll Call
II. Announcements and Updates
III. Approval of Minutes
IV. Discussion: Project Planning
V. Public Comment
VI. Next Steps
VII. Adjournment

Dated: December 2, 2021.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2021–26532 Filed 12–7–21; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Census Bureau

[Docket Number 211029–0221]

Voting Rights Act Amendments of 2006, Determinations Under Section 203

AGENCY: Census Bureau, Department of Commerce.

ACTION: Notice of determination.

SUMMARY: As required by Section 203 of the Voting Rights Act of 1965 (Act), as amended, this notice publishes the U.S. Census Bureau's Director's determinations as to which political subdivisions are subject to the minority language assistance provisions of the Act. As of this date, those jurisdictions that are listed in this Notice as covered by Section 203 have a legal obligation to provide the minority language assistance prescribed by the Act.

DATES: This notice is applicable on December 8, 2021.

FOR FURTHER INFORMATION CONTACT: For information regarding this notice, please contact Mr. James Whitehorne, Chief, Census Redistricting and Voting Rights Data Office, Census Bureau, United States Department of Commerce, by telephone at 301–763–4039, by email at *rdo@census.gov* or *james.whitehorne@census.gov,* or visit the Redistricting & Voting Rights Data Office internet site at *https://www.census.gov/rdo/.*

For information regarding the applicable provisions of the Act, please contact T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Division, United States Department of Justice, 4CON 8th Floor, 950 Pennsylvania Avenue NW, Washington, DC 20530, by telephone at (800) 253–3931 or visit the Voting Section internet site at *https://www.justice.gov/crt/voting-section.*

SUPPLEMENTARY INFORMATION: In July 2006, Congress amended the Voting Rights Act of 1965, now codified at title 52, United States Code (U.S.C.), 10301 *et seq.* (See Pub. L. 109–246, 120 Stat. 577 (2006)). Among other changes, the sunset date for minority language assistance provisions set forth in section 203 of the Act was extended to August 5, 2032.

Section 203 mandates that a state or political subdivision must provide language assistance to voters if more than five (5) percent of voting-age citizens are members of a single-language minority group and do not ''speak or understand English adequately enough to participate in the electoral process,'' and if the rate of those citizens who have not completed the fifth grade is higher than the national rate of voting-age citizens who have not completed the fifth grade. When a state is covered for a particular language minority group, an exception is made for any political subdivision in which less than five (5) percent of the voting-age citizens are members of the minority group and are limited in English proficiency, unless the political subdivision is covered independently. A political subdivision is also covered if

more than 10,000 of the voting-age citizens are members of a single-language minority group, do not ''speak or understand English adequately enough to participate in the electoral process,'' and the rate of those citizens who have not completed the fifth grade is higher than the national rate of voting-age citizens who have not completed the fifth grade.

Finally, if more than five (5) percent of the American Indian or Alaska Native voting-age citizens residing within an American Indian Area, as defined for the purposes of the decennial census, are members of a single language minority group, do not ''speak or understand English adequately enough to participate in the electoral process,'' and the rate of those citizens who have not completed the fifth grade is higher than the national rate of voting-age citizens who have not completed the fifth grade, any political subdivision, such as a county, which contains all or any part of that American Indian Area, is covered by the minority language assistance provision set forth in Section 203. For the 2020 Census, American Indian areas and Alaska Native Regional Corporations were identified by the federally recognized tribal governments, Bureau of Indian Affairs, and state governments. The Census Bureau worked with American Indians and Alaska Natives to identify statistical areas, such as Oklahoma Tribal Statistical Areas (OTSA), Tribal Designated Statistical Areas (TDSA), State Designated Tribal Statistical Areas (SDTSA), and Alaska Native Village Statistical Areas (ANVSA).

Pursuant to Section 203, the Census Bureau Director has the responsibility to determine which states and political subdivisions are subject to the minority language assistance provisions of Section 203. The Section 203 determinations are generated using data from the American Community Survey, or comparable census data, as directed by the Act. To find more detailed information, please see the documentation on the 2021 tab of the Section 203 Language Determinations internet site at *https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/voting-rights-determination-file.html.* The state and political subdivisions obligated to comply with the requirements are listed in this Notice.

Section 203 also provides that the ''determinations of the Director of the Census under this subsection shall be effective upon publication in the **Federal Register** and shall not be subject to review in any court.'' Therefore, as of this date, those jurisdictions that are listed as covered by Section 203 have a legal obligation to provide the minority language assistance prescribed in Section 203 of the Act. In the cases where a state is covered, those counties or county equivalents not displayed in the attachment are exempt from the obligation. Those jurisdictions subject to Section 203 of the Act previously, but not included on the list in this Notice, are no longer obligated to comply with Section 203.

Ron S. Jarmin, Acting Director, Census Bureau, approved the publication of this Notice in the **Federal Register**.

Dated: December 2, 2021.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

COVERED AREAS FOR VOTING RIGHTS BILINGUAL ELECTION MATERIALS—2020

State and political subdivision	Language minority group
Alaska:	
Aleutians East Borough	Yup'ik.
Aleutians West Census Area	Filipino.
Bethel Census Area	Yup'ik.
Bristol Bay Borough	Yup'ik.
Dillingham Census Area	Yup'ik.
Kenai Peninsula Borough	Yup'ik.
Kodiak Island Borough	Yup'ik.
Kodiak Island Borough	Filipino.
Kusilvak Census Area	Yup'ik.
Lake and Peninsula Borough	Aleut.
Lake and Peninsula Borough	Yup'ik.
Nome Census Area	Yup'ik.
North Slope Borough	Inupiat.
Northwest Arctic Borough	Inupiat.
Yukon-Koyukuk Census Area	Inupiat.
Arizona:	
Apache County	Navajo.
Apache County	Pueblo.
Coconino County	Hopi.
Coconino County	Navajo.
Coconino County	Paiute.
Gila County	Apache.
Graham County	Apache.
Maricopa County	Hispanic.
Mohave County	Paiute.
Navajo County	Hopi.
Navajo County	Navajo.
Pima County	Hispanic.
Pinal County	Apache.
Santa Cruz County	Hispanic.
Yuma County	Hispanic.
California:	
State Coverage	Hispanic.
Alameda County	Hispanic.
Alameda County	Chinese (including Taiwanese).
Alameda County	Filipino.

COVERED AREAS FOR VOTING RIGHTS BILINGUAL ELECTION MATERIALS—2020—Continued

State and political subdivision	Language minority group
Alameda County	Vietnamese.
Colusa County	Hispanic.
Contra Costa County	Hispanic.
Contra Costa County	Chinese (including Taiwanese).
Fresno County	Hispanic.
Glenn County	Hispanic.
Imperial County	Hispanic.
Kern County	Hispanic.
Kings County	Hispanic.
Los Angeles County	Hispanic.
Los Angeles County	Cambodian.
Los Angeles County	Chinese (including Taiwanese).
Los Angeles County	Filipino.
Los Angeles County	Korean.
Los Angeles County	Vietnamese.
Madera County	Hispanic.
Merced County	Hispanic.
Monterey County	Hispanic.
Napa County	Hispanic.
Orange County	Hispanic.
Orange County	Chinese (including Taiwanese).
Orange County	Korean.
Orange County	Vietnamese.
Riverside County	Hispanic.
Sacramento County	Hispanic.
Sacramento County	Chinese (including Taiwanese).
Sacramento County	Vietnamese.
San Benito County	Hispanic.
San Bernardino County	Hispanic.
San Diego County	Hispanic.
San Diego County	Chinese (including Taiwanese).
San Diego County	Filipino.
San Diego County	Vietnamese.
San Francisco County	Hispanic.
San Francisco County	Chinese (including Taiwanese).
San Joaquin County	Hispanic.
San Mateo County	Hispanic.
San Mateo County	Chinese (including Taiwanese).
San Mateo County	Filipino.
Santa Barbara County	Hispanic.
Santa Clara County	Hispanic.
Santa Clara County	Chinese (including Taiwanese).
Santa Clara County	Filipino.
Santa Clara County	Vietnamese.
Sonoma County	Hispanic.
Stanislaus County	Hispanic.
Tulare County	Hispanic.
Ventura County	Hispanic.
Colorado:	
Adams County	Hispanic.
Alamosa County	Hispanic.
Conejos County	Hispanic.
Costilla County	Hispanic.
Denver County	Hispanic.
La Plata County	Ute.
Montezuma County	Ute.
Saguache County	Hispanic.
Connecticut:	
Bridgeport town	Hispanic.
East Hartford town	Hispanic.
Hartford town	Hispanic.
Meriden town	Hispanic.
New Britain town	Hispanic.
New Haven town	Hispanic.
New London town	Hispanic.
Norwalk town	Hispanic.
Waterbury town	Hispanic.
Windham town	Hispanic.
Florida:	
State Coverage	Hispanic.
Broward County	Hispanic.
Collier County	Hispanic.

COVERED AREAS FOR VOTING RIGHTS BILINGUAL ELECTION MATERIALS—2020—Continued

State and political subdivision	Language minority group
DeSoto County	Hispanic.
Glades County	Seminole.
Hardee County	Hispanic.
Hendry County	Hispanic.
Hillsborough County	Hispanic.
Lee County	Hispanic.
Miami-Dade County	Hispanic.
Orange County	Hispanic.
Osceola County	Hispanic.
Palm Beach County	Hispanic.
Pinellas County	Hispanic.
Polk County	Hispanic.
Seminole County	Hispanic.
Georgia:	
Gwinnett County	Hispanic.
Hawaii:	
Honolulu County	Chinese (including Taiwanese).
Honolulu County	Filipino.
Maui County	Filipino.
Idaho:	
Clark County	Hispanic.
Clearwater County	All other American Indian tribes.
Idaho County	All other American Indian tribes.
Lewis County	All other American Indian tribes.
Nez Perce County	All other American Indian tribes.
Illinois:	
Cook County	Hispanic.
Cook County	Asian Indian (including Sikh).
Cook County	Chinese (including Taiwanese).
DuPage County	Hispanic.
Kane County	Hispanic.
Lake County	Hispanic.
Will County	Hispanic.
Kansas:	
Finney County	Hispanic.
Ford County	Hispanic.
Grant County	Hispanic.
Haskell County	Hispanic.
Seward County	Hispanic.
Stevens County	Hispanic.
Maryland:	
Montgomery County	Hispanic.
Prince George's County	Hispanic.
Massachusetts:	
Boston city	Hispanic.
Chelsea city	Hispanic.
Clinton town	Hispanic.
Everett city	Hispanic.
Fitchburg city	Hispanic.
Holyoke city	Hispanic.
Lawrence city	Hispanic.
Leominster city	Hispanic.
Lowell city	Hispanic.
Lowell city	Cambodian.
Lynn city	Hispanic.
Malden city	Chinese (including Taiwanese).
Methuen Town city	Hispanic.
Quincy city	Chinese (including Taiwanese).
Randolph Town city	Vietnamese.
Revere city	Hispanic.
Salem city	Hispanic.
Southbridge Town city	Hispanic.
Springfield city	Hispanic.
Worcester city	Hispanic.
Michigan:	
Clyde township	Hispanic.
Covert township	Hispanic.
Fennville city	Hispanic.
Hamtramck city	Bangladeshi.
Minnesota:	
Houston County	All other American Indian tribes.
Ramsey County	Hmong.

COVERED AREAS FOR VOTING RIGHTS BILINGUAL ELECTION MATERIALS—2020—Continued

State and political subdivision	Language minority group
Mississippi:	
Attala County	Choctaw.
Carroll County	Choctaw.
Jackson County	Choctaw.
Jones County	Choctaw.
Kemper County	Choctaw.
Leake County	Choctaw.
Neshoba County	Choctaw.
Newton County	Choctaw.
Noxubee County	Choctaw.
Scott County	Choctaw.
Winston County	Choctaw.
Nebraska:	
Colfax County	Hispanic.
Dakota County	Hispanic.
Dawson County	Hispanic.
Nevada:	
Clark County	Hispanic.
Clark County	Filipino.
Nye County	Shoshone.
New Jersey:	
Bergen County	Hispanic.
Bergen County	Korean.
Camden County	Hispanic.
Cumberland County	Hispanic.
Essex County	Hispanic.
Hudson County	Hispanic.
Middlesex County	Hispanic.
Middlesex County	Asian Indian (including Sikh).
Passaic County	Hispanic.
Union County	Hispanic.
New Mexico:	
Bernalillo County	Hispanic.
Bernalillo County	Navajo.
Catron County	Pueblo.
Chaves County	Hispanic.
Cibola County	Navajo.
Cibola County	Pueblo.
Doña Ana County	Hispanic.
Guadalupe County	Hispanic.
Hidalgo County	Hispanic.
Lea County	Hispanic.
Luna County	Hispanic.
McKinley County	Navajo.
McKinley County	Pueblo.
Mora County	Hispanic.
Rio Arriba County	Navajo.
Sandoval County	Navajo.
San Juan County	Navajo.
San Juan County	Ute.
San Miguel County	Hispanic.
Socorro County	Hispanic.
Socorro County	Navajo.
Taos County	Hispanic.
New York:	
Bronx County	Hispanic.
Kings County	Hispanic.
Kings County	Chinese (including Taiwanese).
Monroe County	Hispanic.
Nassau County	Hispanic.
New York County	Hispanic.
New York County	Chinese (including Taiwanese).
Queens County	Hispanic.
Queens County	Asian Indian (including Sikh).
Queens County	Bangladeshi.
Queens County	Chinese (including Taiwanese).
Queens County	Korean.
Suffolk County	Hispanic.
Westchester County	Hispanic.
Ohio:	
Cuyahoga County	Hispanic.
Oklahoma:	

COVERED AREAS FOR VOTING RIGHTS BILINGUAL ELECTION MATERIALS—2020—Continued

State and political subdivision	Language minority group
Texas County	Hispanic.
Pennsylvania:	
Berks County	Hispanic.
Lehigh County	Hispanic.
Philadelphia County	Hispanic.
Philadelphia County	Chinese (including Taiwanese).
Rhode Island:	
Central Falls city	Hispanic.
Pawtucket city	Hispanic.
Providence city	Hispanic.
Texas:	
State Coverage	Hispanic.
Andrews County	Hispanic.
Atascosa County	Hispanic.
Bailey County	Hispanic.
Bee County	Hispanic.
Bexar County	Hispanic.
Brewster County	Hispanic.
Brooks County	Hispanic.
Caldwell County	Hispanic.
Cameron County	Hispanic.
Castro County	Hispanic.
Cochran County	Hispanic.
Concho County	Hispanic.
Crane County	Hispanic.
Crockett County	Hispanic.
Crosby County	Hispanic.
Culberson County	Hispanic.
Dallam County	Hispanic.
Dallas County	Hispanic.
Dallas County	Vietnamese.
Dawson County	Hispanic.
Deaf Smith County	Hispanic.
Denton County	Hispanic.
Dimmit County	Hispanic.
Duval County	Hispanic.
Ector County	Hispanic.
Edwards County	Hispanic.
El Paso County	Hispanic.
Floyd County	Hispanic.
Fort Bend County	Hispanic.
Frio County	Hispanic.
Gaines County	Hispanic.
Garza County	Hispanic.
Gonzales County	Hispanic.
Hale County	Hispanic.
Hansford County	Hispanic.
Harris County	Hispanic.
Harris County	Chinese (including Taiwanese).
Harris County	Vietnamese.
Hidalgo County	Hispanic.
Hockley County	Hispanic.
Hudspeth County	Hispanic.
Jeff Davis County	Hispanic.
Jim Hogg County	Hispanic.
Jim Wells County	Hispanic.
Karnes County	Hispanic.
Kenedy County	Hispanic.
Kinney County	Hispanic.
Kleberg County	Hispanic.
Knox County	Hispanic.
Lamb County	Hispanic.
La Salle County	Hispanic.
Live Oak County	Hispanic.
Lynn County	Hispanic.
Martin County	Hispanic.
Maverick County	Hispanic.
Maverick County	All other American Indian tribes.
Medina County	Hispanic.
Menard County	Hispanic.
Moore County	Hispanic.
Nueces County	Hispanic.

COVERED AREAS FOR VOTING RIGHTS BILINGUAL ELECTION MATERIALS—2020—Continued

State and political subdivision	Language minority group
Ochiltree County	Hispanic.
Parmer County	Hispanic.
Pecos County	Hispanic.
Polk County	All other American Indian tribes.
Presidio County	Hispanic.
Reagan County	Hispanic.
Reeves County	Hispanic.
San Patricio County	Hispanic.
Schleicher County	Hispanic.
Sherman County	Hispanic.
Starr County	Hispanic.
Sterling County	Hispanic.
Sutton County	Hispanic.
Tarrant County	Hispanic.
Tarrant County	Vietnamese.
Terrell County	Hispanic.
Terry County	Hispanic.
Titus County	Hispanic.
Travis County	Hispanic.
Uvalde County	Hispanic.
Val Verde County	Hispanic.
Ward County	Hispanic.
Webb County	Hispanic.
Willacy County	Hispanic.
Winkler County	Hispanic.
Yoakum County	Hispanic.
Zapata County	Hispanic.
Zavala County	Hispanic.
Utah:	
Salt Lake County	Hispanic.
San Juan County	Navajo.
San Juan County	Ute.
Virginia:	
Fairfax County	Hispanic.
Fairfax County	Vietnamese.
Prince William County	Hispanic.
Manassas city	Hispanic.
Manassas Park city	Hispanic.
Washington:	
Adams County	Hispanic.
Franklin County	Hispanic.
King County	Hispanic.
King County	Chinese (including Taiwanese).
King County	Vietnamese.
Yakima County	Hispanic.
Wisconsin:	
Abbotsford city	Hispanic.
Adams town	All other American Indian tribes.
Albion town	All other American Indian tribes.
Arcadia city	Hispanic.
Bangor town	All other American Indian tribes.
Birnamwood town	All other American Indian tribes.
Black River Falls city	All other American Indian tribes.
Brockway town	All other American Indian tribes.
Byron town	All other American Indian tribes.
Cranmoor town	All other American Indian tribes.
Curtiss village	Hispanic.
Dellona town	All other American Indian tribes.
Delton town	All other American Indian tribes.
Dewhurst town	All other American Indian tribes.
Eaton town	All other American Indian tribes.
Elderon town	All other American Indian tribes.
Ferryville village	All other American Indian tribes.
Franzen town	All other American Indian tribes.
Freeman town	All other American Indian tribes.
Friendship village	All other American Indian tribes.
Germania town	All other American Indian tribes.
Germantown town	All other American Indian tribes.
Greenfield town	All other American Indian tribes.
Holland town	All other American Indian tribes.
Komensky town	All other American Indian tribes.
La Grange town	All other American Indian tribes.

COVERED AREAS FOR VOTING RIGHTS BILINGUAL ELECTION MATERIALS—2020—Continued

State and political subdivision	Language minority group
Lemonweir town	All other American Indian tribes.
Leon town	All other American Indian tribes.
Levis town	All other American Indian tribes.
Lyndon town	All other American Indian tribes.
Madison city	All other American Indian tribes.
Manchester town	All other American Indian tribes.
Mead town	All other American Indian tribes.
Millston town	All other American Indian tribes.
Milwaukee city	Hispanic.
Oakdale town	All other American Indian tribes.
Onalaska town	All other American Indian tribes.
Port Edwards town	All other American Indian tribes.
Preston town	All other American Indian tribes.
Reid town	All other American Indian tribes.
Seneca town	All other American Indian tribes.
Seven Mile Creek town	All other American Indian tribes.
Sharon village	Hispanic.
Stark town	All other American Indian tribes.
Sumpter town	All other American Indian tribes.
West Milwaukee village	Hispanic.
Whitestown town	All other American Indian tribes.
Wilson town	All other American Indian tribes.
Wittenberg village	All other American Indian tribes.
Wittenberg town	All other American Indian tribes.

[FR Doc. 2021–26547 Filed 12–7–21; 8:45 am]
BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Certification of Identity (Form BC–300)

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. This notice allows 30 days for public comments.

Agency: U.S. Census Bureau, Commerce.

Title: Certification of Identity (Form BC–300).

OMB Control Number: 0607–XXXX.

Form Number(s): Form BC–300.

Type of Request: Emergency submission, New Information Collection Request.

Number of Respondents: 250.

Average Hours per Response: 6 minutes.

Burden Hours: 25 Hours.

Needs and Uses: The need for the Certification of Identity (Form BC–300) is imperative to performing accurate controls of the disbursement of personnel records to the public. This information collection is necessary to prevent unauthorized disclosure of records of individuals maintained by the U.S. Census Bureau, and allows parties who are, or were, in proceedings to disclose or release their records to an attorney, accredited representative, qualified organization, or other third party.

Affected Public: Individuals requesting the release of personnel records.

Frequency: On an as needed basis.

Respondent's Obligation: Voluntary.

Legal Authority: In accordance with 15 CFR Section 4.24(d), the U.S. Census Bureau requires you provide us with sufficient information to identify you when you submit requests by mail or otherwise not in person under the Privacy Act of 1974, 5 U.S.C. 552a.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the 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 the title of the collection.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–26557 Filed 12–7–21; 8:45 am]
BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–842]

Large Residential Washers From Mexico: Final Results of Antidumping Duty Administrative Review; 2019–2020; Correction

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On November 26, 2021, the Department of Commerce (Commerce) inadvertently published duplicate copies of a **Federal Register** notice. This notice serves as a notification of, and correction to, this inadvertent duplicate publication.

DATES: Applicable December 8, 2021.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue

NW, Washington, DC 20230; telephone: (202) 482–3874.

SUPPLEMENTARY INFORMATION:

Background

On November 26, 2021, the Department of Commerce (Commerce) inadvertently published duplicate copies of the final results of the 2019–2020 antidumping duty administrative review of large residential washers from Mexico.[1] The first version of this notice (86 FR 67444) incorrectly listed the applicable date of this notice, which is listed correctly as the publication date (*i.e.,* November 26, 2021) in the second version of this notice (86 FR 67446). The inadvertent duplicate publication of this notice does not constitute redetermination of this proceeding. This notice serves as a notification of, and correction to, this inadvertent duplicate publication.

Dated: December 2, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021–26553 Filed 12–7–21; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Large Residential Washers from Mexico: Final Results of Antidumping Duty Administrative Review; 2019–2020,* 86 FR 67444 (November 26, 2021), also published at 86 FR 67446 (November 26, 2021).

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Scope Rulings

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable December 8, 2021.

SUMMARY: The Department of Commerce (Commerce) hereby publishes a list of scope rulings and anti-circumvention determinations made during the period July 1, 2021, through September 30, 2021. We intend to publish future lists after the close of the next calendar quarter.

FOR FURTHER INFORMATION CONTACT: Marcia E. Short, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: 202–482–1560.

SUPPLEMENTARY INFORMATION:

Background

Commerce regulations provide that it will publish in the **Federal Register** a list of scope rulings on a quarterly basis.[1] Our most recent notification of scope rulings was published on August 25, 2021.[2] This current notice covers all scope rulings and anti-circumvention determinations made by Enforcement and Compliance between July 1, 2021 and September 30, 2021.

Scope Rulings Made July 1, 2021, Through September 30, 2021

India

A–533–885 and C–533–886: Polyester Textured Yarn From India

Requestor: AYM Syntex Ltd. Flat bulk continuous filament (BCF) yarn produced from polybutylene terephthalate (PBT) is outside the scope of the antidumping duty (AD) and countervailing duty (CVD) orders on polyester textured yarn from India based on the plain language of the scope, which states that subject merchandise consists of ''synthetic multifilament yarn'' that is manufactured from polyester (polyethylene terephthalate); September 15, 2021.

People's Republic of China (China)

A–570–067 and C–570–068: Forged Steel Fittings From China

Requestor: Midwest Diversified Technologies, Inc. Fifteen self-drilling anchor bolt systems couplers are not covered by the scope of the AD and CVD orders on forged steel fittings from China because they are not designed to connect pipes and cannot convey fluid at high pressure; July 1, 2021.

A–570–090 and C–570–091: Certain Steel Wheels 12 to 16.5 Inches in Diameter From China

Requestor: Rimco, Inc. (Rimco). Rimco's passenger vehicle wheel model number X45477 is outside the scope of the AD and CVD orders because it is physically distinguishable from subject steel wheels based on: (1) A different hub bore size; (2) a different offset measurement; and (3) a lower load rating; July 9, 2021.

A–570–084 and C–570–085: Quartz Surface Products From China

Requestor: SMA Surfaces, Inc. SMA Surfaces' crushed glass products are covered by the scope of the AD and CVD orders on quartz surface products from China because they do not meet the language of the crushed glass scope exclusion; July 15, 2021.

A–570–831: Garlic From China

Requestor: Trinity Distribution Inc. (Trinity). Based on our analysis of Trinity's Request, and in accordance with 19 CFR 351.225(d) and 351.225(k)(1), we determined that Trinity's individually quick frozen (IQF) garlic cloves from China are within the scope of the AD order; July 21, 2021.

A–570–909: Certain Steel Nails From China

Requestor: Fastenal Company Purchasing (Fastenal). Fastenal's zinc and nylon masonry anchors, which consist of a zinc, steel, or nylon body component and a steel pin component, are outside the scope of the AD order. Consistent with the U.S. Court of Appeals for the Federal Circuit's reasoning in *OMG, Inc.* v. *United States,* we find that Fastenal's masonry anchors are unitary articles of commerce, and that they are not nails because they require pre-drilled holes for installation. This is a revision, based on litigation, to our previous scope ruling. *See Certain Steel Nails from the People's Republic of China: Notice of Court Decision Not in Harmony With Final Scope Ruling and Notice of Amended Final Scope Ruling Pursuant to Court Decision,* 86 FR 38675 (July 22, 2021).

A–570–909: Certain Steel Nails From China

Requestor: Midwest Fastener Corp. (Midwest). Midwest's strike pin anchors, which consist of four components—a steel pin, a threaded body, a nut, and a flat washer—are outside the scope of the AD order. Consistent with the U.S. Court of Appeals for the Federal Circuit's reasoning in *OMG, Inc.* v. *United States,* we find that Midwest's anchors are unitary articles of commerce, and that they are not nails because they require pre-drilled holes for installation. This is a revision, based on litigation, to our previous scope ruling. *See Certain Steel Nails from the People's Republic of China: Notice of Court Decision Not in Harmony With Final Scope Ruling and Notice of Amended Final Scope Ruling Pursuant to Court Decision,* 86 FR 38979 (July 23, 2021).

A–570–831: Garlic From China

Requestor: Trinity Distribution Inc. (Trinity). In accordance with 19 CFR 351.225(d) and 351.225(k)(1), we determined that Trinity's individually quick frozen (IQF) ⅛-inch diced garlic and IQF garlic puree, are not within the scope of the AD order; July 22, 2021.

[1] *See* 19 CFR 351.225(o).

[2] *See Notice of Scope Rulings,* 86 FR 47476 (August 25, 2021).

A–570–952 and C–570–953: Narrow Woven Ribbons With Woven Selvedge From China

Requestor: D&F Consolidated, Inc., DBA Car-Mel Products Inc. Three label tapes are covered by the scope of the AD and CVD orders on narrow woven ribbon with woven selvedge from China because they meet the physical specifications outlined by the scope and do not qualify for an exclusion; July 27, 2021.

A–570–909: Certain Steel Nails From China

Requestor: Simpson Strong-Tie Company (Simpson). Simpson's split-drive masonry anchors are outside the scope of the AD order. Consistent with the U.S. Court of Appeals for the Federal Circuit's reasoning in *OMG, Inc.* v. *United States,* we find that Simpson's masonry anchors are not nails because the anchors require pre-drilled holes for installation. This is a revision, based on litigation, to our previous scope ruling. *See Certain Steel Nails from the People's Republic of China: Notice of Court Decision Not in Harmony With Final Scope Ruling and Notice of Amended Final Scope Ruling Pursuant to Court Decision,* 86 FR 43994 (August 11, 2021).

A–570–909: Certain Steel Nails From China

Requestor: Simpson Strong-Tie Company (Simpson). Simpson's crimp drive anchors are outside the scope of the AD order. Consistent with the U.S. Court of Appeals for the Federal Circuit's reasoning in *OMG, Inc.* v. *United States,* we find that Simpson's masonry anchors are not nails because the anchors require pre-drilled holes for installation. This is a revision, based on litigation, to our previous scope ruling. *See Certain Steel Nails from the People's Republic of China: Notice of Court Decision Not in Harmony With Final Scope Ruling and Notice of Amended Final Scope Ruling Pursuant to Court Decision,* 86 FR 43993 (August 11, 2021).

A–570–073 and C–570–074: Common Alloy Aluminum Sheet From China

Requestor: Sunbeam Products Inc. Stamped circular disc blanks are not covered by the scope of the AD and CVD orders on common alloy aluminum sheet from China because stamped circular disc blanks are stamped or punched from aluminum sheet in China, are in non-rectangular shapes and are no longer in coils or cut-to-length sheets when exported from China, and the punching of these stamped circular disc blanks has the functional purpose of preparing the discs to be pressed into circular vessels such as pots and pans; August 20, 2021.

A–570–108 and C–570–109: Ceramic Tile From China

Requestor: Maryland Mosaics, LLC. Decorative ceramic tile mosaic pieces in heart, star, circle, and petal shapes are covered by the scope of the AD and CVD orders on ceramic tile from China because they are tiles made from porcelain and fall within the tile sizes covered by the scope; August 31, 2021.

A–570–117 and C–570–118: Wood Mouldings and Millwork Products From China

Requestor: Greenbrier International, Inc. and Family Dollar Services, LLC. Craft dowels are covered by the scope of the AD and CVD orders on wood mouldings and millwork products from China because they are dowels made of wood and continuously shaped; September 7, 2021.

Notification to Interested Parties

Interested parties are invited to comment on the completeness of this list of completed scope inquiries and anti-circumvention determinations made during the period July 1, 2021 through September 30, 2021. Any comments should be submitted to the Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, Enforcement and Compliance, International Trade Administration, via email to *CommerceCLU@trade.gov.*

This notice is published in accordance with 19 CFR 351.225(o).

Dated: December 2, 2021.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2021–26552 Filed 12–7–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–502]

Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019–2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that circular welded carbon steel pipes and tubes from Thailand were sold at less than normal value during the period of review (POR) March 1, 2019, through February 29, 2020.

DATES: Applicable December 8, 2021.

FOR FURTHER INFORMATION CONTACT: Thomas Schauer, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0410.

SUPPLEMENTARY INFORMATION:

Background

On June 8, 2021, Commerce published the preliminary results of the 2019–2020 administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand.[1] The review covers 29 producers and/or exporters of subject merchandise. We invited interested parties to comment on the *Preliminary Results.* A full description of the events since the *Preliminary Results* is contained in the Issues and Decision Memorandum.[2] Commerce conducted this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [3]

The products covered by the antidumping duty *Order* are circular welded carbon steel pipes and tubes. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are listed in the appendix to this notice and addressed in the Issues and Decision Memorandum. The Issues and Decision Memorandum is a public document and is on file electronically *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a

---

[1] *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2019–2020,* 86 FR 30405 (June 8, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Circular Welded Carbon Steel Pipes and Tubes from Thailand: Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination, In Part; 2019–2020,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See Antidumping Duty Order; Circular Welded Carbon Steel Pipes and Tubes from Thailand,* 51 FR 8341 (March 11, 1986) (*Order*).

complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Final Determination of No Shipments

We preliminarily found that Blue Pipe Steel Center (Blue Pipe) and K Line Logistics (Thailand) Ltd. (K-Line) each had no shipments of subject merchandise during the POR.[4] Based on the comments received, we continue to find that Blue Pipe had no shipments.[5] Moreover, no party commented on the *Preliminary Results* regarding the no-shipments decision with respect to K-Line. Therefore, for these final results, we continue to find that each of these companies had no shipments of subject merchandise during the POR and will issue appropriate instructions to U.S. Customs and Border Protection (CBP) based on these final results.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* and for the reasons explained in the Issues and Decision Memorandum, we made revisions to our calculations in the *Preliminary Results* of the weighted-average dumping margin for the mandatory respondent, Saha Thai Steel Pipe Public Co., Ltd., also known as Saha Thai Steel Pipe (Public) Co., Ltd. (collectively, Saha Thai), and the weighted-average dumping margin assigned to the non-examined companies.

Rate for Non-Examined Companies

In the *Preliminary Results,* we determined the weighted-average dumping margin for Saha Thai that is not zero, *de minimis* or based entirely on facts available. For the other mandatory respondent, Blue Pipe, we determined that Blue Pipe had no shipments during the POR and accordingly we did not determine a weighted-average dumping margin for Blue Pipe for these final results. Following the guidelines for calculating the ''all-others'' rate in a less-than-fair-value investigation, we accordingly determined that the weighted-average dumping margin for each of the companies not selected for individual examination to be equal to the weighted-average dumping margin calculated for Saha Thai.

Final Results of Administrative Review

Commerce determines that the following weighted-average dumping margins exist for the period March 1, 2019, through February 29, 2020:

Producer/exporter	Weighted-average dumping margin (percent)
Saha Thai Steel Pipe Public Company, Ltd	36.97
Rate Applicable to the Following Non-Selected Companies	
Apex International Logistics	36.97
Aquatec Maxcon Asia	36.97
Asian Unity Part Co., Ltd	36.97
Bis Pipe Fitting Industry Co., Ltd	36.97
Chuhatsu (Thailand) Co., Ltd	36.97
CSE Technologies Co., Ltd	36.97
Expeditors International (Bangkok)	36.97
Expeditors Ltd	36.97
FS International (Thailand) Co., Ltd	36.97
Kerry-Apex (Thailand) Co., Ltd	36.97
Oil Steel Tube (Thailand) Co., Ltd	36.97
Otto Ender Steel Structure Co., Ltd	36.97
Pacific Pipe and Pump	36.97
Pacific Pipe Public Company Limited	36.97
Panalpina World Transport Ltd	36.97
Polypipe Engineering Co., Ltd	36.97
Schlumberger Overseas S.A	36.97
Siam Fittings Co., Ltd	36.97
Siam Steel Pipe Co., Ltd	36.97
Sino Connections Logistics (Thailand) Co., Ltd	36.97
Thai Malleable Iron and Steel	36.97
Thai Oil Group	36.97
Thai Oil Pipe Co., Ltd	36.97
Thai Premium Pipe Co., Ltd	36.97
Vatana Phaisal Engineering Company	36.97
Visavakit Patana Corp., Ltd	36.97

Disclosure

Commerce intends to disclose the calculations performed for these final results within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

For Saha Thai, we calculated importer-specific antidumping duty assessment rates on the basis of the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of those sales in accordance with 19 CFR 351.212(b)(1). If an importer-specific assessment rate is zero or *de minimis,* then we will instruct CBP to liquidate the entries for that importer without regard to antidumping duties.

For entries of subject merchandise during the POR produced by Saha Thai for which it did not know its merchandise was destined for the United States, and for Blue Pipe and K-Line, the two companies which we find had no shipments during the POR, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

The assessment rate for antidumping duties for each of the companies not selected for individual examination, will be equal to the weighted-average dumping margin listed above in the final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of these reviews for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the companies listed above in the final results of review will be equal to the company-specific weighted-average dumping margin established in the final results of this review; (2) for previously reviewed or investigated companies not listed above in the ''Final Results of Administrative Review,'' above, including companies for which Commerce may determine to have had no shipments during the POR, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review or another completed segment of this proceeding, but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; and (4) if neither the exporter nor the producer is a firm covered in this or any previously completed segment of this proceeding, then the cash deposit rate will be the all-others rate of 15.67 percent established in the less-than-fair-value investigation.[6]

These deposit requirements, when imposed, shall remain in effect until further notice.

[4] *See Preliminary Results,* 86 FR 30406.

[5] *See* Issues and Decision Memorandum at comment 1.

[6] *See Order,* 51 FR at 8341.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Interested Parties

Commerce is issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(5).

Dated: December 2, 2021.

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 Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Changes to the Preliminary Results
V. Discussion of the Issues
  Comment 1: Whether Commerce Should Base the Weighted-Average Dumping Margins for Saha Thai and Blue Pipe on Adverse Facts Available
  Comment 2: Whether Saha Thai Created a Fictitious Market
  Comment 3: Whether Saha Thai Is Affiliated with Certain Companies
  Comment 4: Whether Commerce Should Require Saha Thai and Blue Pipe to Resubmit Certain Submissions
  Comment 5: Whether Commerce Must Take Steps to Ensure the Government Can Collect the Duties Owed
  Comment 6: Whether Commerce Should Reconsider Prior Reviews to Account for Potential Fraud
  Comment 7: Whether Commerce Should Adjust Saha Thai's Costs to Account for a Particular Market Situation
  Comment 8: Whether Commerce's Preliminary Determination for Non-Examined Companies Is Contrary to Law
  Comment 9: Whether Commerce Should Calculate an Individual Weighted-Average Dumping Margin for Thai Premium Pipe Co., Ltd.
VI. Recommendation

[FR Doc. 2021–26573 Filed 12–7–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB547]

Marine Mammals; File No. 25900

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Echo Pictures Ltd. (Responsible Party: Joe Stevens), St Nicholas House, 31–34 High Street, Bristol, BS1 2AW, United Kingdom has applied in due form for a permit to conduct commercial or educational photography on humpback whales (*Megaptera novaeangliae*).

DATES: Written, telefaxed, or email comments must be received on or before January 7, 2022.

ADDRESSES: These documents are available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 25900 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Jordan Rutland or Carrie Hubard, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking of marine mammals (50 CFR part 216).

The applicant proposes to film humpback whales off the coast of Maui, Hawaii to obtain footage for a television series. Up to 1,120 humpback whales may be harassed during filming from vessels, an unmanned aircraft system, and underwater divers. The permit would expire April 30, 2022.

It has come to the agency's attention that the 2016 interim final humpback approach rule (50 CFR 216.19; 81 FR 62010, September 8, 2016) does not explicitly exempt permits issued under section 104(c)(6) of the MMPA from its prohibitions. It is not the agency's intent to preclude the issuance of permits or authorizations consistent with the requirements of the MMPA. We interpret the rule to allow issuance of these permits. Consistent with this interpretation, it has been our practice to continue to issue section 104(c)(6) permits that are in compliance with the Act's requirements and our review procedures, as evidenced by issuance of four such permits since the rule's effective date. However, to eliminate any potential ambiguity, we intend to revise the rule to explicitly clarify that photography permits issued under section 104(c)(6) of the MMPA are exempt from the prohibitions on approach.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 3, 2021.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–26563 Filed 12–7–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB617]

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 Letters 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, notification is hereby given that two Letters of Authorization (LOA) have been issued to Shell Offshore Inc. (Shell) for the take of marine mammals incidental to geophysical survey activity in the Gulf of Mexico.

DATES: The LOAs are effective from January 1, 2022, through August 31, 2022.

ADDRESSES: The LOAs, LOA requests, and supporting documentation are available online at: *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: Ben Laws, 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, breathing, 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 operators''), in Federal waters of the U.S. Gulf of Mexico (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

Shell plans to conduct two separate geophysical surveys, and submitted an LOA request for each survey. The first survey is a 3D ocean bottom node (OBN) survey of Mississippi Canyon Lease Block 809 and portions of the surrounding approximately 143 lease blocks in the Ursa development area (Ursa survey). The second survey would also be a 3D OBN survey, and would cover Mississippi Canyon Lease Block 890 and Atwater Canyon and portions of the surrounding approximately 36 lease blocks (Europa survey). See Section F of the respective LOA applications for maps of these areas.

For both surveys, Shell anticipates using an airgun array consisting of 32 elements, with a total volume of 5,110 cubic inches (in^3). Please see Shell's applications for additional detail.

Consistent with the preamble to the final rule, the survey effort proposed by Shell in its LOA requests was used to develop LOA-specific take estimates based on the acoustic exposure modeling results described in the preamble (86 FR 5322, 5398; 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 zone [1]); (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 3D OBN 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 3D OBN survey effort, largely due to the greater area covered by the modeled proxies. Summary descriptions of these modeled survey geometries are available in the preamble to the proposed rule (83 FR 29212, 29220; June 22, 2018). Coil was selected as the best available proxy survey type for both surveys in this case, because the spatial coverage of the planned surveys is most similar to the coil survey pattern. The planned 3D OBN surveys will each involve a single source vessel sailing along closely spaced survey lines that are 100 m apart and approximately 30 km in length. The path taken by the vessel to cover these lines will mean that consecutive survey lines sailed will be 400 m apart. The coil survey pattern was assumed to cover approximately 144 kilometers squared (km^2) per day (compared with approximately 795 km^2, 199 km^2, and 845 km^2 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. Although Shell is not proposing specifically to perform surveys using the coil geometry, its planned 3D OBN surveys

[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 include Winter (December–March) and Summer (April–November).

are expected to cover approximately 15.7 km^2 per day, meaning that the coil proxy is most representative of the effort planned by Shell in terms of predicted Level B harassment exposures.

In addition, all available acoustic exposure modeling results assume use of a 72-element, 8,000 in^3 array. Thus, estimated take numbers for this LOA are considered conservative due to differences in both the airgun array (32 elements, 5,110 in^3) and the daily survey area planned by Shell (15.7 km^2), as compared to those modeled for the rule.

The Ursa survey will take place over 61 days, including 45 days of sound source operation. The Europa survey will take place over 122 days, including 20 days of sound source operation. Both surveys will occur within Zone 5. For both surveys, the seasonal distribution of survey days is not known in advance. Therefore, the take estimates for each species are based on the season that produces the greater value.

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. 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, 5442 (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 certain marine mammal species 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.

Rice's whales (formerly known as GOM Bryde's whales) [3] are generally found within a small area in the northeastern GOM in waters between 100–400 m depth along the continental shelf break (Rosel *et al.,* 2016). 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), and a NOAA survey reported observation of a Rice's whale in the western GOM in 2017 (NMFS, 2018). Habitat-based density modeling identified similar habitat (*i.e.,* approximately 100–400 m water depths along the continental shelf break) as being potential Rice's whale habitat (Roberts *et al.,* 2016), although a ''core habitat area'' defined in the northeastern GOM (outside the scope of the rule) contained approximately 92 percent of the predicted abundance of Rice's whales. See discussion provided at, *e.g.,* 83 FR 29212, 29228, 29280 (June 22, 2018); 86 FR 5322, 5418 (January 19, 2021).

Although it is possible that Rice's whales may occur outside of their core habitat, NMFS expects that any such occurrence would be limited to the narrow band of suitable habitat described above (*i.e.,* 100–400 m). Shell's planned activities will occur in water depths of approximately 600–1,800 m and 800–1,400 (Ursa and Europa, respectively) 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 this 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). 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. NMFS has determined that the approach results in unrealistic projections regarding the likelihood of encountering killer whales.

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 three encounters during more recent survey effort from 2017–18 (Waring *et al.,* 2013; *www.boem.gov/gommapps*). Two other species were also observed on less than 20 occasions during the 1992–2009 NOAA surveys (Fraser's dolphin and false killer whale [4]). 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, 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 four killer whales, noting that the whales performed 20 times as many dives to 1–

[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).

[4] However, note that these species have been observed over a greater range of water depths in the GOM than have killer whales.

30 m 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. 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. NMFS' determination in reflection of the data discussed above, which informed the final rule, is that use of the generic acoustic exposure modeling results for killer whales would result in high estimated take numbers that are inconsistent with the assumptions made in the rule regarding expected killer whale take (86 FR 5322, 5403; January 19, 2021).

In past authorizations, NMFS has often addressed situations involving the low likelihood of encountering a rare species such as killer whales in the GOM through authorization of take of a single group of average size (*i.e.,* representing a single potential encounter). See 83 FR 63268, December 7, 2018. See also 86 FR 29090, May 28, 2021; 85 FR 55645, September 9, 2020. For the reasons expressed above, NMFS determined that a single encounter of killer whales is more likely than the model-generated estimates and has authorized take associated with a single killer whale group encounter (*i.e.,* up to 7 animals) for the Ursa LOA.

For the Europa LOA, use of the exposure modeling produces an estimate of 7 killer whale exposures. Given the foregoing, it is unlikely that even one killer whale would be encountered during this 20-day survey, and accordingly no take of killer whales is authorized through the Europa LOA.

Based on the results of our analysis, NMFS has determined that the level of taking authorized through the LOAs is consistent with the findings made for the total taking allowable under the regulations. See Tables 1 and 2 in this notice and Table 9 of the rule (86 FR 5322; January 19, 2021).

Small Numbers Determinations

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 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, 5438; January 19, 2021).

The take numbers for authorization are determined as described above in the Summary of Request and Analysis section. Subsequently, the total incidents of harassment for each species are multiplied by scalar ratios to produce a derived product that better reflects the number of individuals likely to be taken within a survey (as compared to the total number of instances of take), accounting for the likelihood that some individual marine mammals may be taken on more than one day (see 86 FR 5322, 5404; January 19, 2021). The output of this scaling, where appropriate, is incorporated into an adjusted total take estimate that is the basis for NMFS' small numbers determinations, as depicted in Table 1 for Shell's Ursa survey and in Table 2 for the Europa survey.

This product is used by NMFS in making the necessary small numbers determinations, through comparison with the best available abundance estimates (see discussion at 86 FR 5322, 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; *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 Tables 1 and 2.

TABLE 1—TAKE ANALYSIS, URSA LOA

Species	Authorized take	Scaled take [1]	Abundance [2]	Percent abundance
Rice's whale	0	n/a	51	n/a
Sperm whale	1,184	500.7	2,207	22.7
Kogia spp	[3] 447	159.7	4,373	3.7
Beaked whales	5,224	527.6	3,768	14.0
Rough-toothed dolphin	898	257.8	4,853	5.3
Bottlenose dolphin	4,256	1,221.5	176,108	0.7
Clymene dolphin	2,528	725.4	11,895	6.1
Atlantic spotted dolphin	1,700	487.9	74,785	0.7
Pantropical spotted dolphin	11,470	3,291.9	102,361	3.2
Spinner dolphin	3,073	882.1	25,114	3.5
Striped dolphin	987	283.3	5,229	5.4
Fraser's dolphin	284	81.5	1,665	4.9
Risso's dolphin	743	219.1	3,764	5.8
Melon-headed whale	1,661	489.9	7,003	7.0
Pygmy killer whale	391	115.3	2,126	5.4
False killer whale	622	183.4	3,204	5.7
Killer whale	7	n/a	267	2.6
Short-finned pilot whale	480	141.7	1,981	7.2

[1] Scalar ratios were applied to ''Authorized Take'' values as described at 86 FR 5322, 5404 (January 19, 2021) to derive scaled take numbers shown here.

[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 the killer whale, the larger estimated SAR abundance estimate is used.

[3] Includes 24 takes by Level A harassment and 423 takes by Level B harassment. Scalar ratio is applied to takes by Level B harassment only; small numbers determination made on basis of scaled Level B harassment take plus authorized Level A harassment take.

TABLE 2—TAKE ANALYSIS, EUROPA LOA

Species	Authorized take	Scaled take [1]	Abundance [2]	% abundance
Rice's whale	0	n/a	51	n/a
Sperm whale	526	222.5	2,207	10.1
Kogia spp	[3] 199	71.0	4,373	1.6
Beaked whales	2,322	234.5	3,768	6.2
Rough-toothed dolphin	399	114.6	4,853	2.4
Bottlenose dolphin	1,892	542.9	176,108	0.3
Clymene dolphin	1,123	322.4	11,895	2.7
Atlantic spotted dolphin	756	216.9	74,785	0.3
Pantropical spotted dolphin	5,098	1,463.1	102,361	1.4
Spinner dolphin	1,366	392.0	25,114	1.6
Striped dolphin	439	125.9	5,229	2.4
Fraser's dolphin	126	36.2	1,665	2.2
Risso's dolphin	330	97.4	3,764	2.6
Melon-headed whale	738	217.7	7,003	3.1
Pygmy killer whale	174	51.2	2,126	2.4
False killer whale	276	81.5	3,204	2.5
Killer whale	0	n/a	267	n/a
Short-finned pilot whale	213	63.0	1,981	3.2

[1] Scalar ratios were applied to "Authorized Take" values as described at 86 FR 5322, 5404 (January 19, 2021) to derive scaled take numbers shown here.

[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 the killer whale, the larger estimated SAR abundance estimate is used.

[3] Includes 11 takes by Level A harassment and 188 takes by Level B harassment. Scalar ratio is applied to takes by Level B harassment only; small numbers determination made on basis of scaled Level B harassment take plus authorized Level A harassment take.

[5] Modeled take of 16 increased to account for potential encounter with group of average size (Maze-Foley and Mullin, 2006).

Based on the analysis contained herein of Shell's proposed survey activity described in its LOA applications 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 and therefore is of no more than small numbers.

Authorization

NMFS has determined that the level of taking for these LOA requests 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 LOAs is of no more than small numbers. Accordingly, we have issued two LOAs to Shell authorizing the take of marine mammals incidental to its geophysical survey activity, as described above.

Dated: December 3, 2021.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–26601 Filed 12–7–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB622]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) will host an online meeting of the Area 2A Pacific halibut governmental management entities that is open to the public.

DATES: The online meeting will be held Tuesday, January 4, 2022, from 10 a.m. until 1 p.m. Pacific Time, or until business for the day has been completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Ms. Robin Ehlke, Staff Officer, Pacific Council; telephone: (503) 820–2410.

SUPPLEMENTARY INFORMATION: The primary purpose of the online meeting is to prepare and develop recommendations for the 2022 International Pacific Halibut Commission's (IPHC) annual meeting held online from January 24 through January 28, 2022. Recommendations generated from the 2A managers meeting will be communicated to the IPHC by the Pacific Council's representatives. Attendees may also address other topics relating to Pacific halibut management.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this

document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov;* (503) 820–2412) at least 10 days prior to the meeting date.

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

Dated: December 3, 2021.

Tracey L. Thompson,

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

[FR Doc. 2021–26569 Filed 12–7–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB556]

Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permit

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

ACTION: Notice.

SUMMARY: The National Marine Fisheries Service (NMFS) is issuing a permit for a period of 3 years to authorize the incidental, but not intentional, take of specific Endangered Species Act (ESA)-listed marine mammal species or stocks under the Marine Mammal Protection Act (MMPA), in the WA/OR/CA sablefish pot fishery.

DATES: The permit is effective for a 3-year period beginning December 8, 2021.

ADDRESSES: Reference materials for the permit including the final negligible impact determination are available on the internet at *https://www.fisheries.noaa.gov/action/negligible-impact-determination-and-mmpa-section-101a5e-authorization-wa-or-ca-sablefish-pot* or *https://www.regulations.gov/docket/NOAA-NMFS-2021-0092.* Other supporting information is available on the internet including: Recovery plans for the ESA-listed marine mammal species, *https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act;* 2021 MMPA List of Fisheries (LOF), *https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables;* the most recent Marine Mammal Stock Assessment Reports (SAR) by region, *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region,* and stock, *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock;* and Take Reduction Teams and Plans, *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams.*

FOR FURTHER INFORMATION CONTACT: Tina Fahy, NMFS West Coast Region, (562) 980–4023, *Christina.Fahy@noaa.gov;* or Jaclyn Taylor, NMFS Office of Protected Resources, (301) 427–8402, *Jaclyn.Taylor@noaa.gov.*

SUPPLEMENTARY INFORMATION: The MMPA requires NMFS to authorize the incidental take of ESA-listed marine mammals in commercial fisheries provided it can make the following determinations: (1) The incidental mortality and serious injury (M/SI) from commercial fisheries will have a negligible impact on the affected species or stocks; (2) a recovery plan for all affected species or stocks of threatened or endangered marine mammals has been developed or is being developed; and (3) where required under MMPA section 118, a take reduction plan has been developed or is being developed, a monitoring program is implemented, and vessels participating in the fishery are registered. NMFS has determined that the WA/OR/CA sablefish pot fishery meets these three requirements and is issuing a permit to the fishery to authorize the incidental take of ESA-listed marine mammal species or stocks under the MMPA for a period of 3 years.

Background

The MMPA LOF classifies each commercial fishery as a Category I, II, or III fishery based on the level of mortality and injury of marine mammals occurring incidental to each fishery as defined in 50 CFR 229.2. Category I and II fisheries must register with NMFS and are subsequently authorized to incidentally take marine mammals during commercial fishing operations. However, that authorization is limited to those marine mammals that are not listed as threatened or endangered under the ESA. Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1371, states that NMFS, as delegated by the Secretary of Commerce, for a period of up to three years shall allow the incidental, but not intentional, taking of marine mammal stocks designated as depleted because of their listing as an endangered species or threatened species under the ESA, 16 U.S.C. 1531 *et seq.,* by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) Incidental M/SI from commercial fisheries will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock.

The LOF includes a list of marine mammal species or stocks incidentally killed or injured in each commercial fishery. The WA/OR/CA sablefish pot fishery is classified as a Category II fishery on the final 2021 LOF (86 FR 3028; January 14, 2021) based on occasional incidental M/SI of the CA/OR/WA stock of humpback whales. We evaluated ESA-listed stocks or species included on the 2021 MMPA LOF as killed or seriously injured following NMFS' Procedural Directive 02–238 ''Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals.'' Based on this evaluation, NMFS proposed to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the Category II WA/OR/CA sablefish pot fishery, as classified on the final 2021 MMPA LOF, to incidentally kill or seriously injure the CA/OR/WA stock of humpback whale (86 FR 58641; October 22, 2021).

NMFS will regularly evaluate other commercial fisheries for purposes of making a negligible impact determination (NID) and issuing MMPA section 101(a)(5)(E) authorizations with the annual LOF as new information becomes available. More information about the WA/OR/CA sablefish pot fishery is available in the 2021 MMPA LOF (86 FR 3028; January 14, 2021) and

on the internet at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables.*

We reviewed the best available scientific information to determine if the WA/OR/CA sablefish pot fishery met the three requirements of MMPA section 101(a)(5)(E) for issuing a permit for the incidental taking of ESA-listed marine mammals. This information is included in the 2021 MMPA LOF (86 FR 3028; January 14, 2021), the SAR for CA/OR/WA stock of humpback whale (available at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports*), the humpback whale recovery plan (available at: *https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act*), and other relevant information, as detailed further in the document describing the preliminary and final determinations supporting the permit (available at: *https://www.regulations.gov/docket/NOAA-NMFS-2021-0092*).

NMFS is in the process of revising humpback whale stock structure under the MMPA in light of the 14 Distinct Population Segments (DPSs) established under the ESA (81 FR 62259, September 8, 2016), based on the recently finalized ''Procedural Directive 02–204–03: Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act'' (NMFS 2019). The DPSs that occur in waters under the jurisdiction of the United States do not align with the existing MMPA stocks. Some of the listed DPSs partially coincide with the currently defined stocks. Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until such time as the MMPA stock designations are revised in light of the ESA DPSs, NMFS continues to use the existing MMPA stock structure for MMPA management purposes (*e.g.,* selection of a recovery factor, stock status) and treats such stocks as ESA-listed if a component of that stock is listed under the ESA and overlaps with the analyzed commercial fishery. Therefore, for the purpose of this MMPA 101(a)(5)(E) authorization, NMFS considered the CA/OR/WA stock of humpback whale to be ESA-listed as it overlaps with two ESA-listed DPSs (Mexico and Central America).

Basis for Determining Negligible Impact

Prior to issuing a MMPA 101(a)(5)(E) permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine that the M/SI incidental to commercial fisheries will have a negligible impact on the affected marine mammal species or stocks. NMFS satisfies this requirement by making a NID. Although the MMPA does not define ''negligible impact,'' NMFS has issued regulations providing a qualitative definition of ''negligible impact,'' defined 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.''

Criteria for Determining Negligible Impact

NMFS relies on a quantitative approach for determining negligible impact detailed in NMFS Procedural Directive 02–204–02 (directive), ''Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E),'' which became effective on June 17, 2020 (NMFS 2020). The procedural directive is available online at: *https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives.* This directive describes NMFS' process for determining whether incidental M/SI from commercial fisheries will have a negligible impact on ESA-listed marine mammal species/stocks (the first requirement necessary for issuing a MMPA section 101(a)(5)(E) permit as noted above).

The directive first describes the derivation of two Negligible Impact Thresholds (NIT), which represent levels of removal from a marine mammal species or stock. The first, Total Negligible Impact Threshold (NIT_t), represents the total amount of human-caused M/SI that NMFS considers negligible for a given stock. The second, lower threshold, Single NIT (NIT_s) represents the level of M/SI from a single commercial fishery that NMFS considers negligible for a stock. NIT_s was developed in recognition that some stocks may experience non-negligible levels of total human-caused M/SI but one or more individual fisheries may contribute a very small portion of that M/SI, and the effect of an individual fishery may be considered negligible.

The directive describes a detailed process for using these NIT values to conduct a NID analysis for each fishery classified as a Category I or II fishery on the MMPA LOF. The NID process uses a two-tiered analysis. The Tier 1 analysis first compares the total human-caused M/SI for a particular stock to NIT_t. If NIT_t is not exceeded, then all commercial fisheries that kill or seriously injure the stock are determined to have a negligible impact on the particular stock. If NIT_t is exceeded, then the Tier 2 analysis compares each individual fishery's M/SI for a particular stock to NIT_s. If NIT_s is not exceeded, then the commercial fishery is determined to have a negligible impact on that particular stock. For transboundary, migratory stocks, because of the uncertainty regarding the M/SI that occurs outside of U.S. waters, we assume that total M/SI exceeds NIT_t and proceed directly to the Tier 2 NIT_s analysis. If a commercial fishery has a negligible impact across all ESA-listed stocks, then the first of three findings necessary for issuing a MMPA 101(a)(5)(E) permit to the commercial fishery has been met (*i.e.,* a negligible impact determination). If a commercial fishery has a non-negligible impact on any ESA-listed stock, then NMFS cannot issue a MMPA 101(a)(5)(E) permit for the fishery to incidentally take ESA-listed marine mammals.

These NID criteria rely on the best available scientific information, including estimates of a stock's minimum population size and human-caused M/SI levels, as published in the most recent SARs and other supporting documents, as appropriate. Using these inputs, the quantitative negligible impact thresholds allow for straightforward calculations that lead to clear negligible or non-negligible impact determinations for each commercial fishery analyzed. In rare cases, robust data may be unavailable for a straightforward calculation, and the directive provides instructions for completing alternative calculations or assessments where appropriate.

Negligible Impact Determination

NMFS evaluated the impact of the WA/OR/CA sablefish pot fishery using the process outlined in the directive, and, based on the best available scientific information, made a NID.

The CA/OR/WA stock of humpback whale is a transboundary stock. As noted above, because of the uncertainty regarding M/SI that occurs outside of U.S. waters for transboundary stocks, we assumed that total M/SI exceeds NIT_t and proceeded directly to the Tier 2 NIT_s analysis. The proposed NID relied on the final 2019 CA/OR/WA humpback whale SAR. Since the publication of the proposed MMPA 101(a)(5)(E) permit for the WA/OR/CA sablefish pot fishery, the draft 2021 SAR for the CA/OR/WA stock of humpback whales was published (86 FR 58887; October 25, 2021). The M/SI estimates in the draft 2021 CA/OR/WA humpback

whale SAR for the WA/OR/CA sablefish pot fishery remain the same as the M/SI estimates in the final 2019 SAR and the draft 2021 SAR was used for the final NID analysis (see response to comment #7 below).

The CA/OR/WA stock of humpback whale has documented incidental M/SI with this fishery in the most recent (2021) draft CA/OR/WA humpback whale SAR (Carretta *et al.* 2021). The estimated annual M/SI of humpback whales (CA/OR/WA stock) in the WA/OR/CA sablefish pot fishery is 1.9, based on observer data. Since this M/SI (1.9) is less than NIT_s (2.48), NMFS determined that the WA/OR/CA sablefish pot fishery has a negligible impact on the CA/OR/WA stock of humpback whales (see accompanying MMPA 101(a)(5)(E) determination document linked above for NIT calculations).

The draft 2021 SAR includes mean annual total commercial fishery-related M/SI (≥25.2) for the CA/OR/WA stock of humpback whale. This comprises M/SI from all commercial fisheries, including the WA/OR/CA sablefish pot fishery, as well as fishery-related M/SI for the stock not assigned to a specific commercial fishery. This unattributed fishery-related M/SI could be from any number of commercial, recreational or tribal fisheries, including the WA/OR/CA sablefish pot fishery. Because data are not currently available to assign the unattributed fishery-related M/SI to a specific commercial fishery, we did not include unattributed mortality in the calculations for the NID Tier 2 analysis. In addition, because the CA/OR/WA humpback whale stock is considered to be a transboundary stock, NMFS assumed NIT_t is exceeded and conducted the more conservative Tier 2 analysis with the lower NIT_s criterion. NMFS is actively monitoring the WA/OR/CA sablefish pot fishery through a fishery observer program. Further, most of the information on large whale entanglements on the West Coast is reported to and documented by the West Coast Large Whale Entanglement Response Program. If additional fishery-related M/SI of the CA/OR/WA stock of humpback whale is documented through the observer program or West Coast Large Whale Entanglement Response Program that indicates additional M/SI of the CA/OR/WA stock of humpback whale in the WA/OR/CA sablefish pot fishery, then NMFS will re-evaluate the NID and the permit.

The NID analysis is presented in the accompanying MMPA 101(a)(5)(E) determination document that provides summaries of the information used to evaluate each ESA-listed stock documented on the 2021 MMPA LOF as killed or injured incidental to the fishery. The final MMPA 101(a)(5)(E) determination document is available at: *https://www.fisheries.noaa.gov/action/negligible-impact-determination-and-mmpa-section-101a5e-authorization-wa-or-ca-sablefish-pot* or *https://www.regulations.gov/docket/NOAA-NMFS-2021-0092.* Based on the criteria outlined in the directive, the most recent SAR, and the best available scientific information, NMFS has determined that the M/SI incidental to the Category II WA/OR/CA sablefish pot fishery will have a negligible impact on the associated ESA-listed marine mammal stock (CA/OR/WA stock of humpback whale). Accordingly, this MMPA 101(a)(5)(E) requirement is satisfied for the commercial fishery.

Recovery Plan

The humpback whale recovery plan has been completed (see *https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act*). Accordingly, the requirement to have a recovery plan in place or being developed is satisfied.

Take Reduction Plan

Subject to available funding, MMPA section 118 requires the development and implementation of a Take Reduction Plan (TRP) for each strategic stock that interacts with a Category I or II fishery. The stock considered for this permit is designated as a strategic stock under the MMPA because the stock, or a component of the stock, is listed as threatened or endangered under the ESA (MMPA section 3(19)(C)).

The short- and long-term goals of a TRP are to reduce M/SI of marine mammals incidental to commercial fishing to levels below the Potential Biological Removal (PBR) level for stocks and to an insignificant threshold, defined by NMFS as 10 percent of PBR, respectively. The obligations to develop and implement a TRP are subject to the availability of funding. MMPA section 118(f)(3) (16 U.S.C. 1387(f)(3)) contains specific priorities for developing TRPs when funding is insufficient. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category II fisheries. As provided in MMPA section 118(f)(6)(A) and (f)(7), NMFS uses the most recent SAR and LOF as the basis to determine its priorities for establishing Take Reduction Teams (TRT) and developing TRPs. Information about NMFS' marine mammal TRTs and TRPs may be found at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams.*

Based on NMFS' priorities, implementation of a TRP for the WA/OR/CA sablefish pot fishery is currently deferred under MMPA section 118 as other stocks/fisheries are a higher priority for any available funding. Accordingly, the requirement under MMPA section 118 to have TRPs in place or in development is satisfied (see determination supporting the permit available on the internet at *https://www.fisheries.noaa.gov/action/negligible-impact-determination-and-mmpa-section-101a5e-authorization-wa-or-ca-sablefish-pot* or *https://www.regulations.gov/docket/NOAA-NMFS-2021-0092*).

Monitoring Program

Under MMPA section 118(d), NMFS is to establish a program for monitoring incidental M/SI of marine mammals from commercial fishing operations. The WA/OR/CA sablefish pot fishery is the subject of a NMFS fishery observer program. Accordingly, the requirement under MMPA section 118 to have a monitoring program in place is satisfied.

Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. NMFS has integrated the MMPA registration process, implemented through the Marine Mammal Authorization Program, with existing state and Federal fishery license, registration, or permit systems for Category I and II fisheries on the LOF. Therefore, the requirement for vessel registration is satisfied.

Conclusions for Permit

Based on the above evaluation for the WA/OR/CA sablefish pot fishery as it relates to the three requirements of MMPA 101(a)(5)(E), we are issuing a MMPA 101(a)(5)(E) permit to the WA/OR/CA sablefish pot fishery to authorize the incidental take of ESA-listed species or stocks during commercial fishing operations. If, during the 3-year authorization, there is a significant change in the information or conditions used to support the determinations, NMFS will re-evaluate whether to amend or modify the authorization, after notice and opportunity for public comment.

ESA Section 7 and National Environmental Policy Act Requirements

ESA section 7(a)(2) requires Federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any ESA-listed species. The effects of the WA/OR/CA sablefish pot fishery on ESA-listed marine mammals were analyzed in an October 2020 ESA section 7 Biological Opinion.

Under section 7 of the ESA, Biological Opinions analyze the effects of the proposed action on ESA-listed species and their critical habitat and, where appropriate, exempt anticipated future take of ESA-listed species as specified in the incidental take statement. Under MMPA section 101(a)(5)(E), NMFS analyzes previously documented M/SI incidental to commercial fisheries through the negligible impact determination process, and when the necessary findings can be made, issues a MMPA section 101(a)(5)(E) permit that allows for an unspecified amount of incidental taking of specific ESA-listed marine mammal stocks while engaging in commercial fishing operations. Thus, the applicable standards and resulting analyses under the MMPA and ESA differ, and as such, may not always align.

The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. Because this permit would not modify any fishery operation and the effects of the fishery operations have been evaluated in accordance with NEPA, no additional NEPA analysis beyond that conducted for the associated Fishery Management Plans is required for the permit. Issuing the permit would have no additional impact on the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

Comments and Responses

On October 22, 2021, NMFS published a notice and request for comments in the **Federal Register** for the proposed issuance of permit under MMPA section 101(a)(5)(E) to vessels registered in the Category II WA/OR/CA sablefish pot fishery (86 FR 58641). The public comment period closed on November 8, 2021. NMFS received seven comment letters on the proposed issuance of the permit and underlying preliminary negligible impact determination. The Center for Biological Diversity (CBD) and a joint letter from Whale and Dolphin Conservation and Natural Resources Defense Council (WDC/NRDC) oppose issuing the permit while Langford Walton & Associates, Sablefish and Halibut Pot Association, and a member of the public support issuing the permit. In addition, the Fishing Vessels Owner's Association supports issuing the permit and commented on several ways the ESA section 7 Biological Opinion supported the determinations in the proposed MMPA 101(a)(5)(E) permit. NMFS also received a joint letter from Whale and Dolphin Conservation, Defenders of Wildlife and Natural Resources Defense Council (WDC et al.) requesting NMFS extend the public comment period for the proposed permit. Only responses to substantive comments pertaining to the proposed permit and preliminary determination under MMPA section 101(a)(5)(E) are addressed below.

Comment 1: WDC et al. requested NMFS extend the comment period by 15-days for the proposed issuance of a MMPA 101(a)(5)(E) permit to authorize the incidental take of the CA/OR/WA stock of humpback whales in the WA/OR/CA sablefish pot fishery.

Response: NMFS did not grant an extension to the comment period, as the information presented in the proposed determination was not new but rather is based on the M/SI data from the most recent final humpback whale stock assessment report, published in 2020. On June 17, 2020, NMFS finalized Procedure 02–204–02 (Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E)). The procedural directive describes NMFS' process for determining whether incidental M/SI from commercial fisheries will have a negligible impact on ESA-listed marine mammal species/stocks. The criteria and process from that procedural directive, including the calculation for developing a negligible impact threshold, was used in order to determine that the WA/OR/CA sablefish pot fishery has a negligible impact on the CA/OR/WA stock of humpback whales. The NID determination and proposed MMPA 101(a)(5)(E) permit was based on the best available science on the stock's minimum population estimate, recovery factor, and the most recent estimates of M/SI in the WA/OR/CA sablefish pot fishery.

Comment 2: CBD incorporates their previous comments submitted on both the NMFS' draft ''Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)'' and the proposed MMPA 101(a)(5)(E) authorizations published on October 5, 2020 (85 FR 62709).

Response: CBD's comments on the draft ''Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)'' were previously addressed by NMFS and are available at: *https://www.fisheries.noaa.gov/action/criteria-determining-negligible-impact-under-mmpa-section-101a5e.* Comments on the proposed MMPA 101(a)(5)(E) authorizations published on October 5, 2020 (85 FR 62709) were addressed in the **Federal Register** notice for the final MMPA 101(a)(5)(E) authorizations (86 FR 24384; May 6, 2021).

Comment 3: CBD asserts that because NMFS has not revised the CA/OR/WA humpback whale stock structure following the designation of 14 DPS under the ESA the assumptions of the negligible impact thresholds do not hold true. CBD raises two issues with applying NIT_t and NIT_s to the CA/OR/WA stock of humpback whale: (1) The CA//OR/WA stock is not ESA-listed, and (2) the stock does not conform to the assumptions of PBR. CBD states that NMFS cannot assume that M/SI levels are below NIT_t and NIT_s for the WA/OR/CA stock will not prevent recovery of the ESA-listed DPSs, especially the Central America DPS. They further note that the CA/OR/WA stock of humpback whale abundance estimate is based on mark-recapture models for closed populations, ignoring the designation of the ESA DPSs. CBD points to NMFS' ''Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E) guidance'' and recommends a NID analysis be conducted for an ESA-listed stock that does not conform to the underlying assumptions of PBR and consider if there is an alternate approach to determining negligible impact. They request NMFS use an alternate approach, revise the draft NID, and make it available for public comment.

Response: Humpback whales were listed globally as endangered under the ESA in 1970 (35 FR 18319). On September 8, 2016, NMFS published a final rule dividing the globally listed endangered humpback whale into 14 DPSs and categorizing four DPSs as endangered and one as threatened (81 FR 62259). NMFS is in the process of revising humpback whale stock structure under the MMPA in light of the 2016 final rule on humpback whale DPSs as established under the ESA. In doing so, NMFS is following the process laid out in ''Procedural Directive 02–204–03: Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act'' (NMFS 2019). As noted by the commenters, the CA/OR/WA stock of humpback whales does not

align with the DPSs established under the ESA and comprises animals from the endangered Central American DPS, the threatened Mexico DPS, and the unlisted Hawaii DPS.

Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until humpback whale stock structure has been revised, NMFS continues to use the existing MMPA stock structure for MMPA management purposes, including NIDs and 101(a)(5)(E) authorizations. Therefore, for purposes of evaluating the impact of the WA/OR/CA sablefish pot fishery under the MMPA, NMFS used the current MMPA designation of the CA/OR/WA stock of humpback whales. In the case of the CA/OR/WA stock of humpback whales, for the purposes of this NID analysis, NMFS considers the entire stock to be endangered under the ESA and depleted under the MMPA. In addition, because the CA/OR/WA humpback whale stock is considered to be transboundary, NMFS assumed NIT_t is exceeded and conducted the more conservative Tier 2 analysis with the lower NIT_s criterion.

Given this approach and ongoing efforts to revise humpback whale stock structure in the Pacific, NMFS has proceeded with a final NID for the WA/OR/CA sablefish pot gear fishery with respect to the CA/OR/WA stock of humpback whales and is issuing a 101(a)(5)(E) permit for this fishery. Nevertheless, if, during the 3-year authorization, there is a significant change in the information or conditions used to support any of these determinations, including a change in MMPA stock structure and associated estimates of abundance and M/SI incidental to commercial fisheries, NMFS will re-evaluate the NID.

Comment 4: Both CBD and WDC/NRDC note that the humpback whale recovery plan included in the proposed permit is for the world-wide population that was finalized in 1991. They state that NMFS identified 14 DPSs of humpback whales in 2016, and updated recovery plans have not been developed for the 14 DPSs. Therefore, the 1991 humpback whale recovery plan does not meet the requirement of MMPA section 101(a)(5)(E).

Response: Given that the 1991 NMFS Recovery Plan for humpback whales was written for the taxonomic species, it is still applicable to humpback whale DPSs within the species and still serves as a guide for recovery actions for the currently listed DPSs that occur in U.S. waters. As noted in the final rule designating humpback whale critical habitat (86 FR 21082, April 21, 2021), some of the objectives of the 1991 Recovery Plan are still relevant today for the Mexico and Central America, and Western North Pacific DPSs. Furthermore, NMFS is working to develop updated humpback DPS recovery plans as resources allow. However, the 1991 Recovery Plan satisfies the recovery plan need for the purposes of MMPA 101(a)(5)(E), while new recovery plans are developed.

Comment 5: CBD states that NMFS has not established a program to monitor incidental marine mammal M/SI in the WA/OR/CA sablefish pot fishery. They note that the observer program that observes a portion of this fishery was not established to monitor marine mammal M/SI but to monitor groundfish catch composition. Therefore, the monitoring program does not meet the requirements of MMPA section 118(d).

Response: The observer program in the sablefish pot fishery collects data on all target and non-target species, including the incidental M/SI of marine mammals. Data from the observer program is used by NMFS scientists to generate statistically valid estimates of entanglements and mortality/serious injury that are represented in the most recent SAR for the CA/OR/WA stock of humpback whales. As such, it satisfies the requirement in MMPA section 101(a)(5)(E)(i)(III). Given that estimates of entanglements produced from observer data are used in the NID analysis, it is incorrect to state the NID analysis relies only upon confirmed entanglement reports.

Comment 6: CBD states that NMFS is not developing and has not developed a TRP for humpback whales in the WA/OR/CA sablefish pot fishery, noting NMFS' response that developing a TRP for the WA/OR/CA sablefish pot trap fishery and other similar Category II fisheries has been deferred under MMPA section 118 as other stocks/fisheries are a higher priority for any available funding for establishing new TRPs. They acknowledge that NMFS updated the list of priorities for establishing TRTs in September 2021, and the CA/WA/OR stock of humpback whale remains a low priority for establishing a TRT. CBD disagrees with NMFS that the NMFS priorities for establishing TRTS meets the MMPA section 101(a)(5)(E) requirement and asserts that MMPA section 101(a)(5)(E) requires a TRP be in place or in development prior to authorizing incidental take of these ESA-listed marine mammals.

Response: As we have noted previously (86 FR 58641; October 22, 2021), MMPA section 118(f)(3) contains specific priorities for developing TRPs if insufficient funding is available to further develop and implement TRPs for all applicable stocks and fisheries. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category II fisheries. Thus, NMFS prioritizes which stocks and fisheries to address under a TRP. MMPA section 118(f) provides that if there is insufficient funding available to develop and implement a take reduction plan for stocks that interact with Category I and II fisheries, the Secretary shall give highest priority to the development of TRPs for species or stocks whose level of incidental mortality and serious injury exceeds PBR, that have a small population size, and those that are declining most rapidly. As noted in the **Federal Register** notice announcing NMFS's proposed intent to issue a 101(a)(5)(e) permit for the WA/OR/CA sablefish pot fishery, the CA/OR/WA stock of humpback whale authorized to be incidentally taken under this permit is currently a lower priority for developing a TRP because of the low levels of M/SI incidental to commercial fishing compared to other marine mammal stocks and commercial fisheries.

Comment 7: WDC/NRDC comments that the proposed permit is based on the 2019 CA/OR/WA humpback whale SAR and the 2019 SAR does not include up-to-date data on confirmed entanglements in the WA/OR/CA sablefish pot fishery reported in Carretta *et al.* 2021a. They also state that NMFS did not include confirmed unattributed humpback whale entanglements in the NID analysis and, by doing so, NMFS has underestimated humpback whale M/SI in the WA/OR/CA sablefish pot fishery.

Response: Since the publication of the proposed MMPA 101(a)(5)(E) permit for the WA/OR/CA sablefish pot fishery, the draft 2021 SAR for the CA/OR/WA stock of humpback whales published and is available for public comment (86 FR 58887; October 25, 2021). The M/SI estimates in the draft 2021 CA/OR/WA humpback whale SAR for the WA/OR/CA sablefish pot fishery remain the same as the M/SI estimates in the final 2019 SAR. The 2014 humpback whale mortality and the 2016 humpback whale serious injuries in the WA/OR/CA sablefish pot fishery reported in Carretta *et al.* 2021a are included in the M/SI estimates in the 2019 CA/OR/WA humpback whale SAR that was used in the analysis for the proposed permit. Carretta *et al.* 2021a also includes a non-serious injury of a humpback whale in

the WA/OR/CA sablefish pot fishery that occurred in 2017. As noted in Carretta *et al.* 2021a, this non-serious injury is not counted against PBR and is not included in the M/SI estimates for the fishery. The accompanying MMPA 101(a)(5)(E) determination document has been updated to reflect the draft 2021 CA/OR/WA humpback whale SAR.

As noted above, the CA/OR/WA humpback whale SAR also includes unattributed fishery-related M/SI for the stock, which is not assigned to a specific commercial fishery. This unattributed fishery-related M/SI could be from any number of commercial, recreational or tribal fisheries, including the WA/OR/CA sablefish pot fishery. Because data are not currently available to assign the unattributed fishery-related M/SI to a specific commercial fishery, we did not include it in the calculations for the NID Tier 2 analysis. In addition, because the CA/OR/WA humpback whale stock is considered to be transboundary stock, NMFS assumed NIT_t is exceeded and conducted the more conservative Tier 2 analysis with the lower NIT_s criterion.

Comment 8: WDC/NRDC notes that the proposed permit uses a different abundance estimate for the CA/OR/WA stock of humpback whale than the abundance estimate in the final 2019 SAR. They state that NMFS has identified the Central America DPS as a demographically independent population (DIP) under the MMPA, and PBR should be calculated for the Central America DIP separately.

Response: See response to Comment #3 and #7 above. The abundance estimates for the CA/OR/WA stock of humpback whales used in the analysis for the proposed permit are consistent with the final 2019 SAR and the recent 2021 draft SAR. As noted in the response to comment #3, NMFS is in the process of revising humpback whale stock structure following the process laid out in NMFS (2019). This process includes evaluating the lines of evidence to support the delineation of DIPs, including whether such evidence supports the delineation of the Central America DPS as a DIP. Martien et al. (2019) does not serve as the DIP delineation document for the Central America DPS. In the analysis supporting issuance of this permit and the NID, NMFS relied on the existing MMPA designation of the CA/OR/WA stock of humpback whales. Nevertheless, if, during the 3-year authorization, there is a significant change in the information or conditions used to support any of these determinations, including a change in MMPA stock structure, NMFS will re-evaluate the permit.

Comment 9: WDC/NRDC reiterate their previous comments submitted on the NMFS' draft ''Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E).'' They restate that the approach to negligible impact determinations undermines the protections for marine mammals protected as threatened or endangered under the ESA, and assessing the impacts of a single fishery when total M/SI exceeds PBR is an inadequate standard. WDC/NRDC requests NMFS consider total human-caused M/SI for the humpback whale DPSs, and if all fisheries-related M/SI exceeds PBR for the Central America or Mexico DPS, that NMFS delay issuing the permit until mitigation measures are implemented.

Response: As previously stated (86 FR 24384; May 6, 2021), NMFS received several comments on the draft ''Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)'' stating the directive was either overly precautionary or not precautionary enough. These comments were previously addressed in the response to comments (see Comment #4) on the draft ''Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E).'' The full response to comments on the procedural directive is available at: *https://www.fisheries.noaa.gov/action/criteria-determining-negligible-impact-under-mmpa-section-101a5e.*

As described in the ''Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E),'' due to the uncertainty regarding the M/SI that occurs outside of U.S. waters, we assume that total M/SI exceeds NIT_t for transboundary, migratory stocks and proceed directly to the Tier 2 NIT_s analysis. The CA/OR/WA stock of humpback whale is considered a transboundary stock and using the ''Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)'' a Tier 2 NIT_s analysis was conducted.

References

Carretta, J.W., K.A. Forney, E.M. Olson, D.W. Weller, A.R. Lang, J. Baker, M.M. Muto, B. Hanson, A.J. Orr, H. Huber, M.S. Lowry, J. Barlow, J.E. Moore, D. Lynch, and R.L. Brownell. 2021. Draft U.S. Pacific Marine Mammal Stock Assessments: 2021. NOAA–TM–NMFS–SWFSC–XXX.

Carretta, J.W., J. Greenman, K. Wilkinson, J. Freed, L. Saez, D. Lawson, J. Viezbicke, and J. Jannot. 2021a. Sources of Human-related Injury and Mortality for U.S. Pacific West Coast Marine Mammal Stock Assessments, 2015–2019. U.S. Department of Commerce, NOAA Technical Memorandum NMFS–SWFSC–643.

Martien, K.K., A.R. Lang, B.L. Taylor, P.E. Rosel, SE Simmons, E.M. Oleson, P.L. Boveng., and M.B. Hanson. 2019. The DIP Delineation Handbook: A Guide to Using Multiple Lines of Evidence to Delineate Demographically Independent Populations of Marine Mammals. NOAA Technical Memorandum NMFS–SWFSC–622, 135 p. Available at: *https://repository.library.noaa.gov/view/noaa/22660.*

National Marine Fisheries Service (NMFS). 2020. National Marine Fisheries Service Procedure 02–204–02: Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E). 20 p. Available online: *https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives.*

National Marine Fisheries Service (NMFS). 2019. National Marine Fisheries Service Procedure 02–204–03: Reviewing and designating stocks and issuing Stock Assessment Reports under the Marine Mammal Protection Act. 9 p. Available online: *https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives.*

National Marine Fisheries Service (NMFS). 2016. National Marine Fisheries Service Procedure 02–204–01: Guidelines for preparing stock assessment reports pursuant to the 1994 amendments to the Marine Mammal Protection Act. 23 p. Available online: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/guidelines-assessing-marine-mammal-stocks.*

National Marine Fisheries Service (NMFS). 2014. National Marine Fisheries Service Procedure 02–238–01: Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals. 42 p. Available online: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations*

Dated: December 2, 2021.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–26536 Filed 12–7–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB623]

Marine Mammals; File No. 26024

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Ocean Futures Society, 513 De La Vina

Street, Santa Barbara, CA 93101 (Responsible Party: Jean-Michel Cousteau), has applied in due form for a permit to conduct commercial or educational photography on humpback whales (*Megaptera novaeangliae*), bottlenose dolphins (*Tursiops truncatus*), spinner dolphins (*Stenella longirostris*), and pantropical spotted dolphins (*S. attenuata*).

DATES: Written, telefaxed, or email comments must be received on or before January 7, 2022.

ADDRESSES: These documents are available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 26024 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Carrie Hubard, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant proposes to film humpback whales and dolphins to produce a documentary to celebrate Jean-Michel Cousteau's 75 years of diving and educate the public about the protection, conservation, and management of humpback whales and other cetaceans in Hawaii waters. Filmmakers would annually harass up to 105 humpback whales, 700 bottlenose dolphins, 700 pantropical spotted dolphins, and 700 spinner dolphins for photography/videography (aerial, topside and underwater) using two vessels, divers, and two unmanned aircraft systems. Filming is expected to occur within a two-week period in February or March each year. The permit would be valid for two years.

It has come to the agency's attention that the 2016 interim final humpback approach rule (50 CFR 216.19; 81 FR 62010, September 8, 2016) does not explicitly exempt permits issued under section 104(c)(6) of the MMPA from its prohibitions. It is not the agency's intent to preclude the issuance of permits or authorizations consistent with the requirements of the MMPA. We interpret the rule to allow issuance of these permits. Consistent with this interpretation, it has been our practice to continue to issue section 104(c)(6) permits that are in compliance with the MMPA's requirements and our review procedures, as evidenced by issuance of four such permits since the rule's effective date. However, to eliminate any potential ambiguity, we intend to revise the rule to explicitly clarify that photography permits issued under section 104(c)(6) of the MMPA are exempt from the prohibitions on approach.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 2, 2021.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–26537 Filed 12–7–21; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Tuesday, December 14, 2021 10:00 a.m.–12:30 p.m.

PLACE: This meeting will be held remotely.

STATUS: Commission Meeting—Open to the Public.

MATTERS TO BE CONSIDERED:

Decisional Matters

Proposed Rule: Safety Standard for Magnets; and

Notices of Proposed Rulemaking to (1) Add Window Covering Cords to the Substantial Product Hazard List, and (2) Establish a Safety Standard for Operating Cords on Custom Window Coverings.

All attendees should preregister for the Commission Meeting at the following link: *https://attendee.gotowebinar.com/register/5506548165419382288.*

CONTACT PERSON FOR MORE INFORMATION: Alberta E. Mills, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, 301–504–7479 (Office) or 240–863–8938 (Cell).

Dated: December 3, 2021.

Alberta E. Mills,

Commission Secretary.

[FR Doc. 2021–26631 Filed 12–6–21; 11:15 am]

BILLING CODE 6355–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP22–19–000]

Florida Gas Transmission, LLC; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on November 22, 2021, Florida Gas Transmission, LLC (FGT), 1300 Main Street, Houston, Texas 77002, filed in the above referenced docket a prior notice pursuant to Section 157.205, 157.208 and 157.210 of the Federal Energy Regulatory Commission's regulations under the Natural Gas Act and the blanket certificate issued to FGT by the Commission in Docket No. CP82–553–000, seeking for authorization to increase mainline capacity, and construct, own, operate, and maintain approximately 5.63 miles of 12-inch lateral loop pipeline and appurtenant facilities, and make minor auxiliary facility modifications under Section 2.55(a) of the Commission's Regulations on compressor units 1601 and 1603 at Compressor Station (CS) 16 in Bradford County, Florida. The proposed modifications at CS 16 will allow FGT to flow and transport incremental interstate natural gas primarily southwest from an existing receipt point in Clay County, Florida, to an existing primary delivery point, or optional delivery points, south of CS 16 on FGT's existing lateral facilities in Alachua County, Florida for the Gainesville Regional Utilities. The proposal is known as the Deerhaven Project (or the Project) and it is estimated to cost about $16 Million.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public

Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application should be directed to Blair Lichtenwalter, Senior Director, Certificates, Florida Gas Transmission, LLC, 1300 Main Street, P.O. Box 4967, Houston, Texas 77210–4967, by telephone (713) 989–2605, or by email at *Blair.Lichtenwalter@energytransfer.com.*

Public Participation

There are three ways to become involved in the Commission's review of this project: You can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5:00 p.m. Eastern Time on January 31, 2022. How to file protests, motions to intervene, and comments is explained below.

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[1] any person [2] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is January 31, 2022. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

[1] 18 CFR 157.205.

[2] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[3] 18 CFR 157.205(e).

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is January 31, 2022. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before January 31, 2022. The filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding.

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP22–19–000 in your submission. The Commission encourages electronic filing of submissions.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select General'' and then select ''Protest'', ''Intervention'', or ''Comment on a Filing''; or [6]

(2) You can file a paper copy of your submission. Your submission must reference the Project docket number CP22–19–000.

To mail via USPS, use the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To mail via any other courier, use the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: *Blair.Lichtenwalter@energytransfer.com* or 1300 Main St., P.O. Box 4967, Houston, Texas 77210–4967. Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link

[6] Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: December 2, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26582 Filed 12–7–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG22–26–000.
Applicants: Parkway Generation Essex, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Parkway Generation Essex, LLC.
Filed Date: 12/2/21.
Accession Number: 20211202–5138.
Comment Date: 5 p.m. ET 12/23/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER20–2429–002.
Applicants: ISO New England Inc., Central Maine Power Company.
Description: Central Maine Power Company submits responses to the requests set forth in the September 15, 2021 deficiency letter.
Filed Date: 11/8/21.
Accession Number: 20211108–5188.
Comment Date: 5 p.m. ET 12/9/21.

Docket Numbers: ER21–254–001.
Applicants: Harmony Florida Solar, LLC.
Description: Refund Report: Harmony Florida Solar, LLC Supplement to Refund Report of Sellers to be effective N/A.
Filed Date: 12/2/21.
Accession Number: 20211202–5188.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER21–255–001.
Applicants: Taylor Creek Solar, LLC.
Description: Refund Report: Taylor Creek Solar, LLC Supplement to Refund Report of Sellers to be effective N/A.
Filed Date: 12/2/21.
Accession Number: 20211202–5193.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER21–2624–000.
Applicants: Puget Sound Energy, Inc.
Description: Refund Report: PSE Refund Report for Morgan Stanley to be effective N/A.
Filed Date: 12/1/21.
Accession Number: 20211201–5260.
Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER21–2637–000.
Applicants: Puget Sound Energy, Inc.
Description: Refund Report: PSE Refund Report for Powerex to be effective N/A.
Filed Date: 12/1/21.
Accession Number: 20211201–5261.
Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–517–000.
Applicants: Puget Sound Energy, Inc.
Description: § 205(d) Rate Filing: Holly Frontier Transmission Agreements to be effective 11/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5262.
Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–518–000.
Applicants: Puget Sound Energy, Inc.
Description: Tariff Amendment: Shell Transmission Service Agreement Cancellation to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5263.
Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–519–000.
Applicants: Indra Power Business DC LLC.
Description: Baseline eTariff Filing: Tariffs and Agreements to be effective 2/1/2022.
Filed Date: 12/2/21.
Accession Number: 20211202–5000.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER22–521–000.
Applicants: Indra Power Business VA LLC.
Description: Baseline eTariff Filing: Tariffs and Agreements to be effective 2/2/2022.
Filed Date: 12/2/21.
Accession Number: 20211202–5071.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER22–522–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX-Texas-New Mexico Power 5th A&R Interconnection Agreement to be effective 11/19/2021.
Filed Date: 12/2/21.
Accession Number: 20211202–5074.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER22–523–000.
Applicants: Indra Power Business TX LLC.
Description: Baseline eTariff Filing: Tariffs and Agreements to be effective 2/2/2022.
Filed Date: 12/2/21.
Accession Number: 20211202–5081.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER22–524–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3618R3 Little Blue Wind Project, LLC GIA to be effective 11/10/2021.
Filed Date: 12/2/21.
Accession Number: 20211202–5089.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER22–525–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3867 Southwestern Power Admin & OG&E Interconnection Agr to be effective 1/1/2022.
Filed Date: 12/2/21.
Accession Number: 20211202–5114.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER22–526–000.
Applicants: Glacier Sands Wind Power, LLC.
Description: Baseline eTariff Filing: Reactive Power Compensation Filing to be effective 1/31/2022.
Filed Date: 12/2/21.
Accession Number: 20211202–5117.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER22–527–000.
Applicants: San Diego Gas & Electric Company.
Description: Informational Filing of Fifth Transmission Owner Rate of San Diego Gas & Electric Company.
Filed Date: 12/1/21.
Accession Number: 20211201–5325.
Comment Date: 5 p.m. ET 12/22/21.

Docket Numbers: ER22–528–000.
Applicants: Tucson Electric Power Company.
Description: § 205(d) Rate Filing: OATT Revisions to Reflect CAISO EIM Participation to be effective 2/1/2022.
Filed Date: 12/2/21.
Accession Number: 20211202–5149.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER22–529–000.
Applicants: 299F2M WHAM8 SOLAR, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization and Request for Waivers to be effective 12/3/2021.
Filed Date: 12/2/21.
Accession Number: 20211202–5168.
Comment Date: 5 p.m. ET 12/23/21.

Docket Numbers: ER22–54–001.
Applicants: Golden Spread Electric Cooperative, Inc.
Description: Tariff Amendment: Supplement to WPC Sched B Rider I and FRT Filing to be effective 2/1/2021.

Filed Date: 12/2/21.
Accession Number: 20211202–5038.
Comment Date: 5 p.m. ET 12/16/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 2, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26584 Filed 12–7–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 11286–026]

City of Abbeville; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Application for Temporary Variance and Approval of Reservoir Drawdown Plan.

b. *Project No.:* 11286–026.

c. *Date Filed:* November 16, 2021, as supplemented on November 24 and December 2, 2021.

d. *Applicant:* City of Abbeville.

e. *Name of Project:* Abbeville Hydroelectric Project.

f. *Location:* The project is located on the Rocky River in Abbeville and Anderson counties, South Carolina.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Tim Hall, Public Utilities Director, City of Abbeville, 306 Cambridge Street, P.O. Box 639, Abbeville, SC 29620; (864) 366–5058.

i. *FERC Contact:* Christopher Chaney, (202) 502–6778, *christopher.chaney@ferc.gov*.

j. Deadline for filing comments, motions to intervene, and protests is 30 days from the issuance date of this notice by the Commission.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. The first page of any filing should include the docket number P–11286–026. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, it must also serve a copy of the document on that resource agency.

k. *Description of Request:* The City of Abbeville (licensee) requests approval to implement a temporary drawdown of the reservoir to an elevation of 528 feet mean sea level (msl). Under the licensee's proposal, the reservoir would be drawn down 12 feet below the seasonal minimum elevation of 540 feet msl allowed under Article 401 of the project's license. The licensee states the drawdown is necessary to conduct repairs on the penstock fill valve. As proposed in the December 2, 2021 supplement, the drawdown would begin on January 10, 2022, and the licensee would start refilling the reservoir on January 28, 2022. The licensee estimates the reservoir refill would take approximately 30 days. As required under Article 403 of the project's license, the licensee's request includes an associated Reservoir Drawdown Plan for Commission approval.

l. *Locations of the Application:* This filing may also be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting, or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: December 2, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26581 Filed 12–7–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL22–13–000; EL22–14–000]

Seneca Generation, LLC. Yards Creek Energy, LLC; Notice of Institution of Section 206 Proceedings and Refund Effective Date

On December 2, 2021, the Commission issued an order in Docket Nos. EL22–13–000 and EL22–14–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether Seneca Generation, LLC's and Yards Creek Energy, LLC's Reactive Service rate schedules are unjust and unreasonable. *Seneca Generation, LLC, et al.,* 177 FERC ¶ 61,160 (2021).

The refund effective date in Docket Nos. EL22–13–000 and EL22–14–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket Nos. EL22–13–000 and EL22–14–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2020), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: December 2, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26578 Filed 12–7–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP22–377–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Cherokee AGL—Replacement Shippers—Dec 2021 to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5117.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–378–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: List of Non-Conforming Service Agreements (Leidy South_Interim Svc_2_3) to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5122.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–379–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: REX 2021–11–30 Negotiated Rate Agreements to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5149.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–380–000.
Applicants: Alliance Pipeline L.P.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Dec 1 Capacity Releases to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5155.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–381–000.
Applicants: MarkWest Pioneer, L.L.C.
Description: § 4(d) Rate Filing: Quarterly Fuel Adjustment Filing to be effective 1/1/2022.
Filed Date: 12/1/21.
Accession Number: 20211201–5169.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–382–000.
Applicants: Cameron Interstate Pipeline, LLC.
Description: § 4(d) Rate Filing: Cameron Interstate Pipeline, LLC Annual Adjustment of Fuel Retainage Percentage to be effective 1/1/2022.
Filed Date: 12/1/21.
Accession Number: 20211201–5215.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–383–000.
Applicants: MoGas Pipeline LLC.
Description: § 4(d) Rate Filing: MoGas Pipeline LLC Negotiated Rate Tariff Filing to be effective 1/1/2022.
Filed Date: 12/1/21.
Accession Number: 20211201–5224.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–384–000.
Applicants: Columbia Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Vitol OPT30 & OPT60 Rev Share Neg Rate Agmts to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5237.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–385–000.
Applicants: ANR Pipeline Company.
Description: § 4(d) Rate Filing: Venture Global Calcasieu 133756—Neg Rate/Non-Conforming to be effective 1/1/2022.
Filed Date: 12/1/21.
Accession Number: 20211201–5238.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–386–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreements Filing (Eco Energy/Red Willow/Shell) to be effective 1/1/2022.
Filed Date: 12/1/21.
Accession Number: 20211201–5242.
Comment Date: 5 p.m. ET 12/13/21.

Docket Numbers: RP22–387–000.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: § 4(d) Rate Filing: Amendment to a Negotiated Rate Agreement—Kiowa Power Partners, LLC to be effective 12/1/2021.
Filed Date: 12/1/21.
Accession Number: 20211201–5266.
Comment Date: 5 p.m. ET 12/13/21.

Any person desiring to intervene or protest in any of the above proceedings

must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP21–100–000.
Applicants: National Grid LNG, LLC.
Description: Refund Report: Refund Report of National Grid LNG in Docket RP21–100 to be effective N/A.
Filed Date: 12/1/21.
Accession Number: 20211201–5236.
Comment Date: 5 p.m. ET 12/13/21.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 2, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26580 Filed 12–7–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER22–519–000]

Indra Power Business DC LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Indra Power Business DC LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 22, 2021.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: December 2, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26583 Filed 12–7–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5984–071]

Erie Boulevard Hydropower, L.P.; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Application for Non-Capacity Amendment of License.
b. *Project No:* 5984–071.
c. *Date Filed:* November 9, 2021.
d. *Applicant:* Erie Boulevard Hydropower, L.P.
e. *Name of Project:* Oswego Falls Hydroelectric Project.
f. *Location:* The project is located on the Oswego River in Oswego and Onodaga counties, New York.
g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.
h. *Applicant Contact:*

Thomas Uncher, Erie Boulevard Hydropower, L.P., 399 Big Bay Road, Queensbury, NY 12804, (518) 743–2018

Nathan Stevens, Brookfield Renewable, 150 Main Street, Lewiston, ME 04240, (207) 660–2223

i. *FERC Contact:* Elizabeth Moats, (202) 502–6632, *Elizabeth.Moats@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* January 3, 2022.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory

Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–5984–071. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The licensee proposes to remove the existing trashracks from the structure at the upstream end of the West Development hydro canal and construct a new concrete sill and steel structure immediately upstream of the powerhouse intake to support new 1-inch clear trashracks. The licensee would also construct a new fish conveyance system along the right side of the West Development hydro canal, 90 feet upstream of the new trashracks. In addition, the licensee proposes to now discharge some of the required minimum flow from the new fish conveyance system instead of the Tainter gate. The proposed amendment would only affect the West Development. The licensee does not propose any changes to existing project operations, headpond elevation, or spillway capacity.

l. *Locations of the Application:* This filing may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: December 2, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–26579 Filed 12–7–21; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9285–01–OMS]

Privacy Act of 1974; System of Records

AGENCY: Office of the Administrator (OA), Environmental Protection Agency (EPA).

ACTION: Notice of a modified system of records.

SUMMARY: The U.S. Environmental Protection Agency's (EPA), Office of the Administrator is giving notice that it proposes to modify the Reasonable Accommodation Management System (RAMS) pursuant to the provisions of the Privacy Act of 1974. This system of records stores and maintains reasonable accommodation request files for EPA employees and applicants for employment. EPA is updating the RAMS SORN to reflect the explicit inclusion of requests for religious accommodations in addition to medical accommodations.

DATES: Persons wishing to comment on this system of records notice must do so by January 7, 2022. New or modified routine uses for this modified system of records will be effective January 7, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OEI–2017–0536, by one of the following methods:

Federal eRulemaking Portal: www.regulations.gov. Follow the online instructions for submitting comments.

Email: oei.docket@epa.gov.

Fax: 202–566–1752.

Mail: OMS Docket, Environmental Protection Agency, Mail Code: 2822T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

Hand Delivery: OMS Docket, EPA/DC, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OEI–2017–0536. The EPA 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 Controlled Unclassified Information (CUI) or other information for which disclosure is restricted by statute. Do not submit information that you consider to be CUI or otherwise protected through *www.regulations.gov.* The *www.regulations.gov* website is an ''anonymous access'' system for EPA, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. Each agency determines submission requirements within their own internal processes and standards. EPA has no requirement of personal information. If you send an email comment directly to the EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. 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 public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CUI or other information for which disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the OMS Docket, EPA/DC, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington. DC 20460. 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 OMS Docket is (202) 566–1752.

Temporary Hours During COVID–19

Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: For information related to medical accommodation requests contact the National Reasonable Accommodation Coordinators (NRACs) at *ReasonableAccommodations@epa.gov.* For information related to religious accommodation requests contact Krysti Wells, Director, Office of Customer Advocacy, Policy and Portfolio Management (OCAPPM), *wells.krysti@epa.gov,* 202–564–6295.

SUPPLEMENTARY INFORMATION: EPA uses RAMS to store and maintain information related to requests from individuals for reasonable accommodations from the Agency, as necessary to ensure compliance with applicable laws and regulations. Previously, RAMS covered information on requests for accommodation based on disability. EPA is amending the SORN so that in addition to these disability-related requests, the SORN also explicitly covers requests based on an individual's religious belief, practice, or observance. Additionally, EPA is adding coverage for certain specific accommodation requests based on medical conditions that may not qualify as a disability when such accommodations are authorized (*e.g.* requests for temporary accommodation for a broken leg, or a delay from the COVID–19 vaccination requirement). EPA is additionally updating the SORN to reflect new requirements in Executive Orders and federal guidance. Accordingly, EPA is updating the following sections of the RAMS SORN: For Further Information Contact; Supplementary Information; System Location; System Manager; Authority; Purpose; Categories of Individuals Covered; Categories of Records; Record Source Categories; Routine Uses; Policies and Practices for Storage of Records; Policies And Practices For Retention And Disposal Of Records; Administrative, Technical, And Physical Safeguards; Record Access Procedure; Contesting Records Procedures, and Notification Procedure.

The updates will allow the Agency to manage all reasonable accommodation request information under the single updated RAMS SORN. EPA will maintain information under the RAMS SORN in two sections—one for medical accommodation request information and one for religious accommodation request information. Medical information is maintained separately from other personnel records.

SYSTEM NAME AND NUMBER:

Reasonable Accommodation Management System (RAMS), EPA–73.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Hard copy and electronic records are maintained at EPA Headquarters, 1200 Pennsylvania Ave. NW, Washington, DC 20460, and/or at the EPA Regional Office and/or the local office of the requestor.

SYSTEM MANAGER(S):

OCAPPM Director, and NRACs, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352); the Rehabilitation Act of 1973; the Americans with Disabilities Act (ADA) and the ADA Amendments Act of 2008 (ADAAA) (Pub. L. 110–325); Executive Order 13164, *Requiring Federal Agencies To Establish Procedures To Facilitate the Provision of Reasonable Accommodation* (July 28, 2000); Executive Order 13548, *Increasing Federal Employment of Individuals with Disabilities* (July 26, 2010); Executive Order 14043, *Requiring Coronavirus Disease 2019 Vaccination for Federal Employees* (Sept. 9, 2021); Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors* (Sept. 9, 2021); Executive Order 13991, *Protecting the Federal Workforce and Requiring Mask-Wearing* (Jan. 20, 2021); Executive Order 12196, *Occupational Safety and Health Program for Federal Employees* (Feb. 26, 1980); 5 U.S.C. chs. 63, 79; 29 U.S.C. 654, 668, 42 U.S.C. 247d, 12101, 44 U.S.C. 3101, 5 CFR part 339, and 29 CFR part 1602; and Equal Employment Opportunity Commission (EEOC) reasonable accommodation regulations and guidance.

PURPOSE OF THE SYSTEM:

EPA uses RAMS to collect and maintain information on reasonable accommodation requests from EPA employees and applicants for employment. Under Title VII of the Civil Rights Act, the Rehabilitation Act, and the ADA and ADAAA, EPA must provide reasonable accommodations to employees and applicants for employment for qualifying medical disabilities and sincerely held religious beliefs and practices, unless the accommodation would impose an undue hardship on the agency. In certain authorized situations, EPA may provide accommodations to individuals whose medical condition may not qualify as a disability.

Reasonable accommodations are modifications or adjustments that will allow applicants and employees to apply for a job, perform job duties, and/or enjoy the benefits and privileges of employment. Reasonable accommodations may include, but are not limited to: (1) Making existing facilities readily accessible to and usable by individual with disabilities; (2) job restructuring, modification of work schedules or place of work, extended leave, telecommuting, or reassignment to a vacant position; (3) acquisition or modification of equipment or devices, including computer software and hardware, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers and/or interpreters, personal assistants that enable the

individual to perform their job duties and enjoy the benefits and privileges of employment, and other similar accommodations; and/or (4) providing interpreters, large print programs, or other accommodations for EPA events or activities open to employees, applicants, and/or the public.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

EPA employees and applicants for employment at EPA who request a reasonable accommodation (the ''Requestor''); individuals whom the Requestor authorizes to submit information in support of their request; and authorized individuals responsible for processing requests.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information collected in RAMS may include but is not limited to: Email correspondence with the Requestor and authorized individuals responsible for processing requests; documentation submitted in support of a request consistent with EPA's Procedures for Providing Reasonable Accommodation for EPA Employees and Applicants with Disabilities; religious belief and practice information submitted in support of a request; and accommodation determination documentation. Specific data elements may include: Requestor name, work address, work phone, work email address, office name, occupational series, pay grade, and bargaining unit; accommodation requested, request date, work/application activity limited by requesting condition; medical information, religious information, disability status, determination date, determination method, explanation of method, and decision-making official name and title; and contact information for individuals whom the Requestor authorizes to submit information in support of their request and for authorized individuals responsible for processing requests.

RECORD SOURCE CATEGORIES:

Information is obtained from: The Requestor; authorized individuals responsible for processing requests; persons appointed by and/or acting on the Requestor's behalf such as a union representative, colleague, or spouse; the NRACs or the Local Reasonable Accommodation Coordinator (LORAC), if there is one for the Requestor's office; the Requestor's medical provider(s); and/or third parties attesting to the Requestor's religious belief or practice (if submitted by or with permission of the individual seeking the accommodation).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSE OF SUCH USES:

The routine uses below are both related to and compatible with the original purpose for which the information was collected. The following general routine uses apply to this system:

A. Disclosure for Law Enforcement Purposes: Information may be disclosed to the appropriate Federal, State, local, tribal, or foreign agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates or is relevant to a violation or potential violation of civil or criminal law or regulation within the jurisdiction of the receiving entity.

B. Disclosure Incident to Requesting Information: Information may be disclosed to any source from which additional information is requested (to the extent necessary to identify the individual, inform the source of the purpose of the request, and to identify the type of information requested) when necessary to obtain information relevant to an agency decision concerning a personnel action (other than hiring), such as retention of an employee, retention of a security clearance, the letting of a contract, or the issuance or retention of a grant, or other benefit.

E. Disclosure to Congressional Offices: Information may be disclosed to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of the individual.

F. Disclosure to Department of Justice: Information may be disclosed to the Department of Justice, or in a proceeding before a court, adjudicative body, or other administrative body before which the Agency is authorized to appear, when:

1. The Agency, or any component thereof;

2. Any employee of the Agency in his or her official capacity;

3. Any employee of the Agency in his or her individual capacity where the Department of Justice or the Agency have agreed to represent the employee; or

4. The United States, if the Agency determines that litigation is likely to affect the Agency or any of its components,

Is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice or the Agency is deemed by the Agency to be relevant and necessary to the litigation provided, however, that in each case it has been determined that the disclosure is compatible with the purpose for which the records were collected.

G. Disclosure to the National Archives: Information may be disclosed to the National Archives and Records Administration in records management inspections.

H. Disclosure to Contractors, Grantees, and Others: Information may be disclosed to contractors, grantees, consultants, or volunteers performing or working on a contract, service, grant, cooperative agreement, job, or other activity for the Agency and who have a need to have access to the information in the performance of their duties or activities for the Agency.

I. Disclosures for Administrative Claims, Complaints and Appeals Information may be disclosed to an authorized appeal grievance examiner, formal complaints examiner, equal employment opportunity investigator, arbitrator, or other person properly engaged in investigation or settlement of an administrative grievance, complaint, claim, or appeal filed by an employee, but only to the extent that the information is relevant and necessary to the proceeding. Agencies that may obtain information under this routine use include, but are not limited to, the Office of Personnel Management, Office of Special Counsel, Merit Systems Protection Board, Federal Labor Relations Authority, Equal Employment Opportunity Commission, and Office of Government Ethics.

J. Disclosure to the Office of Personnel Management: Information may be disclosed to the Office of Personnel Management pursuant to that agency's responsibility for evaluation and oversight of Federal personnel management.

K. Disclosure in Connection with Litigation: Information may be disclosed in connection with litigation or settlement discussions regarding claims by or against the Agency, including public filing with a court, to the extent that disclosure of the information is relevant and necessary to the litigation or discussions and except where court orders are otherwise required under section (b)(11) of the Privacy Act of 1974, 5 U.S.C. 552a(b)(11).

The two routine uses below (L and M) are required by OMB Memorandum M–17–12.

L. Disclosure to Persons or Entities in Response to an actual or Suspected Breach of Personally Identifiable Information: To appropriate agencies, entities, and persons when (1) EPA suspects or has confirmed that there has been a breach of the system of records, (2) EPA has determined that as a result

of the suspected or confirmed breach there is a risk of harm to individuals, EPA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with EPA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

M. Disclosure to Assist Another Agency in its Efforts to Respond to a Breach of Personally Identifiable Information: To another Federal agency or Federal entity, when EPA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

Additional routine uses that apply to this system are:

1. Disclosure for Mandatory Reporting Requirements: Information may be disclosed to appropriate federal, state, local, tribal, or foreign governmental agencies or multilateral governmental organizations, to the extent permitted by law, and in consultation with legal counsel, to satisfy mandatory reporting requirements when applicable.

2. Disclosure to a Public Health Authority: Information may be disclosed to: Federal agencies such as the Department of Health and Human Services (HHS), State and local health departments, and other public health or cooperating medical authorities in connection with program activities and related collaborative efforts to deal more effectively with exposures to communicable diseases or to combat public health threats, and to satisfy mandatory reporting requirements when applicable.

3. Disclosure to Governmental Organization: Information may be disclosed to: Appropriate federal, state, local, tribal, or foreign governmental agencies or multilateral governmental organizations, to the extent permitted by law, and in consultation with legal counsel, for the purpose of protecting the vital interests of a data subject or other persons, including to assist such agencies or organizations in preventing exposure to or transmission of a communicable or quarantinable disease or to combat other significant public health threats.

4. Disclosure to Assisting Agency: Information may be disclosed to: A Federal agency or entity authorized to procure assistive technologies and services in response to a request for reasonable accommodation; another Federal agency pursuant to a written agreement with EPA to provide services (such as medical evaluations), when necessary, in support of reasonable accommodation decisions.

5. Disclosure for Emergencies: Information may be disclosed to first aid and safety personnel if the individual's medical condition requires emergency treatment.

6. Disclosure to Oversight Body: Information may be disclosed to another Federal agency or oversight body charged with evaluating EPA's compliance with the laws, regulations, and policies governing reasonable accommodation requests.

7. Disclosure to Hosting Entity: Information may be disclosed to an entity that is hosting an individual receiving an accommodation in order to provide continuation of that accommodation in the hosting location.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records are maintained in a secure password protected environment on electronic storage devices, including internal servers and local hardware devices (government furnished equipment laptops). The electronic storage devices and any paper records are located at EPA Headquarters, EPA Regional Offices, and/or the local office of the Requestor. Paper records are maintained in file folders stored within locking filing cabinets or locked rooms in secured facilities with controlled access.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

These records are retrieved by the Requestor's name, and/or a case number that is assigned to the request in RAMS, and/or by office or region.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records stored in this system are subject to EPA records schedule number (EPA 0068), Reasonable Accommodation Request Records. A records schedule provides mandatory instructions on how long to keep records (retention) and when they can be disposed. Reasonable accommodation records are retained until three years after an employee separates from EPA or three years after an applicant made the request if they are not hired.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Security controls used to protect personal sensitive data in RAMS are commensurate with those required for an information system rated MODERATE for confidentiality, integrity, and availability, as prescribed in National Institute of Standards and Technology (NIST) Special Publication, 800–53, ''Security and Privacy Controls for Information Systems and Organizations,'' Revision 5.

1. Administrative Safeguards: EPA staff must complete annual agency training for Information Security and Privacy. EPA instructs staff to lock and secure their computers and offices, if applicable, when unattended. All staff authorized to use RAMS are required to take training on the proper handling of personally identifiable information before using RAMS as well as annual Agency Information Security and Privacy Awareness training.

2. Technical Safeguards: EPA staff authorized to access electronic records are assigned permission levels. Permission level assignments allow authorized users to access only those system functions and records specific to their Agency work need. EPA also has technical security measures including restrictions on computer access to authorized individuals and required use of a personal identity verification (PIV) card and password. Medical documentation is password protected.

3. Physical Safeguards: Only authorized EPA staff have access to paper files, which are stored within locking filing cabinets or locked rooms in secured facilities with controlled access. Electronic storage devices are maintained in secured facilities with controlled access.

RECORD ACCESS PROCEDURES:

All requests for access to personal records should cite the Privacy Act of 1974 and reference the type of request being made (*i.e.,* access). Requests must include: (1) The name and signature of the individual making the request; (2) the name of the Privacy Act system of records to which the request relates; (3) a statement whether a personal inspection of the records or a copy of them by mail is desired; and (4) proof of identity. A full description of EPA's Privacy Act procedures for requesting access to records is available at 40 CFR part 16.

CONTESTING RECORD PROCEDURES:

Requests for correction or amendment must include: (1) The name and signature of the individual making the request; (2) the name of the Privacy Act

system of records to which the request relates; (3) a description of the information sought to be corrected or amended and the specific reasons for the correction or amendment; and (4) proof of identity A full description of EPA's Privacy Act procedures for the correction or amendment of a record are described in EPA's Privacy Act regulations at 40 CFR part 16.

NOTIFICATION PROCEDURE:

Individuals who wish to be informed whether a Privacy Act system of records maintained by EPA contains any record pertaining to them, should make a written request to the EPA, Attn: Agency Privacy Officer, MC 2831T, 1200 Pennsylvania Ave. NW, Washington, DC 20460, *privacy@epa.gov.*

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

The original system of records notice for RAMS was published in the **Federal Register** on July 8, 2019 (84 FR 32456–32460).

Vaughn Noga,

Senior Agency Official for Privacy.

[FR Doc. 2021–26432 Filed 12–7–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0076; FR ID 61144]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before February 7, 2022. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0076.

Title: Common Carrier Annual Employment Report.

Form Number: FCC Form 395.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 521 respondents; 521 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: Annual reporting requirement and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 154(i), 303, and 307–310 of the Communications Act of 1934, as amended.

Total Annual Burden: 521 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The respondents are instructed on the appropriate procedures to follow to safeguard information deemed confidential under *47 CFR 0.457* of the Commission's rules, which details the type of records that are not routinely available for public inspection. Section 0.459 of the Commission's rules contains procedures for requesting that material and information submitted to the Commission be withheld from public inspection.

Needs and Uses: FCC Report 395, Common Carrier Annual Employment Report, is a data collection mechanism to implement the FCC's Equal Employment Opportunity (EEO) rules. All common carrier licensees or permittees with sixteen (16) or more full-time employees are required to file the Annual Employment Report. Each common carrier is also obligated to file with this Commission copies of all exhibits, letters, and documents pertaining to all equal employment opportunity statements and annual reports on complaints regarding violations of equal employment provisions of Federal, State, Territorial, or local law. Section 22.321(f), 47 CFR, requires each licensee to maintain these documents for a period of two years. The Annual Employment Report identifies each filer's staff by gender, race, color, and/or national origin in each of ten major job categories. The report and all other EEOC documents are filed with the Commission to detail the applicant's compliance with the Commission's EEO rules. Data from these reports are available online so that users can easily locate data for a particular carrier and/or specific reporting years.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021–26607 Filed 12–7–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, without revision, the Uniform Application for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer (Form MSD–4; OMB No. 7100–0100) and the Uniform Termination Notice for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer (Form MSD–5; OMB No. 7100–0101).

DATES: Comments must be submitted on or before February 7, 2022.

ADDRESSES: You may submit comments, identified by Form MSD–4 or Form MSD–5, by any of the following methods:

- Agency website: *https://www.federalreserve.gov/.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include the OMB number or FR number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any confidential business information, identifying information, or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

SUPPLEMENTARY INFORMATION: The Board invites comment on a proposal to extend for three years, without revision, the Uniform Application for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer and the Uniform Termination Notice for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer.[1]

On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

During the comment period for this proposal, a copy of the proposed PRA OMB submission, including the draft reporting form and instructions, supporting statement, and other documentation, will be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above. Final versions of these documents will be made available at *https://www.reginfo.gov/public/do/PRAMain,* if approved.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collections, which are being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collections of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, Without Revision, the Following Information Collections

Report title: Uniform Application for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer.

Agency form number: Form MSD–4.

OMB control number: 7100–0100.

Frequency: Event generated.

Respondents: Each municipal securities dealer (MSD) that is a state member bank (SMB), bank holding company (BHC), or a savings and loan holding company (SLHC), certain subsidiaries of such firms, or a foreign dealer bank.[2]

Estimated number of respondents: Reporting, 13; Recordkeeping, 13.

Estimated average hours per response: Reporting, 0.92; Recordkeeping, 0.08.

Estimated annual burden hours: Reporting, 11.96; Recordkeeping, 1.04.

General description of report: The Municipal Securities Rulemaking Board (MSRB) rule G–7, Information Concerning Associated Persons, requires persons who are or seek to be an associated person of an MSD, either as a municipal securities principal (a person performing supervisory functions) or representative (a person engaged in underwriting, trading, or sales of municipal securities or furnishing financial advice to issuers in connection with the issuance of municipal securities) or in any other manner set forth under the rule, to provide certain background information to the MSD. The rule also requires MSDs to obtain and report this information. MSDs for which the Board is the appropriate regulatory agency (ARA) must report to the Board information required by MSRB rule G–7 using Form MSD–4. Generally, the information required by Form MSD–4

[1] As part of this clearance, the Board will clear the Form MSD–4 and Form MSD–5 under the Form MSD–4 OMB control number (7100–0100), and then discontinue the Form MSD–5's separate OMB control number (7100–0101). This non-substantive change is aimed at simplifying the tracking and clearance process for the two related forms. This change would not modify the reporting or recordkeeping requirements of the forms in any way. The collection will then be titled ''The Uniform Application and the Uniform Termination Notice for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer'' (Form MSD–4 and Form MSD–5; 7100–0100).

[2] 15 U.S.C. 78c(34)(A)(ii).

relates to employment history and professional background, including any disciplinary sanctions, as well as any claimed basis for exemption from MSRB examination requirements. Certain information reported on Form MSD–4 is filled out by the employee, with the rest completed by the MSD. As required by MSRB rule G–7, bank municipal securities dealers must retain copies of Form MSD–4 for each associated person during the entire term of employment.

Report title: Uniform Termination Notice for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer.

Agency form number: Form MSD–5.

OMB control number: 7100–0101.

Frequency: Event generated.

Respondents: Each MSD that is an SMB, BHC, or an SLHC, certain subsidiaries of such firms, or a foreign dealer bank.[3]

Estimated number of respondents: Reporting, 21; Recordkeeping, 21.

Estimated average hours per response: Reporting, 0.16; Recordkeeping; 0.08.

Estimated annual burden hours: Reporting, 3.36; Recordkeeping 1.68.

General description of report: An MSD for which the Board is the ARA must file Form MSD–5 with the Board when any employee previously registered as a municipal securities principal or representative is terminated for any reason. Form MSD–5 requires information such as the reason for termination and whether any investigations or actions by agencies or self-regulatory organizations (SROs) involving the associated person occurred during the period of employment.

Any SMB, BHC, or SLHC, as well as certain subsidiaries of such firms, and any foreign dealer bank that is an MSD is required to file Forms MSD–4 and MSD–5 with the Board with respect to its employees. As required by MSRB rule G–7, an MSD must retain both Form MSD–4 and Form MSD–5 for three years from the date of termination of employment.

Legal authorization and confidentiality: The Securities Exchange Act of 1934 (Exchange Act) authorizes the Securities and Exchange Commission (SEC) and MSRB to promulgate rules requiring MSDs to file reports about associated persons with the SEC and ARAs,[4] and the Board is the ARA for most Form MSD–4 and Form MSD–5 respondents.[5] The Exchange Act further authorizes the Board to enforce compliance with the SEC's and MSRB's rules,[6] and make rules and regulations to implement the portions of the Exchange Act for which it is responsible.[7]

Several additional statutes also authorize the Board to require submission of the Forms MSD–4 and MSD–5 by specific entities, including the Federal Reserve Act (for SMBs and their affiliates),[8] the International Banking Act (for branches and agencies of foreign banks),[9] the Bank Holding Company Act of 1956 (for BHCs and their subsidiaries),[10] and the Home Owners' Loan Act (for SLHCs and their subsidiaries).[11]

Filing of the Forms MSD–4 and MSD–5 is mandatory. Information provided on Forms MSD–4 and MSD–5 may be kept confidential pursuant to exemption 6 of the Freedom of Information Act (FOIA) to the extent disclosure of such information ''would constitute a clearly unwarranted invasion of personal privacy.''[12] Information contained on Forms MSD–4 and MSD–5 may also be kept confidential under FOIA exemption 4 if it is confidential commercial or financial information that is both customarily and actually treated as private[13] or under FOIA exemption 8 if it is obtained as part of an examination or supervision of a financial institution.[14]

Board of Governors of the Federal Reserve System, November 30, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–26325 Filed 12–7–21; 8:45 am]

BILLING CODE 6210–01–P

[3] 15 U.S.C. 78c(34)(A)(ii).

[4] 15 U.S.C. 78o-4(a)–(b) and (q).

[5] 15 U.S.C. 78c(a)(34)(A)(ii) (establishing the Board as the ARA for an MSD that is, or is the subsidiary of, an SLHC, SMB, or BHC (including a subsidiary of the BHC if the subsidiary does not already report to another ARA or to the SEC). While the Exchange Act does not specify the ARA for MSD activities of foreign dealer banks, the SEC has agreed that the Board should examine their MSD activities. *See* Letter from Catherine McGuire, Chief Counsel, SEC Division of Market Regulation, to Laura M. Homer, Assistant Director of Board S&R, June 14, 1994.

[6] 15 U.S.C. 78o–4(c).

[7] 15 U.S.C. 78w(a).

[8] 12 U.S.C. 248(a)(1) (authorizing the Board to ''require such statements and reports'' of member banks as it may deem necessary).

[9] 12 U.S.C. 3105(c)(2) (subjecting branches and agencies of foreign banks to reporting requirements in the same manner as if the branch or agency were a State member bank).

[10] 12 U.S.C. 1844(c)(1)(A)(ii)(II) (authorizing the Board to require from a BHC or any subsidiary reports as to compliance with federal laws that the Board has jurisdiction to enforce).

[11] 12 U.S.C. 1467a(b)(2) (authorizing the Board to require reports from SLHCs and their subsidiaries containing such information concerning the operations of the SLHC or subsidiary as the Board may require).

[12] 5 U.S.C. 552(b)(6).

[13] 5 U.S.C. 552(b)(4).

[14] 5 U.S.C. 552(b)(8).

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, with revisions, the Financial Statements for Holding Companies (FR Y–9 reports; OMB Control Number 7100–0128). The revisions are effective as of December 31, 2021.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are available at *https://www.reginfo.gov/public/do/PRAMain.* These documents are also available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection

Report title: Financial Statements for Holding Companies.

Agency form number: FR Y–9C, FR Y–9LP, FR Y–9SP, FR Y–9ES, and FR Y–9CS.

OMB control number: 7100–0128.

Effective Date: December 31, 2021.

Frequency: Quarterly, semiannually, and annually.

Respondents: Bank holding companies (BHCs), savings and loan holding companies (SLHCs), securities holding companies, and U.S. intermediate holding companies (IHCs) (collectively, holding companies).[1]

Estimated number of respondents:

Reporting

FR Y–9C (non-advanced approaches holding companies with less than $5 billion in total assets): 119; FR Y–9C (non-advanced approaches holding companies with $5 billion or more in total assets): 221; FR Y–9C (advanced approaches holding companies): 9; FR Y–9LP: 412; FR Y–9SP: 3,708; FR Y–9ES: 78; FR Y–9CS: 236.

Recordkeeping

FR Y–9C: 349; FR Y–9LP: 412; FR Y–9SP: 3,708; FR Y–9ES: 78; FR Y–9CS: 236.

Estimated average hours per response:

Reporting

FR Y–9C (non-advanced approaches holding companies with less than $5 billion in total assets): 35.74; FR Y–9C (non-advanced approaches holding companies with $5 billion or more in total assets): 44.94; FR Y–9C (advanced approaches holding companies): 50.16; FR Y–9LP: 5.27; FR Y–9SP: 5.45; FR Y–9ES: 0.50; FR Y–9CS: 0.50.

Recordkeeping

FR Y–9C: 1; FR Y–9LP: 1; FR Y–9SP: 0.50; FR Y–9ES: 0.50; FR Y–9CS: 0.50.

Estimated annual burden hours:

Reporting

FR Y–9C (non-advanced approaches holding companies with less than $5 billion in total assets): 17,012; FR Y–9C (non-advanced approaches holding companies with $5 billion or more in total assets): 39,727; FR Y–9C (advanced approaches holding companies): 1,806; FR Y–9LP: 8,685; FR Y–9SP: 40,417; FR Y–9ES: 39; FR Y–9CS: 472.

Recordkeeping

FR Y–9C: 1,396; FR Y–9LP: 1,648; FR Y–9SP: 3,708; FR Y–9ES: 39; FR Y–9CS: 472.

General description of report: The FR Y–9 family of reporting forms continues to be the primary source of financial data on holding companies that examiners rely on in the intervals between on-site inspections. The Board requires holding companies to provide standardized financial statements to fulfill the Board's statutory obligation to supervise these organizations. Financial data from these reporting forms are used to detect emerging financial problems, to review performance and conduct pre-inspection analysis, to monitor and evaluate capital adequacy, to evaluate holding company mergers and acquisitions, and to analyze a holding company's overall financial condition to ensure the safety and soundness of its operations. The FR Y–9C, FR Y–9LP, and FR Y–9SP serve as standardized financial statements for the holding companies. The FR Y–9ES is a financial statement for holding companies that are Employee Stock Ownership Plans. The Board uses the voluntary FR Y–9CS (a free-form supplement) to collect additional information deemed to be critical and needed in an expedited manner. Holding companies file the FR Y–9C on a quarterly basis, the FR Y–9LP quarterly, the FR Y–9SP semiannually, the FR Y–9ES annually, and the FR Y–9CS on a schedule that is determined when this supplement is used.

Legal authorization and confidentiality: The reporting and recordkeeping requirements associated with the Y–9 series of reports are authorized for BHCs pursuant to section 5 of the Bank Holding Company Act (BHC Act);[2] for SLHCs pursuant to section 10(b)(2) and (3) of the Home Owners' Loan Act;[3] for IHCs pursuant to section 5 of the BHC Act, as well as pursuant to sections 102(a)(1) and 165 of the Dodd-Frank Wall Street and Consumer Protection Act (Dodd-Frank Act);[4] and for securities holding companies pursuant to section 618 of the Dodd-Frank Act.[5]

Except for the FR Y–9CS report, which is collected on a voluntary basis, the obligation to submit the remaining reports in the FR Y–9 series of reports and to comply with the recordkeeping requirements set forth in the respective instructions to each of the other reports is mandatory.

Certain information collected on the FR Y–9C and FR Y–9SP Reports is kept confidential by the Board. The following items are kept confidential under exemption 4 of the Freedom of Information Act (FOIA) because these data items reflect commercial and financial information that is both customarily and actually treated as private by the respondent:[6]

- FR Y–9C, Schedule HI, memoranda item 7(g), ''FDIC deposit insurance assessments;''
- FR Y–9C, Schedule HC–P, item 7(a) ''Representation and warranty reserves for 1–4 family residential mortgage loans sold to U.S. government agencies and government sponsored agencies;''
- FR Y–9C, Schedule HC–P, item 7(b) ''Representation and warranty reserves for 1–4 family residential mortgage loans sold to other parties;''
- FR Y–9C, Schedule HC–C, Part I, Memorandum items 16.a and 16.b, for eligible loan modifications under Section 4013 of the 2020 Coronavirus Aid, Relief, and Economic Security Act; and
- FR Y–9C, Schedule HC and FR Y–9SP, Schedule SC, Memoranda item 2.b., the name and email address of the external auditing firm's engagement partner.[7]

In some circumstances, disclosing these data items may also reveal confidential examination and supervisory information protected from disclosure under exemption 8 of the FOIA.[8] The Board has previously assured submitters that these data items will be treated as confidential.

In addition, the Chief Executive Officer Contact Information section of both the FR Y–9C and FR Y–9SP is kept confidential pursuant to FOIA exemption 6, which applies to personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,[9] and exemption 8,

[1] The following depository institution holding companies are exempt: (1) A unitary savings and loan holding company with primarily commercial assets that meets the requirements of section 10(c)(9)(c) of the Home Owners' Loan Act, for which thrifts make up less than 5 percent of its consolidated assets; and (2) a SLHC that primarily holds insurance-related assets and does not otherwise submit financial reports with the Securities and Exchange Commission pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934.

[2] 12 U.S.C. 1844.

[3] 12 U.S.C. 1467a(b)(2) and (3).

[4] 12 U.S.C. 5311(a)(1) and 5365; Section 165(b)(2) of Title I of the Dodd-Frank Act, 12 U.S.C. 5365(b)(2), refers to ''foreign-based bank holding company.'' Section 102(a)(1) of the Dodd-Frank Act, 12 U.S.C. 5311(a)(1), defines ''bank holding company'' for purposes of Title I of the Dodd-Frank Act to include foreign banking organizations that are treated as bank holding companies under section 8(a) of the International Banking Act, 12 U.S.C. 3106(a). The Board has required, pursuant to section 165(b)(1)(B)(iv) of the Dodd-Frank Act, 12 U.S.C. 5365(b)(1)(B)(iv), certain foreign banking organizations subject to section 165 of the Dodd-Frank Act to form U.S. intermediate holding companies. Accordingly, the parent foreign-based organization of a U.S. IHC is treated as a BHC for purposes of the BHC Act and section 165 of the Dodd-Frank Act. Because Section 5(c) of the BHC Act authorizes the Board to require reports from subsidiaries of BHCs, section 5(c) provides additional authority to require U.S. IHCs to report the information contained in the FR Y–9 series of reports.

[5] 12 U.S.C. 1850a(c)(1)(A).

[6] 12 U.S.C. 552(b)(4).

[7] The Board has assured respondents that this information will be treated as confidential since the collection of this data item was proposed in 2004, under the assumption that the identity of the engagement partner is treated as private information by HCs.

[8] 12 U.S.C. 552(b)(8).

[9] 5 U.S.C. 552(b)(6).

which applies to information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.[10]

Aside from the data items described above, data collected by the FR Y–9 reports generally are not accorded confidential treatment. As provided in the Board's Rules Regarding Availability of Information,[11] however, a respondent may request confidential treatment for any data items the respondent believes should be withheld pursuant to a FOIA exemption. The Board will review any such request to determine if confidential treatment is appropriate and will inform the respondent if the request for confidential treatment has been granted or denied.

To the extent that the instructions to the FR Y–9 reports direct the financial institution to retain the workpapers and related materials used in preparation of each report, such material would only be obtained by the Board as part of the examination or supervision of the financial institution. Accordingly, such information may be considered confidential pursuant to exemption 8 of the FOIA.[12] In addition, the workpapers and related materials may also be protected by exemption 4 of the FOIA, to the extent such financial information is customarily and actually treated as private by the respondent.[13]

Current actions: On September 8, 2021, the Board published a notice in the **Federal Register** (86 FR 50354) requesting public comment for 60 days on the extension for three years of the Financial Statements for Holding Companies (FR Y–9 Reports), with revision.

Proposed Revisions

Chief Executive Officer Contact Information

The Federal Reserve periodically needs to communicate directly with the CEOs of holding companies via email; however, the Federal Reserve currently does not have a complete list of CEO email addresses. To streamline communications to CEOs, the Board proposed to collect the name, email address, and phone number of the holding company's CEO on the FR Y–9C and FR Y–9SP reports. CEO communications would be initiated or approved by the Board's senior management and would involve topics such as new initiatives and policy notifications.

The proposed CEO contact information would have been for the confidential use of the Federal Reserve and would not have been released to the public. In the proposal, the Board stated that it would use the collected CEO email addresses and phone numbers judiciously and only for significant matters requiring CEO-level attention. Having a comprehensive database of holding companies' CEO contact information, including email addresses and phone numbers, would allow the Federal Reserve to have current information to communicate important and time-sensitive information to CEOs. This information was proposed to be collected quarterly on the FR Y–9C report for consistency with the Call Report and semiannually on the FR Y–9SP report. The information would have been collected from top tier holding companies only.

Full-Time Employees

Consistent with the Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies of Entities Regulated by the Agencies,[14] which was issued as required by section 342 of the Dodd-Frank Act, the Board's Office of Minority and Women Inclusion (OMWI) conducts an annual survey of entities the Board regulates. In this voluntary survey, the Board collects a self-assessment report on diversity policies and practices from Board-regulated entities with 100 or more full-time equivalent employees.

Currently, to identify those entities that should be invited to participate in the survey, the Board's OMWI relies on the FR Y–9C and Call Report, which collect data on the number of full-time equivalent employees for the consolidated entity. Because these data are not collected on the parent-only FR Y–9SP or the nonbank subsidiary reports,[15] the Board cannot accurately identify the FR Y–9SP reporters with 100 or more full-time equivalent employees on a consolidated basis that should be invited to participate in this survey.

Therefore, the Board proposed to add a new check box, Memorandum item 5, ''Does your holding company have 100 or more full-time equivalent employees on a consolidated basis?'' to Schedule SI, Income Statement of the FR Y–9SP report. The addition of this item on the FR Y–9SP would enable OMWI to have a comprehensive list of the Board-regulated holding companies with full-time equivalent employees of 100 or more on a consolidated basis. The proposed data item would have been collected only from top-tier holding companies and would have been collected only on the report for the December 31 as-of date. Given that the additional information to be reported should be easily obtainable, the Board expects that this revision would cause a small burden increase for reporters.

Brokered Deposits Glossary Entries

The FR Y–9C instructions Glossary defines ''Brokered Deposits'' and ''Brokered Retail Deposits'' consistent with section 29(g) of the Federal Deposit Insurance Act (FDI Act) and the FDIC's brokered deposits regulation.[16] Under these definitions, the meaning of the term ''brokered deposit'' references the defined term ''deposit broker.'' On January 22, 2021, the FDIC published in the **Federal Register** a final rule to amend its brokered deposits regulation (brokered deposits final rule),[17] which established a new framework for analyzing certain provisions of the ''deposit broker'' definition in the FDI Act.[18] The brokered deposits final rule clarified the term ''deposit broker'' and the analysis of whether entities are engaged in the business of placing, or facilitating the placement of, deposits. The revised FDIC regulation describes exceptions to the definition of ''deposit broker'' including when the primary purpose of an agent's or nominee's business relationship with its customers is not the placement of funds with depository institutions (primary purpose exception). The brokered deposits final rule introduced in the FDIC's regulation a list of business relationships that are designated as meeting the primary purpose exception. In February 2021, the Federal Financial Institutions Examination Council proposed changes to the Call Reports forms and instructions consistent with the brokered deposits final rule and

[10] 5 U.S.C. 552(b)(8).

[11] 12 CFR part 261.

[12] 5 U.S.C. 552(b)(8).

[13] 5 U.S.C. 552(b)(4).

[14] See 80 FR 33016 (June 10, 2015). Agencies include the Office of the Comptroller of the Currency (OCC); Board; Federal Deposit Insurance Corporation (FDIC); National Credit Union Administration (NCUA); Consumer Financial Protection Bureau (CFPB); and Securities and Exchange Commission (SEC).

[15] The nonbank subsidiary reports include the Financial Statements of Foreign Subsidiaries of U.S. Banking Organizations (FR 2314/2314S), Financial Statements of U.S. Nonbank Subsidiaries held by Foreign Banking Organizations (FR Y–7N/7NS/7Q), and Financial Statements of U.S. Nonbank Subsidiaries of U.S. Holding Companies (FR Y–11/11S).

[16] 12 CFR 337.6.

[17] 86 FR 6742 (Jan. 22, 2021).

[18] 12 U.S.C. 1831f(g).

proposed conforming clarifications in the Call Reports Glossary.

To provide clarity for respondents, the Board proposed to revise the FR Y–9C Glossary instructions to incorporate changes under the brokered deposits final rule consistent with the proposed Call Report revisions. Specifically, the Board proposed to reorder the content of the Glossary entries for ''Brokered Deposits'' and ''Brokered Retail Deposits,'' to incorporate the revised content of the FDIC regulation, and to update reference to the FDIC insurance limit of $250,000. The Board did not propose otherwise to revise the FR Y–9C form or instructions in respect to brokered deposits.

SA–CCR Check Box

On January 24, 2020, the agencies issued a final rule [19] (SA–CCR final rule) that amends the regulatory capital rule to implement a new approach for calculating the exposure amount for derivatives contracts for purposes of calculating the total risk-weighted assets (RWA), which is called SA–CCR. The final rule also incorporates SA–CCR into the determination of the exposure amounts of derivatives for total leverage exposure under the supplementary leverage ratio and the cleared transaction framework under the capital rule.

Holding companies that are not advanced approaches banking organizations [20] may elect to use SA–CCR to calculate standardized total RWA by notifying the Board.[21] Advanced approaches holding companies are required to use SA–CCR to calculate standardized total RWA starting on January 1, 2022. Advanced approaches holding companies may adopt SA–CCR prior to January 1, 2022, but must notify the Board of their early adoption.[22]

The Board proposed to revise the FR Y–9C forms and instructions by adding new line item 31.b, ''Standardized Approach for Counterparty Credit Risk opt-in election.'' The Board proposed to add this new item to identify holding companies that have chosen to early adopt or voluntarily elect SA–CCR, which would allow for enhanced comparability of the reported derivative data and for better supervision of the implementation of the framework at these holding companies. Due to the inherent complexity of adopting SA–CCR, identification of non-advanced approaches institutions that choose to voluntarily adopt SA–CCR is particularly important for their supervision.

Under the proposal, a non-advanced approaches holding company that adopts SA–CCR would have entered ''1'' for ''Yes'' in line item 31.b. All other non-advanced approaches holding companies would have left this item blank. If a non-advanced approaches holding company has elected to use SA–CCR, the holding company may change its election only with prior approval of the Board.[23] An advanced approaches holding company that elects to early adopt SA–CCR prior to the January 1, 2022, mandatory compliance date would have entered ''1'' for ''Yes'' in line item 31.b. After January 1, 2022, an advanced approaches holding company would have left this item blank. This proposed reporting change would have taken effect starting with the December 31, 2021, FR Y–9C report. This item would have no longer been applicable to advanced approaches holding companies starting with the March 31, 2022, report date. There would have been no material change in burden to the FR Y–9C report related to this revision.

The comment period for this notice expired on Monday, November 8, 2021. The Board did not receive any comments. The revisions will be implemented as proposed.

A comment was received on a comparable proposal involving the Consolidated Reports of Condition and Income (Call Report) (FFIEC 031, FFIEC 041and FFIEC 051; OMB Control Number 7100–0036). The comment was generally supportive of the proposed new line item related to the SA–CCR final rule. The Board has taken the comments from the proposed changes to the Call Report into consideration in finalizing the proposed FR Y–9C changes and the Board intends to add the new item for SA–CCR, as proposed.

Board of Governors of the Federal Reserve System, December 3, 2021.

Ann Misback,

Secretary of the Board.

[FR Doc. 2021–26598 Filed 12–7–21; 8:45 am]

BILLING CODE 6210–01–P

[19] See 85 FR 4362 (January 24, 2021).

[20] See 12 CFR 217.2 (defining ''Advanced approaches Board-regulated institution'').

[21] 12 CFR 217.34(a)(1)(ii).

[22] 12 CRF 217.300(h).

[23] 12 CFR 217.34(a)(1)(ii).

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 January 7, 2022.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Pauls Valley Bancorp, Inc., Pauls Valley, Oklahoma;* to acquire Valley Bancshares, Inc., and thereby indirectly acquire The Pauls Valley National Bank, both of Pauls Valley, Oklahoma.

B. Federal Reserve Bank of San Francisco (Sebastian Astrada, Director, Applications) 101 Market Street, San Francisco, California 94105–1579:

1. *Columbia Banking System, Inc., Tacoma, Washington;* to acquire Umpqua Holdings Corporation, Portland, Oregon, and thereby indirectly acquire Umpqua Bank, Roseburg, Oregon.

Board of Governors of the Federal Reserve System, December 3, 2021.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2021–26574 Filed 12–7–21; 8:45 am]

BILLING CODE 6210–01–P

GULF COAST ECOSYSTEM RESTORATION COUNCIL

[Docket No. 112032021–111–04]

Senior Executive Service Performance Review Board Membership

AGENCY: Gulf Coast Ecosystem Restoration Council (GCERC).

ACTION: Notice of Performance Review Board (PRB) appointments.

SUMMARY: This notice announces the members of the Senior Executive Service (SES) Performance Review Board. The PRB is comprised of a Chairperson and a mix of state representatives and career senior executives that meet annually to review and evaluate performance appraisal documents and provide a written recommendation to the Chairperson of the Council for final approval of each executive's performance rating, performance-based pay adjustment, and performance award.

DATES: The board membership is applicable beginning on 12/01/2020 and ending on 12/31/21.

FOR FURTHER INFORMATION CONTACT: Mary S. Walker, Executive Director, Gulf Coast Ecosystem Restoration Council by email *mary.walker@restorethegulf.gov* or phone 504–210–9982.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the persons named below have been selected to serve on the PRB:

Department of Interior: Blanchard, Mary Josie, Deputy Director, Environmental Protection Compliance, *MaryJosie_Blanchard@ios.doi.gov,* 202–208–3406

State of Florida: Ames, Leslie, Deputy Secretary, Florida Department of Environmental Protection, *Leslie.A.Reed@floridadep.gov,* 850–545–1483

Environmental Protection Agency: Wyatt, Marc, Director, Gulf of Mexico Division, *Wyatt.marc@epa.gov,* 228–679–5915

State of Texas: Baker, Toby, Texas Commission of Environmental Quality, *Toby.Baker@tceq.texas.gov,* 512–239–5515

Keala Hughes,

Director of External Affairs and Tribal Relations.

[FR Doc. 2021–26585 Filed 12–7–21; 8:45 am]

BILLING CODE 6560–58–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project ''AHRQ's National Nursing Home COVID–19 Coordinating Center.''

DATES: Comments on this notice must be received by February 7, 2022.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by email at *doris.lefkowitz@AHRQ.hhs.gov*.

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *doris.lefkowitz@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

AHRQ's National Nursing Home COVID–19 Coordinating Center

As of June 13, 2021, nursing homes have reported 656,336 confirmed cases of severe acute respiratory syndrome coronavirus 2 (SARS–CoV–2) infection and coronavirus disease 2019 (COVID–19), resulting in over 132,000 COVID–19-related deaths. The U.S. Department of Health and Human Services (HHS) has distributed funds to nursing homes and launched several initiatives to improve nursing home safety and infection control. AHRQ's National Nursing Home COVID–19 Action Network (*https://www.ahrq.gov/nursing-home/about/index.html)* (the Network) is a cornerstone of HHS's response, intended to provide training and assistance to nursing homes on best practices to minimize transmission of SARS–CoV–2. The Network expands AHRQ's programmatic efforts to address quality and safety in long-term care, and aligns with other agency efforts to provide COVID–19 guidance to nursing homes. As the pandemic continues, nursing homes require easy access and implementation support for up-to-date best practices on SARS–CoV–2 infection control, COVID–19 care and management, and safety measures to protect residents and staff.

AHRQ's National Nursing Home COVID–19 Coordinating Center plays a complementary role to the Network, serving as a bridge between AHRQ's Network initiatives and the nursing home quality improvement (QI) community. The Coordinating Center is tasked with (1) coordinating engagement with scientific and policy stakeholders to identify safety needs and best practices, (2) ensuring coordinated development and dissemination of QI tools and other resources, and (3) assessing the effectiveness of the Network in providing training and mentorship to support nursing homes in responding to the COVID–19 pandemic.

As part of the Coordinating Center activities, AHRQ seeks to conduct an assessment of whether and how the Network activities aided the nursing homes' efforts to mitigate the challenges posed by the COVID–19 pandemic. The goals of the performance assessment are to:

1. Assess the reach, retention, and engagement of the Network;
2. study the implementation approach, gaps and barriers;
3. study the long-term impact, sustainability, and replicability of the training program and Network activities.

This study is being conducted by AHRQ through its Coordinating Center contractor, NORC at the University of Chicago (NORC), pursuant to AHRQ's statutory authority to conduct and support training and technical assistance on health care and on systems for the delivery of such care. 42 U.S.C. 299a.

Method of Collection

To further achieve the goals of this performance assessment, AHRQ is requesting OMB approval for new data collection. More specifically, the new data collection activities intend to collect systematic information from nursing homes on the following:

- Motivations for participation and non-participation in the Network.
- Context of participation (including state and local context, and participation in other COVID–19 related-initiatives).
- Perceptions on recruitment, engagement, and retention, including facilitators and barriers of engagement and retention.
- Perceptions on the Network training and mentorship resources, including access to and utility of the Network training and resources.

• Gaps in knowledge, skills, and resources required for identifying residents and staff infected with COVID–19.

• Impacts on the prevention and spread of SARS–CoV–2, implementation of best practice safety measures; improvement of quality of care for residents with mild and asymptomatic cases; and reduction of social isolation for residents, families, and staff.

The primary data collection includes the following activities:

Survey of all (approximately 15,000) nursing homes eligible for the COVID–19 Provider Relief Fund. Separate survey instruments will be used for Network participants (''Participant Survey'') and non-participants (''Non-Participant Survey''). The Participant Survey will be conducted primarily via a secure web-based platform. The Non-Participant Survey will be conducted via web and telephone.

Key informant interviews with up to 96 individuals from 32 nursing homes participating in the Network across all assessment domains, conducted virtually on a secure platform.

Information collected will inform whether and how the Network activities aided the nursing homes' efforts to mitigate the challenges posed by the COVID–19 pandemic. This data collection effort will also provide information on why nursing homes may not have been able to participate in the Network (Non-Participant Survey). Findings from the assessment will allow AHRQ to:

• Assess the Network's reach and the effectiveness of the retention and engagement strategies;

• Study implementation of the Network's training sessions, mentorship and technical assistance activities, and dissemination of the safety and quality improvement tools;

• Study the Network's impact on ensuring availability of protective equipment, rapid identification of nursing home residents and staff infected with SARS–CoV–2, entry and transmission of COVID–19, and improving health outcomes; and

• Study the long-term impact, sustainability, and replicability of the training program and Network activities to address other patient safety and quality improvement priorities.

Estimated Annual Respondent Burden

Survey. The nursing home survey will have two survey instruments:

—Participant Survey for nursing home facilities that participated in the Network

—Non-Participant Survey for nursing homes that did not participate in the Network

For the Participant Survey we expect that 1,804 participants (20% response rate) will agree to participate on behalf of their facilities and that the survey will take about 20 minutes to complete. For the Non-Participant Survey, we expect that 1,264 participants will agree to participate (20% response rate) on behalf of their facilities and that the survey will take about 5 minutes to complete. This estimate is based on prior provider survey experience and the response rate for an earlier customer satisfaction survey, which was approximately 20%.

Key Informant Interviews. Key informant interviews will be conducted with up to 32 nursing homes (up to 3 staff from each nursing home in each interview, for a total of 96 staff) involved in the Network. All interviews are expected to last 30 minutes, including time for respondents to provide verbal consent for participation and ask any questions at the start.

The total annual burden hours for the survey and key informant interviews are estimated to be 744 hours, as shown in Exhibit 1.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Total burden hours	Total burden hours
Survey instrument—participant	1,804	0.33	595
Survey instrument—nonparticipant	1,264	0.08	101
Nursing Home Key Informant Interview (Management)	96	0.50	48
Total	3,164	....	744

Exhibit 2 shows the estimated annual cost burden associated with the respondents' time to participate in this information collection, which comes to $45,242.64.

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents	Total burden hours	Average hourly wage rate ** ($)	Total cost burden ($)
Survey instrument—participant	1,804	595	[1] 60.81	36,181.95
Survey instrument—nonparticipant	1,264	101	[1] 60.81	6,141.81
Nursing Home Key Informant Interview (Management)	96	48	[1] 60.81	2,918.88
Total	3,164	744	....	45,242.64

** Wage rates were calculated using the mean hourly wage from the U.S. Department of Labor, Bureau of Labor Statistics, May 2020 National Occupational Employment and Wage Estimates for the United States, *https://www.bls.gov/oes/current/oes_nat.htm.*

[1] Average rate for Nursing Care Facilities: Management Occupations.

[2] Average rate for Nursing Care Facilities: All Occupations.

Request for Comments

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3520, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ's health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: December 2, 2021.

Marquita Cullom,

Associate Director.

[FR Doc. 2021–26561 Filed 12–7–21; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Meetings

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice of five AHRQ Subcommittee meetings.

SUMMARY: The subcommittees listed below are part of AHRQ's Health Services Research Initial Review Group Committee. Grant applications are to be reviewed and discussed at these meetings. Each subcommittee meeting will be closed to the public.

DATES: See below for dates of meetings:

1. *Healthcare Safety and Quality Improvement Research (HSQR)*
   Date: February 2–3, 2022
2. *Healthcare Effectiveness and Outcomes Research (HEOR)*
   Date: February 9–10, 2022
3. *Health System and Value Research (HSVR)*
   Date: February 10–11, 2022
4. *Healthcare Research Training (HCRT)*
   Date: February 24–25–28, 2022
5. *Healthcare Information Technology Research (HITR)*
   Date: February 24–25, 2022

ADDRESSES: Agency for Healthcare Research and Quality (Virtual Review), 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: (to obtain a roster of members, agenda or minutes of the non-confidential portions of the meetings.) Jenny Griffith, Committee Management Officer, Office of Extramural Research Education and Priority Populations, Agency for Healthcare Research and Quality (AHRQ), 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 427–1557.

SUPPLEMENTARY INFORMATION: In accordance with section 10 (a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), AHRQ announces meetings of the above-listed scientific peer review groups, which are subcommittees of AHRQ's Health Services Research Initial Review Group Committee. The subcommittee meetings will be closed to the public in accordance with the provisions set forth in 5 U.S.C. App. 2 section 10(d), 5 U.S.C. 552b(c)(4), and 5 U.S.C. 552b(c)(6). 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.

Agenda items for these meetings are subject to change as priorities dictate.

Marquita Cullom,

Associate Director.

[FR Doc. 2021–26545 Filed 12–7–21; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

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, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. 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: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—RFA–CE–22–004, Research Grants to Prevent Firearm-Related Violence and Injuries.

Dates: April 4–8, 2022.

Times: 8:30 a.m.–5:00 p.m., EDT.

Place: Videoconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Mikel Walters, Ph.D., Scientific Review Officer, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop F–63, Atlanta, Georgia 30341–3717, Telephone: (404) 639–0913; Email: *MWalters@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2021–26576 Filed 12–7–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

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, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to

Public Law 92–463. 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: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)–RFA–OH–22–003, Occupational Safety and Health Training Project Grants.

Date: February 1–2, 2022.

Time: 1:00 p.m.–4:00 p.m., EST.

Place: Video-Assisted Meeting.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Marilyn Ridenour, B.S.N., M.P.H., Scientific Review Officer, Office of Extramural Programs, National Institute for Occupational Safety and Health, CDC, 1095 Willowdale Road, Morgantown, West Virginia 26505, Telephone: (304) 285–5879; Email: *MRidenour@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2021–26575 Filed 12–7–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–D–1140]

Investigational New Drug Application Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases: Clinical Recommendations; Draft Guidance for Sponsor-Investigators; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for sponsor-investigators entitled ‘‘IND Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases: Clinical Recommendations.’’ FDA is publishing this draft guidance to provide sponsor-investigators (hereafter referred to as sponsors) who are interested in developing individualized antisense oligonucleotide (ASO) drug products for a rapidly progressive, severely debilitating, or life-threatening (SDLT) genetic disease (caused by a unique genetic variant or variants), with clinical recommendations for submission of investigational new drug applications (INDs). These recommendations specifically address the following clinical considerations: Ethical and human subject protection, diagnostic and genetic, dosing, administration, safety, and assessment of clinical response to treatment.

DATES: Submit either electronic or written comments on the draft guidance by February 7, 2022 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ‘‘Written/Paper Submissions’’ and ‘‘Instructions’’).

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ‘‘Instructions.’’

Instructions: All submissions received must include the Docket No. FDA–2021–D–1140 for ‘‘IND Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases: Clinical Recommendations.’’ Received comments will be placed in the docket and, except for those submitted as ‘‘Confidential Submissions,’’ publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ‘‘THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.’’ The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ‘‘confidential.’’ Any information marked as ‘‘confidential’’ will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the

heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Hobart Rogers, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Avenue, Bldg. 51, Rm 3114, Silver Spring, MD 20903–0002, 301–796–2213.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for sponsor-investigators entitled ''IND Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases: Clinical Recommendations.'' FDA is publishing this draft guidance to provide sponsor-investigators (hereafter referred to as sponsors) who are interested in developing individualized ASO drug products for a rapidly progressive SDLT genetic disease (caused by a unique genetic variant or variants), with clinical recommendations for submission of INDs. These recommendations specifically address the following clinical considerations: Ethical and human subject protection, diagnostic and genetic, dosing, administration, safety, and assessment of clinical response to treatment.

This draft guidance describes clinical considerations and, when applicable, important information to include in IND submissions for such ASO drug products for a small number of participants (typically one to two) with SDTL diseases. In general, ASO drug products referred to in this draft guidance belong to a well-characterized chemical class and for which there is considerable nonclinical and clinical experience that is publicly available or to which the sponsor has a right of reference. The draft guidance discusses considerations and information to submit in an IND regarding: (1) Confirmation of the participant's genetic diagnosis and genetic variant(s) targeted by the ASO drug product, (2) the requirements and procedures for informed consent of the participant, (3) appropriate and safe dosing and administration procedures that are detailed and supported by relevant nonclinical evidence, (4) the nature and schedule of the specific safety assessments (adverse events and laboratory testing) to be conducted, and (5) methods for continuous clinical monitoring (*e.g.,* via clinical outcome assessments, pharmacodynamic biomarkers) of the participant to evaluate and document their clinical response(s) and to allow for an informed benefit-risk determination. This draft guidance is expected to facilitate the preparation of adequate and complete IND submissions for investigational ASO drug products for participants with SDLT diseases targeted by the specified ASO drug product.

This draft guidance represents one guidance in a series of guidances that FDA intends to publish to advise and help sponsors planning to use individualized ASO drug products for SDLT diseases caused by unique genetic variant(s) and for whom there are no alternative therapies available to treat their disease.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''IND Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases: Clinical Recommendations.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no new collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014. The collections of information in 21 CFR parts 50 and 56 for obtaining informed consent for prospective patients have been approved under OMB control number 0910–0130.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: December 1, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–26453 Filed 12–7–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–D–1139]

Investigational New Drug Application Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases: Chemistry, Manufacturing, and Controls Recommendations, Guidance for Sponsor-Investigators; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''IND Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases: Chemistry, Manufacturing, and Controls Recommendations.'' This draft guidance provides FDA's recommendations on the chemistry, manufacturing, and controls (CMC) information needed to support an investigational new drug application (IND) submitted by a sponsor-investigator developing an individualized antisense oligonucleotide (ASO) drug product for a severely debilitating or life-threatening (SDLT) disease caused by a unique genetic variant affecting a small number of individuals (typically one or two).

DATES: Submit either electronic or written comments on the draft guidance by February 7, 2022 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions)*: Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2021–D–1139 for ''IND Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases: Chemistry, Manufacturing, and Controls Recommendations.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

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

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Carla R. Lankford, Center for Drug Evaluation and Research (HFD–123), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 6656, Silver Spring, MD 20993–0002, 301–796–5203.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''IND Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases: Chemistry, Manufacturing, and Controls Recommendations.'' The purpose of this draft guidance is to provide FDA's current thinking on the recommended CMC data and information to support an IND submitted by a sponsor-investigator developing an ASO drug product for a small number of individuals (typically one or two) with an SDLT disease. This draft guidance also explains FDA's recommendations around compliance with current good manufacturing practice, including the applicability of 21 CFR part 211, to support investigational use of an ASO drug product in a small number of individuals with an SDLT disease.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''IND Submissions for Individualized Antisense Oligonucleotide Drug Products for Severely Debilitating or Life-Threatening Diseases: Chemistry, Manufacturing, and Controls Recommendations.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR parts 312 and 314 have been approved under OMB control numbers 0910–0014 and 0910–0001, respectively. The collections of information in 21 CFR 211 for manufacture of drug product is approved under OMB control number 0910–0139. The collections of information for oversight of clinical investigations and safety reporting have been approved under OMB control number 0910–0733.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: December 1, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–26454 Filed 12–7–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Environmental Information and Documentation, OMB No. 0915–0324, Extension

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than February 7, 2022.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or by mail to the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the acting HRSA Information Collection Clearance Officer at (301) 443–9094.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information collection request title for reference.

Information Collection Request Title: Environmental Information and Documentation (EID), OMB No. 0915–0324, Extension.

Abstract: HRSA is requesting approval of an extension for the EID checklist which consists of information that the agency is required to obtain to comply with the National Environmental Policy Act of 1969 (NEPA). NEPA establishes the federal government's national policy for protection of the environment. HRSA has developed the EID for applicants of funding that would potentially impact the environment and to ensure that their decision-making processes are consistent with NEPA.

Need and Proposed Use of the Information: Applicants must provide information and assurance of compliance with NEPA on the EID checklist. This information is reviewed in the Pre-Award stage (and/or prior to the implementation of the project). The information is reviewed in the Post-Award stage for project changes and the information is reviewed before the implementation of the project changes.

Likely Respondents: HRSA applicants applying for federal loan guarantees, federal construction grants, and cooperative agreements.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
NEPA EID Checklist	1,500	1	1,500	1	1,500
Total	1,500		1,500		1,500

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2021–26560 Filed 12–7–21; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Rural Communities Opioid Response Program Performance Measures, OMB No. 0906–0044, Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than February 7, 2022.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the acting HRSA Information Collection Clearance Officer at (301) 443–9094.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: Rural Communities Opioid Response Program (RCORP) Performance Measures, OMB No. 0906–0044, Revised.

Abstract: RCORP is authorized by Section 711(b)(5) of the Social Security Act (42 U.S.C. 912(b)(5)) and is a multi-initiative program that aims to: (1) Support treatment for and prevention of substance use disorder (SUD), including opioid use disorder (OUD); and (2) reduce morbidity and mortality associated with SUD, to include OUD, by improving access to and delivering prevention, treatment, and recovery support services to high-risk rural communities. To support this purpose, RCORP grant initiatives include:

- RCORP-Implementation grants to fund established networks and consortia to deliver SUD/OUD prevention, treatment, and recovery activities in high-risk rural communities;
- RCORP-Medication Assisted Treatment Expansion grants to enhance access to medication-assisted treatment within eligible hospitals, health clinics, or tribal organizations in high-risk rural communities;
- RCORP-Neonatal Abstinence Syndrome grants to reduce the incidence and impact of Neonatal Abstinence Syndrome in rural communities by improving systems of care, family supports, and social determinants of health;
- RCORP-Psychostimulant Support grants to strengthen and expand prevention, treatment, and recovery services for individuals in rural areas who misuse psychostimulants; to enhance their ability to access treatment and move towards recovery; and
- Note that additional grant programs may be added pending Fiscal Year 2022 and future Fiscal Year appropriations.

Additionally, all RCORP grant award recipients are supported by eight cooperative agreements: RCORP-Technical Assistance, which provides extensive technical assistance to award recipients; RCORP-Evaluation, which evaluates the impact of the RCORP initiative on rural communities; three RCORP-Behavioral Health Care Workforce Centers, which provide workforce training and education initiatives in the region served by the Northern Border Regional Commission; and three RCORP-Centers of Excellence, which disseminate best practices related to the treatment for and prevention of substance use disorders within rural communities.

Need and Proposed Use of the Information: Due to the growth in the number of grant programs included in the RCORP initiative, as well as emerging SUD and other behavioral health trends in rural communities, HRSA is submitting a revised package that includes changes to existing RCORP performance measures as well as new performance measures that better demonstrate the impact of the initiative on rural communities and reduce burden on the grant recipients.

For this program, performance measures were developed to provide data on each RCORP initiative and to enable HRSA to provide aggregate program data required by Congress under the Government Performance and Results Act of 1993. These measures cover the principal topic areas of interest to the Federal Office of Rural Health Policy, including: (a) Provision of, and referral to, rural behavioral health care services, including SUD prevention, treatment and recovery support services; (b) behavioral health care, including SUD prevention, treatment, and recovery, process and outcomes; (c) education of health care providers and community members; (d) emerging trends in rural behavioral health care needs and areas of concern; and (e) consortium strength and sustainability. All measures will speak to the Federal Office of Rural Health Policy's progress toward meeting the goals set.

Likely Respondents: The respondents will be the grant award recipients of the RCORP initiatives.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below. Please note that since RCORP-Psychostimulant Support includes substantially different measures than the other RCORP grant programs, HRSA calculated that program's burden hours separately.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent (annually)	Total responses	Average burden per response (in hours)	Total burden hours
Rural Communities Opioid Response Program—Implementation/Neonatal Abstinence Syndrome/MAT Expansion	290	2	580	1.24	719.20
Rural Communities Opioid Response Program—Psychostimulant Support	15	1	15	1.30	19.50
Total	305		595		738.70

HRSA specifically requests comments on: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance

the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2021–26559 Filed 12–7–21; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; COVID–19 Provider Relief Programs Application and Attestation Portal, and Claims Reimbursement Submission Activities, OMB No. 0906–XXXX—NEW

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30 day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than January 7, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Samantha Miller, the acting HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–9094.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: COVID–19 Provider Relief Programs Application and Attestation Portal, and Claims Reimbursement Submission Activities, OMB No. 0906–XXXX—NEW.

Abstract: HRSA administers the Provider Relief Programs (which includes the Provider Relief Fund (PRF), the American Rescue Plan Act Rural (ARP–R) payments, the COVID–19 Coverage Assistance Fund (CAF), and the COVID–19 Claims Reimbursement to Health Care Providers and Facilities for Testing, Treatment, and Vaccine Administration for the Uninsured (Uninsured Program or UIP)). The Provider Relief Programs disbursed, and are continuing to disburse funds to eligible healthcare providers through two pathways: (1) Direct provider payments via the PRF and ARP–R payments, and (2) claims reimbursement via the CAF and the UIP. This information collection includes four components: (1) The PRF and ARP–R application portal; (2) the PRF and ARP–R attestation portal; (3) the CAF application portal; and (4) the UIP application portal. To date, information for these programs has been collected under a Paperwork Reduction Act waiver executed pursuant to public health emergency authorities. HRSA is seeking comments regarding the CAF and the UIP for the first time. These information collections support administration of the Provider Relief Programs including the PRF, the Uninsured Program, and the CAF (funds for these three programs were appropriated under the Coronavirus Aid, Relief, and Economic Security Act (Pub. L. 116–136), Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), Coronavirus Response and Relief Supplemental Appropriations Act (Division M of Pub. L. 116–260)), and the ARP–R payments (funds were appropriated under the American Rescue Plan Act of 2021, Pub. L. 117–2, as well as funds for the Uninsured Program).

A 60-day notice was published in the **Federal Register**, 86 FR 47119 (August 23, 2021). There were no public comments.

Need and Proposed Use of the Information: Providers who apply for Provider Relief Programs (*i.e.,* PRF, ARP–R, CAF, and UIP payments) must apply for direct provider payments or claims reimbursement and attest to a set of Terms and Conditions to enable HRSA's appropriate disbursement and oversight of recipients' use of funds. Information collected will allow for (1) assessing if recipients have met statutory and programmatic requirements; (2) conducting audits; (3) gathering data required to calculate, disburse, and report on PRF, ARP–R, CAF, and UIP payments; and (4) program evaluation. HRSA staff may also use information collected to identify and report on trends in the effect of the COVID–19 pandemic on health care providers and uninsured or underinsured patients throughout the United States. HHS makes publicly available the names of payment recipients and the aggregate amounts received, for all providers who attest to receipt of a payment and acceptance of the Terms and Conditions or who retain payments for more than 90 days and are deemed to have accepted the Terms and Conditions. By accepting funds, the recipient consents to HHS publicly disclosing the payments that recipient has received.

Likely Respondents: Health care providers that apply to receive, or have applied to receive, PRF, ARP–R, CAF, or UIP payments, and attested to the associated Terms and Conditions.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Attestation Portal	380,000	1	380,000	0.25	95,000
Application Portal	140,000	1	140,000	1.00	140,000
CAF Application	15,000	1	15,000	1.00	15,000
UIP Application	280,000	1	280,000	1.00	280,000
Total	815,000	....	815,000	....	530,000

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2021–26565 Filed 12–7–21; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Information Technology Advisory Committee 2022 Schedule of Meetings

AGENCY: Office of the National Coordinator for Health Information Technology (ONC), HHS.

ACTION: Notice of meetings.

SUMMARY: The Health Information Technology Advisory Committee (HITAC) was established in accordance with the 21st Century Cures Act and the Federal Advisory Committee Act. The HITAC, among other things, identifies priorities for standards adoption and makes recommendations to the National Coordinator for Health Information Technology (National Coordinator). The HITAC will hold public meetings throughout 2022. See list of public meetings below.

FOR FURTHER INFORMATION CONTACT: Michael Berry, Designated Federal Officer, at *Michael.Berry@hhs.gov,* (202) 701–0795.

SUPPLEMENTARY INFORMATION: Section 4003(e) of the 21st Century Cures Act (Pub. L. 114–255) establishes the Health Information Technology Advisory Committee (referred to as the ''HITAC''). The HITAC will be governed by the provisions of the Federal Advisory Committee Act (FACA) (Pub. L. 92–463), as amended, (5 U.S.C. App.), which sets forth standards for the formation and use of federal advisory committees.

Composition

The HITAC is comprised of at least 25 members, of which:

- No fewer than 2 members are advocates for patients or consumers of health information technology;
- 3 members are appointed by the HHS Secretary
  - 1 of whom shall be appointed to represent the Department of Health and Human Services and
  - 1 of whom shall be a public health official;
- 2 members are appointed by the majority leader of the Senate;
- 2 members are appointed by the minority leader of the Senate;
- 2 members are appointed by the Speaker of the House of Representatives;
- 2 members are appointed by the minority leader of the House of Representatives; and
- Other members are appointed by the Comptroller General of the United States.

Members serve for one-, two-, or three-year terms. All members may be reappointed for a subsequent three-year term. Each member is limited to two three-year terms, not to exceed six years of service. Members serve without pay, but will be provided per-diem and travel costs for committee services, if warranted.

Recommendations

The HITAC recommendations to the National Coordinator are publicly available at *https://www.healthit.gov/topic/federal-advisory-committees/recommendations-national-coordinator-health-it.*

Public Meetings

The schedule of meetings to be held in 2022 is as follows:

- January 19, 2022 from approximately 11:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)
- February 17, 2022 from approximately 10:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)
- March 10, 2022 from approximately 10:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)
- April 13, 2022 from approximately 10:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)
- May 18, 2022 from approximately 10:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)
- June 16, 2022 from approximately 10:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)
- July 14, 2022 from approximately 10:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)
- August 17, 2022 from approximately 10:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)
- September 14, 2022 from approximately 10:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)
- October 13, 2022 from approximately 10:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)
- November 10, 2022 from approximately 10:00 a.m. to 3:00 p.m./Eastern Time (virtual meeting)

All meetings are open to the public. Additional meetings may be scheduled as needed. For web conference instructions and the most up-to-date information, please visit the HITAC calendar on the ONC website, *www.healthit.gov/topic/federal-advisory-committees/hitac-calendar.*

Contact Person for Meetings: Michael Berry, *Michael.Berry@hhs.gov.* A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Please email Michael Berry for the most current information about meetings.

Agenda: As outlined in the 21st Century Cures Act, the HITAC will develop and submit recommendations to the National Coordinator on the topics of interoperability, privacy and security, patient access, and use of technologies that support public health.

In addition, the committee will also address any administrative matters and hear periodic reports from ONC. ONC intends to make background material available to the public no later than 24 hours prior to the meeting start time. If ONC is unable to post the background material on its website prior to the meeting, the material will be made publicly available on ONC's website after the meeting, at *www.healthit.gov/hitac.*

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person prior to the meeting date. An oral public comment period will be scheduled at each meeting. Time allotted for each commenter will be limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled public comment period, ONC will take written comments after the meeting.

All HITAC meetings in 2022 will be virtual until further notice. Please refer to future **Federal Register** Notices for updated information on in-person meetings. ONC welcomes the attendance of the public at its HITAC meetings. If you require special accommodations due to a disability, please contact Michael Berry at least seven (7) days in advance of the meeting.

Notice of these meetings are given under the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App. 2).

Dated: November 17, 2021.

Michael Berry,

Designated Federal Officer, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2021–26602 Filed 12–7–21; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Integrative Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Integrative Health Special Emphasis Panel; Early Phase Clinical Trials of Natural Products (NP).

Date: January 20, 2022.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Complementary and Integrative, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Shiyong Huang, Ph.D., Scientific Review Officer, Office of Scientific Review, Division of Extramural Activities, NCCIH/NIH, 6707 Democracy Boulevard, Suite 401, Bethesda, MD 20817, *shiyong.huang@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: December 3, 2021.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26592 Filed 12–7–21; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Cellular and Molecular Technologies.

Date: January 6, 2022.

Time: 2:00 p.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: Tatiana V. Cohen, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5213, Bethesda, MD 20892, 301–455–2364, *tatiana.cohen@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: December 2, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26524 Filed 12–7–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meetings

Pursuant to section 10(d) 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 materials, 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 Library of Medicine Special Emphasis Panel; COI K–99–Curation/R01.

Date: January 11, 2022.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Video Assisted Meeting.

Contact Person: Leonid V. Tsap, Ph.D., Scientific Review Officer, Extramural Programs, National Library of Medicine, NIH, 6705 Rockledge Drive, Suite 500, Bethesda, MD 20892–7968, (301) 827–7077, *tsapl@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: December 2, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26523 Filed 12–7–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) 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 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 grant applications and contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Outstanding Investigator Award.

Date: January 20–21, 2022.

Time: 9:30 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W530, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Shamala K. Srinivas, Ph.D., Associate Director, Office of Referral, Review, and Program Coordination, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W530, Rockville, Maryland 20850, 240–276–6442, *ss537t@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Division of Cancer Epidemiology and Genetics (DCEG) Field and Biospecimen Support Services.

Date: January 20, 2022.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jun Fang, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850, 240–276–5460, *jfang@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Trials Support Unit TEP 1A.

Date: January 27, 2022.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W608, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Nadeem Khan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W608, Rockville, Maryland 20850, 240–276–5856, *nadeem.khan@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Trials Support Unit TEP 1B.

Date: January 28, 2022.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W608, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Nadeem Khan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W608, Rockville, Maryland 20850, 240–276–5856, *nadeem.khan@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–1A: SBIR Contract Review.

Date: February 1, 2022.

Time: 9:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W412, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Ivan Ding, M.D., Health Scientist Administrator, Division of Extramural Activities, Program and Review Extramural Staff Training Office, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W412, Rockville, Maryland 20850, 240–276–6444, *dingi@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–1B: SBIR Contract Review.

Date: February 2, 2022.

Time: 10:00 a.m. to 4:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W412, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Ivan Ding, M.D., Health Scientist Administrator, Division of Extramural Activities, Program and Review Extramural Staff Training Office, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W412, Rockville, Maryland 20850, 240–276–6444, *dingi@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–3: NCI Clinical and Translational Cancer Research.

Date: February 3–4, 2022.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W236, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Shuli Xia, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W236, Rockville, Maryland 20850, 240–276–5256, *shuli.xia@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–2: NCI Clinical and Translational Cancer Research.

Date: February 3–4, 2022.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W264, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Ombretta Salvucci, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W264, Rockville, Maryland 20850, 240–276–7286, *salvucco@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Early Detection Research Network (U01, U24, U2C) Grant Review.

Date: February 7–8, 2022.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W552, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jeanette Irene Marketon, Ph.D., Scientific Review Officer, Program Coordination and Referral Branch, Division of Extramural Activities, 9609 Medical Center Drive, Room 7W552, National Cancer Institute, NIH, Rockville, Maryland 20850, 240–276–6780, *jeanette.marketon@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–3A: Cancer Treatment Technologies for Low-Resource Settings.

Date: February 15–16, 2022.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jun Fang, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850, 240–276–5460, *jfang@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Predoc

to Postdoc Fellow Transition Award (F99/K00).

Date: February 16–17, 2022.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W554, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Scott A. Chen, Ph.D., Chief, Scientific Review Officer, Program Coordination and Referral Branch, Division of Extramural Activities, 9609 Medical Center Drive, Room 7W554, National Cancer Institute, NIH, Rockville, Maryland 20850, 240–276–6038, *chensc@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Technologies for Cancer Research.

Date: February 17–18, 2022.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W608, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Nadeem Khan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W608, Rockville, Maryland 20850, 240–276–5856, *nadeem.khan@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–3B: Cancer Prevention and Diagnosis Technologies for Low-Resource Settings.

Date: February 23, 2022.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jun Fang, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850, 240–276–5460, *jfang@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Prevention-Interception Targeted Agent Discovery Program (CAP–IT) Centers.

Date: March 2–3, 2022.

Time: 10:00 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Byeong-Chel Lee, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240–276–7755, *byeong-chel.lee@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–9: NCI Clinical and Translational Cancer Research.

Date: March 3, 2022.

Time: 10:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W552, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Shannon M. Doyle, Ph.D., Scientific Review Officer, Program Coordination and Referral Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9606 Medical Center Drive, Room 7W552, Rockville, Maryland 20850, 202–731–8449, *doyles@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–6: NCI Clinical and Translational Cancer Research.

Date: March 9, 2022.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jun Fang, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850, 240–276–5460, *jfang@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Small-Cell Lung Cancer Consortium.

Date: March 10, 2022.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Byeong-Chel Lee, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240–276–7755, *byeong-chel.lee@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: December 3, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26593 Filed 12–7–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

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: Communication Disorders Review Committee.

Date: February 17–18, 2022.

Time: 10:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Kausik Ray, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institute of Health, 6001 Executive Blvd., Rockville, MD 20850, 301–402–3587, *rayk@nidcd.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 3, 2021.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–26591 Filed 12–7–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0121]

Trusted Traveler Programs and U.S. APEC Business Travel Card

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; Extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection 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 February 7, 2022) 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 1651–0121 in the subject line and the agency name. Please use the following method to submit comments:

Email: Submit comments to: *CBP_PRA@cbp.dhs.gov.*

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

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: Trusted Traveler Programs and U.S. APEC Business Travel Card.

OMB Number: 1651–0121.

Form Number: 823S (SENTRI) and 823F (FAST).

Current Actions: Extension without change.

Type of Review: Extension (without change).

Affected Public: Individuals and Businesses.

Abstract: This collection of information is for CBP's Trusted Traveler Programs including the Secure Electronic Network for Travelers Rapid Inspection (SENTRI), which allows expedited entry at specified southwest land border ports of entry; the Free and Secure Trade program (FAST), which provides expedited border processing for known, low-risk commercial drivers; and Global Entry which allows pre-approved, low-risk, air travelers expedited clearance upon arrival into the United States.

The purpose of all of these programs is to provide prescreened travelers expedited entry into the United States. The benefit to the traveler is less time spent in line waiting to be processed. These Trusted Traveler programs are provided for in 8 CFR 235.7 and 235.12.

This information collection also includes the U.S. APEC Business Travel Card (ABTC) Program, which is a voluntary program that allows U.S. citizens to use fast-track immigration lanes at airports in the 20 other Asia-Pacific Economic Cooperation (APEC) member countries. This program is mandated by the Asia-Pacific Economic Cooperation Business Travel Cards Act of 2011, Public Law 112–54 and provided for by 8 CFR 235.13.

These collections of information include the data collected on the applications and kiosks for these programs. Applicants may apply to participate in these programs by using the Trusted Traveler Program (TTP) at *https://ttp.cbp.dhs.gov/.* Or at Trusted Traveler Enrollment Centers.

After arriving at the Federal Inspection Services area of the airport, participants in Global Entry can undergo a self-serve inspection process using a Global Entry kiosk. During the self-service inspection, participants have their photograph and fingerprints taken, submit identifying information, and answer several questions about items they are bringing into the United States. When using the Global Entry kiosks, participants are required to declare all articles being brought into the United States pursuant to 19 CFR 148.11.

Type of Information Collection: SENTRI (823S).

Estimated Number of Respondents: 276,579.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 276,579.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 185,308.

Type of Information Collection: FAST (823F).

Estimated Number of Respondents: 20,805.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 20,805.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 13,939.

Type of Information Collection: Global Entry.

Estimated Number of Respondents: 1,392,862.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,392,862.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 933,217.

Type of Information Collection: ABTC.

Estimated Number of Respondents: 9,858.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 9,858.

Estimated Time per Response: 10 minutes (0.17 hours)

Estimated Total Annual Burden Hours: 1,676.

Type of Information Collection: Kiosks.

Estimated Number of Respondents: 3,161,438.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 3,161,438.

Estimated Time per Response: 1 minute (0.016 hours).

Estimated Total Annual Burden Hours: 50,583.

Dated: December 3, 2021.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2021–26599 Filed 12–7–21; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. ICEB–2020–0009]

Privacy Act of 1974; System of Records

AGENCY: U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security.

ACTION: Notice of modified Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the U.S. Department of Homeland Security (DHS) proposes to modify, rename, and reissue a current U.S. Immigration and Customs Enforcement (ICE) system of records titled, ''DHS/ICE–001 Student and Exchange Visitor Information System (SEVIS) System of Records.'' DHS/ICE uses, collects, and maintains information on nonimmigrant students and exchange visitors, and their dependents, admitted to the United States under an F, M, or J class of admission, and the schools and exchange visitor program sponsors that host these individuals in the United States. DHS/ICE is updating the name of this system of records; modifying existing and adding new categories of individuals and categories of records; and updating, modifying, and removing routine uses. Additionally, DHS is issuing a Notice of Proposed Rulemaking to exempt this system of records from certain provisions of the Privacy Act, elsewhere in the **Federal Register**. This updated system of records will be included in DHS's inventory of record systems.

DATES: Submit comments on or before January 7, 2022. This modified system of records will be effective upon publication. New or modified routine uses will be effective January 7, 2022.

ADDRESSES: You may submit comments, identified by docket number ICEB–2020–0009, by one of the following methods:

- *Federal e-Rulemaking Portal: https://www.regulations.gov/.* Follow the instructions for submitting comments.
- *Fax:* (202) 343–4010.
- *Mail:* Lynn Parker Dupree, Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528–0655.

Instructions: All submissions received must include the agency name and docket number ICEB–2020–0009. All comments received will be posted without change to *https://www.regulations.gov/,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov/.*

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Jordan Holz, (202) 732–3300, Privacy Officer, *ICEPrivacy@dhs.gov,* U.S. Immigration and Customs Enforcement, 500 12th Street SW Stop 5004, Washington, DC 20536–5004. For privacy questions, please contact Lynn Parker Dupree, (202) 343–1717, Chief Privacy Officer, *Privacy@hq.dhs.gov,* Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528–0655.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the U.S. Department of Homeland Security (DHS) U.S. Immigration and Customs Enforcement (ICE) is updating, renaming, and reissuing a DHS system of records now titled, ''DHS/ICE–001 Student and Visitor Exchange Program (SEVP)'' System of Records.

The DHS/ICE update to SEVIS, now SEVP, includes several changes. First, the system of records is being renamed to better align it with the purpose of the system. This system of records covers records on nonimmigrant students and exchange visitors, and their dependents, admitted to the United States under F, M, or J class of admission (hereinafter, ''F/M/J nonimmigrants''), and the schools, designated program sponsors and host families that sponsor these individuals in the United States to ensure compliance with immigration laws and regulations and ensure their status is maintained. The SEVP coordinates with the Department of State (DOS), which oversees the operation of the U.S. Government's Exchange Visitor (EV) Program, including the designation of EV Program sponsors, and supports the application and admission of foreign nationals who seek entry into the United States as exchange visitors (*e.g.,* research scholar, government visitor, au pair) under the J class of admission.

In addition, the SEVP oversees the certification of academic and vocational schools to authorize enrollment of F and M nonimmigrant students based on federal regulations, and provides guidance and training to school officials about the SEVP certification requirements to which schools must adhere to and the requirements that their nonimmigrant students must follow to maintain their status.

Second, this update seeks to clarify and better identify the types of individuals and entities contained in this expanded system of records. Some items in the categories of individuals section have been reorganized and edited to more clearly identify the individuals, as well as expanded to include new categories of individuals, such as employers, financial support providers, government bodies and personnel, host families, members of the public, school employees, school partners, and school and EV Program officials.

Third, DHS/ICE has modified and expanded the categories of records section to better identify the types of information contained in the system of records. The new categories of records include education, employment, financial, travel, immigration-related information, school, program sponsor, case-related information, auditing and training, reporting, and inquiries and data corrections.

Fourth, DHS/ICE is modifying Routine Use E and adding Routine Use F to conform to Office of Management and Budget (OMB) Memorandum M–17–12, ''Preparing for and Responding to a Breach of Personally Identifiable Information'' (Jan. 3, 2017). All following routine uses are being re-lettered to account for the additional routine uses.

Finally, DHS is proposing to eliminate several routine uses, modify several routine uses, and add two new routine uses that would allow ICE to share information from the SEVP system of records with the specified recipients for the specified purpose. Below is a summary of those routine uses and their corresponding letter.

(J) Routine Use J is being updated to include disclosures to parties to an administrative proceeding where DHS has an interest in the outcome. This modification eliminates the need for two routine uses previously identified as Routine Uses K and L, and

subsequent routine uses are being re-lettered to account for this change.

(O) Existing Routine Use P is being updated and re-lettered as Routine Use O to clarify that information may be shared about nonimmigrants between certified schools or programs as part of the transfer process from one school or program to another.

(R) Existing Routine Use S is being updated to be consistent with the DHS standard routine use for technology and is now Routine Use R. The modification eliminates the need for one routine use previously identified as Routine Use T, and subsequent routine uses are being re-lettered to account for this change.

(V) Routine Use V is being added to permit sharing identifying information with accrediting agencies, recognized by the Department of Education (ED), to facilitate the inspection and validation of schools and exchange visitor programs in adherence to laws and regulations, and subsequent routine uses are being re-lettered to account for this additional routine use.

(W) Routine Use W is being added to clarify the sharing and disclosure of information to federal, state, local, and other government and public agencies, including foreign or international agencies when the information is relevant and necessary to DHS or a requesting agency's decision concerning the hiring or retention of an individual, or the issuance, grant, renewal, suspension or revocation of a security clearance, license, contract, grant or other benefit.

Information in the SEVP system of records may be shared with other DHS Components that have a need to know the information to carry out their national security, law enforcement, immigration, intelligence, or other homeland security functions. In addition, DHS/ICE may share information with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies consistent with the routine uses set forth in this SORN.

Additionally, DHS is issuing a Notice of Proposed Rulemaking to exempt this system of records from certain provisions of the Privacy Act elsewhere in the **Federal Register**. This modified system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies Fair Information Practice Principles in a statutory framework that governs the means by which federal government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A system of records is a group of records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other matched identifiers assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. Further, those persons who do not currently fall under the definition of individuals may naturalize or adjust status, thus becoming Privacy Act-covered individuals, over the course of this system's records retention schedule. Additionally, the Judicial Redress Act (JRA) provides covered persons with a statutory right to make requests for access and amendment to covered records, as defined by the JRA, along with judicial review for denials of such requests. The JRA also prohibits disclosures of covered records, except as otherwise permitted by the Privacy Act. Below is the description of the DHS/ICE–001 Student and Exchange and Visitor Program (SEVP) system of records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the OMB and to Congress.

SYSTEM NAME AND NUMBER:

U.S. Department of Homeland Security (DHS)/U.S. Immigration and Customs Enforcement (ICE)—001 Student and Exchange Visitor Program (SEVP).

SECURITY CLASSIFICATION:

Unclassified, Controlled Unclassified Information. The data may be retained on classified networks, but this does not change the nature and character of the data until it is combined with classified information.

SYSTEM LOCATION:

Records are maintained at the ICE Headquarters in Washington, DC, and field offices. Records from SEVP systems may also be maintained in DHS unclassified and classified networks.

SYSTEM MANAGER(S):

Systems Management Unit Chief, ICE Student and Exchange Visitor Program, 500 12th St. SW, MS 5600, Washington, DC 20536–5600; *sevp@ice.dhs.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Public Law 104–208, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA); Public Law 106–215, Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA); Public Law 106–396, Visa Waiver Permanent Program Act of 2000 (VWPPA); Public Law 107–56, U.S.A. PATRIOT Act; Public Law 107–173, Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act); 8 CFR 214.2(f), (j), and (m); 8 CFR 214.3, 214.4, 214.5, 214.12, 214.13; 22 CFR part 62; and Homeland Security Presidential Directive—2 (HSPD–2, Combating Terrorism Through Immigration Policies), as amended by HSPD–5, Management of Domestic Incidents (Feb. 28, 2003).

PURPOSE(S) OF THE SYSTEM:

The purpose of this system of records is to maintain the integrity of the U.S. immigration system by collecting, maintaining, and analyzing information so that only bona fide nonimmigrant students or exchange visitors gain entry to the United States and that institutions accepting nonimmigrant students are legitimate and certified and adhere to the federal rules and regulations that govern them. DHS and DOS use of records covered by this system of records are for the following purposes:

Identity Validation—To identify and validate the identity of F/M/J nonimmigrants, federal government personnel, and school and program officials to ensure data integrity, accuracy, and proper data matching, as well as to authenticate individuals who either access SEVP systems or need to update information maintained by SEVP.

Determination and Status—To facilitate and support determination activities related to admissibility into the United States and the eligibility and status of benefits.

Adjudication—To (1) review and decide whether to certify a school or designate an EV Program so that F/M/J nonimmigrants may enroll or participate in the U.S.-based school or program; and (2) use supplemental information such as open-source media (*e.g.,* publicly available information in newspaper articles, school websites, government websites, social media sites and blogs, online forums) to support vetting of F/M/J nonimmigrants and their dependents and school and program officials who handle personally identifiable information (PII) for other officials at their school or program.

Compliance—To monitor the compliance of F/M/J nonimmigrants, schools, programs, and school and program officials with immigration laws and regulations, including those addressing employment and training activities and immigration benefits, that govern the following: F and M nonimmigrants and the schools that enroll or seek to enroll them through the

SEVP certification process; and participation of J nonimmigrants and programs within the EV Program.

Investigative—To perform administrative and criminal investigations related to the participation of F/M/J nonimmigrants, school and EV Program sponsors, and the schools and exchange visitor programs that enroll or seek to enroll individuals through the SEVP certification process, and to identify noncompliance with U.S. laws and regulations. Information is also shared with other law enforcement agencies for purposes of coordinating activities, such as administrative reviews and criminal investigations.

Analysis and Reporting—To create and provide reports for analyzing compliance issues and identifying activities and related individuals (if needed) for evidence-based decision-making.

Communication and Customer Relations—To provide customer service to individuals who contact the SEVP (*e.g.,* via telephone, email, chat, social media), including providing general information about SEVP regulations, performing data corrections, and providing technical support to access SEVP systems.

Training—To keep track of training activities performed by school and program officials to validate compliance with SEVP requirements to access SEVP external-facing systems.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

SEVP collects, receives, captures, and maintains information on individuals who are U.S. citizens and lawful permanent residents, as well as information on persons who are currently nonimmigrants. DHS maintains this information in recognition that persons who are nonimmigrants may later adjust status to lawful permanent resident and naturalize to U.S. citizen and, therefore, become individuals covered by the Privacy Act. DHS provides this notice in anticipation of such an eventuality:

F and M nonimmigrants who participate as students in an academic or vocational program at SEVP-certified schools, as well as F and M dependents (*e.g.,* spouse, minor children).

J nonimmigrants who participate in DOS-designated work or study exchange visitor programs, as well as J dependents (*e.g.,* spouse, minor children).

Proxy, parent, or legal guardian who has legal authority to make decisions or sign documents on behalf of another individual who participates in a student and exchange visitor program (*e.g.,* a minor, an individual with disabilities).

School partners and representatives including the head of school (*e.g.,* owner, president, chief executive officer [CEO], legal counsel) who has legal signature authority for the school and school employees (*e.g.,* faculty members, student recruiters) who are employed by a U.S.-based school and interact with F and M students but who do not oversee the F and M students pursuant to the laws and regulations governing F and M nonimmigrant students and schools that enroll them (this is the responsibility of school officials). Also included are school partners (*e.g.,* contractor who builds housing facility, sports program that uses school space) who provide a service for a school or manage activities on school sites that impact F and M students but who are not employees of the school.

School officials (individuals who are U.S. citizens or lawful permanent residents) who submit information for school SEVP certification and recertification and oversee F and M students enrolled at their school.

Exchange visitor program sponsors (*e.g.,* an entity seeking to sponsor a nonimmigrant au pair, research scholar, intern, or government visitor) who must be designated by DOS to run an EV Program and host J nonimmigrants. This includes the program sponsor (*e.g.,* owner, CEO, legal counsel) who has legal signature authority for the EV Program sponsor.

Program officials (individuals who are U.S. citizens or lawful permanent residents) who submit information for EV Program sponsor DOS designation and re-designation and oversee J nonimmigrants enrolled in programs offered by the sponsor.

Host families (individuals who are U.S. citizens or lawful permanent residents) who provide living arrangements for J nonimmigrants.

Financial support provider who, as an individual, organization, or government, provides support to F/M/J nonimmigrants.

Employers (*e.g.,* supervisor, official with signature authority) of F/M/J nonimmigrants with authority to work in the United States.

Federal government personnel (*i.e.,* federal employees and contractors) who manage the SEVP program and use information maintained by SEVP to support the DHS mission, and coordinate with DOS with respect to the J exchange visitor program-related data. Federal government personnel also use SEVP information to support other federal agency missions that align with DHS's and DOS's oversight of nonimmigrant students and exchange visitors, including the ED, Department of Commerce, Department of Justice—Federal Bureau of Investigation, and federal intelligence agencies.

State government personnel (*i.e.,* state employees and contractors) who interact with federal government personnel and exchange information for activities related to administrative reviews and investigations.

Governing bodies (*e.g.,* licensing and accrediting bodies) that ensure the education provided by schools meets acceptable levels of quality and grant licenses and accreditation to schools that meet these criteria.

Members of the public (*e.g.,* property owners, holding companies, school officials, F and M nonimmigrants, individuals of the general population) who (1) provide SEVP with information about things such as a school, program, or individual aligned with SEVP and potential infractions or illegal activities; (2) provide feedback about SEVP on the performance of SEVP employees, its programs, or its regulations; or (3) contact SEVP for other reasons.

CATEGORIES OF RECORDS IN THE SYSTEM:

The various categories of information (including PII and sensitive PII) collected, received, captured, used, shared, and maintained by SEVP and DOS on the individuals identified above are as follows:

Biographical—Includes full name; gender; date of birth; country of birth; country of citizenship; country of legal permanent residence; contact information (*e.g.,* telephone number, email address, physical/mailing address); and full name and contact information of proxy, parent, or legal guardian for F/M/J nonimmigrant.

Criminal History—Includes arrest and bail information, case number, date charges were filed, case type, initial criminal offense type, date of crime, disposition and judgment date, and county jurisdiction.

Identity Verification—Includes identity documents (*e.g.,* driver's license, passport); unique identifiers (*e.g.,* SEVIS ID, immigration identification number [IIN], official personal identification number [OPID], A-number, passport number, limited instances of incidental collection of social security number); and biometric identifiers (*e.g.,* fingerprint identification number [FIN]).

Education—Includes education transcripts; certificates of graduation; program of study (*e.g.,* types of program, courses, level of education); length of study; school registration information;

school admission number; school transfer information; extensions; and changes to program of study or activity.

Exchange visitor program—Includes exchange visitor program information (*e.g.,* type of program, program activities); placement information (*e.g.,* site of activity, host family, host family contact information, EV Program sponsor name); extensions; and changes to program or activity.

Employment—Includes practical training information (*e.g.,* training plan); employer and supervisor information (*e.g.,* name of employer, name of supervisor); employer and supervisor contact information (*e.g.,* telephone number, email address, website URL); employer identification number; and employment information (*e.g.,* position title, description of duties, employment authorization document number).

Financial—Includes financial support information (*e.g.,* sources of funding); payment receipt information related to school certification and EV Program sponsor designation fees; and payment receipt information for the Form I–901 fee.

Travel—Includes visa information (*e.g.,* visa number, country of issuance, expiration date); passport information (*e.g.,* passport number, expiration date, country issued); and arrival and departure information.

Immigration-Related—Includes entry into and exit from the United States (*e.g.,* Form I–94 admission number, dates of entry and exit, ports of entry); class of admission (*e.g.,* visa type); immigration status; adjudication decisions; and, immigration benefit application information (*e.g.,* adjustment of status).

School—Includes school name; contact information (*e.g.,* telephone number, email address, physical mailing address); open-source media information (*e.g.,* publicly available information available in newspaper articles, websites, personal and organizational social media); school's program information (*e.g.,* site locations, addresses, phone number, school code); school's accreditation and certification information and documentation; and documented evidence from nonaccredited schools (*e.g.,* articulation agreements, state-issued professional licenses).

Program Sponsor—Includes program sponsor name; CEO name and contact information (*e.g.,* telephone number, email address, physical mailing address); and, location and contact information (*e.g.,* site locations, addresses, phone number).

Case-Related—Includes case number; adjudication determinations; site visit reports; appeals determinations; administrative reviews; and information regarding investigations.

Auditing and Training—Includes auditing information (*e.g.,* IP addresses, access and change history, date/time access, username, user role); system login (*e.g.,* username, password, email address, name of individual); unique identifier (*e.g.,* SEVIS ID, IIN, OPID); and training information (*e.g.,* training status, training certificates, training transcripts).

Reporting—Includes reporting information (*e.g.,* aggregate data, statistics on overstays).

Inquiries and Data Corrections—Includes contact information (*e.g.,* telephone number, email address, physical mailing address); unique identifier (*e.g.,* SEVIS ID, IIN, OPID); identity documents (*e.g.,* driver's license, passport, marriage certificate); and information not previously collected (*e.g.,* new address, passport number) by SEVP to facilitate handling inquiries and data corrections.

RECORD SOURCE CATEGORIES:

Records are obtained from F/M/J nonimmigrants; proxy, parent, or legal guardians; school officials; program officials; federal and state government personnel; federal agency systems; governing bodies; and members of the public.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including the U.S. Attorney's Offices, or other federal agencies conducting litigation or proceedings before any court, adjudicative, or administrative body, when it is relevant and necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee or former employee of DHS in his or her official capacity;

3. Any employee or former employee of DHS in his or her individual capacity, only when DOJ or DHS has agreed to represent the employee;

4. The United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or General Services Administration pursuant to records management inspections being conducted under the authority of 44 U.S.C. secs. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when (1) DHS suspects or has confirmed that there has been a breach of the system of records; (2) DHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DHS (including its information systems, programs, and operations), the federal government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

F. To another federal agency or federal entity when DHS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the federal government, or national security resulting from a suspected or confirmed breach.

G. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

H. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which

includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

I. For investigative material compiled for law enforcement purposes, to appropriate federal, state, tribal, local, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or treaty where DHS determines that the information would assist in the enforcement of civil or criminal laws.

J. To a court, magistrate, administrative tribunal, opposing counsel, parties, and witnesses in the course of a civil, criminal or administrative proceeding before a court or adjudicative body when DHS determines that the use of such records is relevant and necessary to the litigation or the proceeding and one of the following is a party to, or has an interest in, the litigation or the proceeding:

1. DHS or any component thereof;

2. Any employee of DHS in his or her official capacity;

3. Any employee of DHS in his or her individual capacity where the agency has agreed to represent the employee;

4. The United States, where DHS determines that litigation is likely to affect DHS or any of its components.

K. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings.

L. To appropriate federal, state, local, tribal, or foreign governmental agencies or multilateral governmental organizations for the purpose of protecting the vital interests of a data subject or other persons, including to assist such agencies or organizations in preventing exposure to or transmission of a communicable or quarantinable disease or to combat other significant public health threats. Appropriate notice of any identified health threat or risk will be given.

M. To foreign governments for the purpose of providing information about their citizens or permanent residents, or family members thereof, during a school closing, local or national disasters, or health emergencies.

N. To the U.S. Treasury Department and its contractors to facilitate and track SEVP fee payments made by F/M/J nonimmigrants.

O. To schools and exchange visitor sponsors participating in the SEVP or EV Program for the purpose of certification and designation, enrollment, transfer, and monitoring of F/M/J nonimmigrants, audit, oversight, and compliance enforcement.

P. To the DOS for the purpose of visa issuance to F/M/J nonimmigrants; the operation of its exchange visitor program; or the enforcement of, and investigation into, its visa and exchange visitor program laws, regulations, and requirements.

Q. To the DOS in the processing of petitions or applications for benefits under the Immigration and Nationality Act and all other immigration and nationality laws including treaties and reciprocal agreements.

R. To appropriate federal, state, local, tribal, or foreign governmental agencies or multilateral governmental organizations, with the approval of the Chief Privacy Officer, when DHS is aware of a need to use relevant data that relate to the purposes stated in this SORN in order to test, develop, and implement new technologies for the purposes of data sharing to support and enhance the efficiency of the SEVP or homeland security.

S. To a federal, state, tribal, local, international, or foreign government agency or entity for the purpose of consulting with that agency or entity:

1. To assist in making a determination about redress provided under the Privacy Act for an individual in connection with the operations of a DHS component or program.

2. For the purpose of verifying the identity of an individual seeking redress in connection with the operations of a DHS component or program.

3. For the purpose of verifying the accuracy of information submitted by an individual who has requested such redress on behalf of another individual.

T. To a former employee of DHS for purposes of (1) responding to an official inquiry by a federal, state, or local government entity or professional licensing authority, in accordance with applicable DHS regulations; or (2) facilitating communications with a former employee that may be necessary for personnel-related or other official purposes when DHS requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

U. To a federal state, or local agency, or other appropriate entities or individuals, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, Executive Order, or other applicable national security directive.

V. To an accrediting agency, recognized by ED, for the purpose of performing accreditation activities for schools and exchange visitor programs, including accreditation of English-language training programs in accordance with the Accreditation of English Language Training Programs Act (Pub. L. 111–306), but only such as is necessary and relevant to such accreditation function.

W. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request.

X. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there is a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of DHS, or when disclosure is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent the CPO determines that release of the specific information in the context of a particular case would constitute a clearly unwarranted invasion of personal privacy.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

DHS/ICE stores records in these systems electronically or on paper in secure facilities in a locked drawer behind a locked door. The records may be stored on magnetic disc, tape, and digital media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by biographical and unique verification identifiers such as full name, date of birth, email address, SEVIS ID, IIN, FIN, OPID, and A–number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

An SEVP program-wide, media-neutral records retention schedule is currently under development. ICE is proposing a 75-year retention schedule for program-specific records maintained by SEVP to facilitate program operations and carry out the mission objectives of the Agency. ICE will maintain these records permanently, until an Agency retention schedule is submitted to the National Archives and Records Administration (NARA) and approved by the Archivist of the Unites States. All other federal Agency records will be maintained in accordance with the appropriate general records schedule (GRS). For example, ICE will follow the appropriate retention periods outlined in the NARA-approved GRS for administrative records (*e.g.,* audit information, system login, inquiries, reporting). The NARA-approved GRS can be found at *https://www.archives.gov/records-mgmt/grs.*

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

DHS/ICE safeguards records in this system according to applicable rules and policies, including all applicable DHS automated systems security and access policies. DHS/ICE has imposed strict controls to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RECORD ACCESS PROCEDURES:

The Secretary of Homeland Security has exempted this system of records from the notification, access, and amendment procedures of the Privacy Act, and the JRA if applicable, because it is a law enforcement system of records. However, DHS/ICE will consider individual requests to determine whether information may be released. Thus, individuals seeking access to and notification of any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the ICE Privacy Officer and ICE Freedom of Information Act (FOIA) Officer, whose contact information can be found at *https://www.dhs.gov/foia* under ''Contact Information.'' If an individual believes more than one component maintains his or her Privacy Act records, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, U.S. Department of Homeland Security, Washington, DC 20528–0655. Even if neither the Privacy Act nor the JRA provides a right of access, certain records about an individual may be available under the FOIA.

When an individual is seeking his or her records about from this system of records or any other departmental system of records, the individual's request must conform with the Privacy Act regulations set forth in 6 CFR part 5. The individual must first verify his or her identity, meaning that the individual must provide full name, current address, and date and place of birth. The individual must sign the request, and the signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. Although no specific form is required, an individual may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *https://www.dhs.gov/foia,* or call (866) 431–0486. In addition, you should do the following:

- Explain why he or she believes the Department would have information being requested;
- Identify which component(s) of the Department he or she believe may have the information;
- Specify when the individual believes the records would have been created; and
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records;

If an individual's request is seeking records pertaining to another living individual, the first individual must include a statement from the second individual certifying that individual's agreement for the first individual to access his/her records.

Without the above information, the component(s) may not be able to conduct an effective search, and the individual's request may be denied due to lack of specificity or lack of compliance with applicable regulations.

CONTESTING RECORD PROCEDURES:

For records covered by the Privacy Act or covered JRA records, individuals may make a request for amendment or correction of a record by writing directly to the Department component that maintains the record, unless the record is not subject to amendment or correction. The request should identify each record in question, state the amendment or correction desired, and state why the individual believes that the record is not accurate, relevant, timely, or complete. The individual may submit any documentation that would be helpful. If the individual believes that the same record is in more than one system of records, the request should state that and be addressed to each component that maintains a system of records containing the record.

To correct an ICE record, individuals may submit a Privacy Act amendment request by completing DHS Form 500–05 ''Certification of Identity,'' which can be found at *https://www.ice.gov/privacy.* The signed form and a detailed request should be sent to the ICE Office of Information Governance and Privacy at *ICEPrivacy@ice.dhs.gov,* or to the following address: U.S. Immigration and Customs Enforcement, ICE Information Governance and Privacy, ATTN: Privacy Office, 500 12th Street SW, Stop 5004, Washington, DC 20536–5004.

NOTIFICATION PROCEDURES:

See the ''Record Access Procedures'' section.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. secs. 552a(c)(3), (c)(4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8); (f); and (g)(1). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a (k)(1) and (k)(2), has exempted this system from the following provisions of the Privacy Act, 5 U.S.C. secs. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f).

When this system receives a record from another system exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary system of records from which they originated and claims any additional exemptions set forth here.

HISTORY:

75 FR 412 (Jan. 5, 2010); 73 FR 63057 (Oct. 23, 2008).

* * * * *

Lynn Parker Dupree,

Chief Privacy Officer, U.S. Department of Homeland Security.

[FR Doc. 2021–26477 Filed 12–7–21; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2021–0035]

Privacy Act of 1974; Computer Matching Program

AGENCY: Department of Homeland Security, U.S. Citizenship and Immigration Services.

ACTION: Notice of a reestablished matching program.

SUMMARY: Pursuant to the Privacy Act of 1974, as amended by the Computer Matching and Privacy Protection Act of 1988 and the Computer Matching and Privacy Protections Amendment of 1990 (Privacy Act), and Office of Management and Budget (OMB) guidance on the conduct of matching programs, notice is hereby given of the reestablishment of a matching program between the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) and the New York Department of Labor (NY–DOL). NY–DOL will match against DHS–USCIS data to verify the immigration status of non-U.S. citizens who apply for federal benefits (Benefit Applicants) under the Unemployment Compensation (UC) programs that it administers.

DATES: Please submit comments on or before January 7, 2022. The matching program will be effective on January 7, 2022 unless comments have been received from interested members of the public that require modification and republication of the notice. The matching program will continue for 18 months from the beginning date and may be extended an additional 12 months if the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

ADDRESSES: You may submit comments, identified by docket number *DHS–2021–0035* by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Lynn Parker Dupree, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528–0655.

Instructions: All submissions received must include the agency name and docket number DHS–2021–0035. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: To obtain additional information about this matching program and the contents of this Computer Matching Agreement between DHS–USCIS and NY–DOL, please view this Computer Matching Agreement at the following website: *https://www.dhs.gov/publication/computer-matching-agreements-and-notices.* For general questions about this matching program, contact Jonathan M. Mills, Acting Chief, USCIS SAVE Program at (202) 306–9874. For general privacy questions, please contact Lynn Parker Dupree, (202) 343–1717, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528–0655.

SUPPLEMENTARY INFORMATION: DHS–USCIS provides this notice in accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503) and the Computer Matching and Privacy Protection Amendments of 1990 (Pub. L. 101–508) (Privacy Act); Office of Management and Budget (OMB) Final Guidance Interpreting the Provisions of Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988, 54 FR 25818 (June 19, 1989); and OMB Circular A–108, 81 FR 94424 (December 23, 2016).

Participating Agencies: DHS–USCIS and NY–DOL.

Authority for Conducting the Matching Program: Section 121 of the Immigration Reform and Control Act (IRCA) of 1986, Public Law 99–603, as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Public Law 104–193, 110 stat. 2168 (1996), requires DHS to establish a system for the verification of immigration status of noncitizen applicants for, or recipients of, certain types of benefits as specified within IRCA, and to make this system available to state agencies that administer such benefits. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104–208, 110 State. 3009 (1996) grants federal, state, or local government agencies seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency with the authority to request such information from DHS–USCIS for any purpose authorized by law.

Purpose: The purpose of this Agreement is to reestablish the terms and conditions governing NY–DOL's access to, and use of, the DHS–USCIS Systematic Alien Verification for Entitlements (SAVE) Program, which provides immigration status information from federal immigration records to authorized users. NY–DOL will use the SAVE Program to verify the immigration status of non-U.S. citizens who apply for federal benefits (Benefit Applicants) under Unemployment Compensation (UC) programs that it administers. NY–DOL will use the information obtained through the SAVE Program to determine whether Benefit Applicants possess the requisite immigration status to be eligible for the UC benefits administered by NY–DOL.

Categories of Individuals: The persons about whom DHS–USCIS maintains information, which is contained in its Verification Information System (VIS) database used by the SAVE Program to verify immigration status, that are involved in this matching program include noncitizens (meaning any person as defined in Immigration and Nationality Act section 101(a)(3)), those naturalized, and to the extent those that have applied for Certificates of Citizenship, derived U.S. citizens, on whom DHS–USCIS has a record as an applicant, petitioner, sponsor, or beneficiary. The persons about whom NY–DOL maintains information that is involved in this matching program include non-citizen Benefit Applicants for, or recipients of, UC administered by NY–DOL. The persons referred to here are only considered individuals as defined by the Privacy Act, and thus covered under this matching program, to the extent they are U.S. citizens or lawful permanent residents.

Categories of Records: Data elements to be matched between NY–DOL records and DHS–USCIS federal immigration records include the following: Last Name, First Name, Middle Name, Date of Birth, Immigration Numbers (*e.g.,* Alien Registration/USCIS Number, I–94 Number, SEVIS ID Number, Certificate of Naturalization Number, Certificate of Citizenship Number, or Unexpired Foreign Passport Number), and Other Information from Immigration Documentation (for example, Country of Birth, Date of Entry, Employment Authorization Category). Additional Data elements provided to NY–DOL from DHS–USCIS records related to the match may include: Citizenship or Immigration Data (for example, immigration class of admission and/or employment authorization), Sponsorship Data (for example, name, address, and social security number of Form I–864/I–864EZ sponsors and Form I–864A household members, when applicable) and Case Verification Number.

System of Records: DHS/USCIS–004 Systematic Alien Verification for

Entitlements (SAVE) System of Records Notice, 85 FR 31798 (May 27, 2020).

Lynn Parker Dupree,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2021–26572 Filed 12–7–21; 8:45 am]

BILLING CODE 9110–9L–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2009–0024]

Enforcement Actions Summary

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of availability.

SUMMARY: TSA is providing notice that it has issued an annual summary of all enforcement actions taken by TSA under the authority granted in the Implementing Recommendations of the 9/11 Commission Act of 2007.

FOR FURTHER INFORMATION CONTACT: Nikki Harding, Assistant Chief Counsel, Civil Enforcement, Office of the Chief Counsel, TSA–2, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6002; telephone (571) 227–4777; facsimile (571) 227–1378; email *nikki.harding@tsa.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On August 3, 2007, section 1302(a) of the Implementing Recommendations of the 9/11 Commission Act of 2007 (the 9/11 Act), Public Law 110–53, 121 Stat. 392, gave TSA authority to assess civil penalties for violations of any surface transportation requirements under title 49 of the United States Code (U.S.C.) and for any violations of chapter 701 of title 46 of the U.S.C., which governs transportation worker identification credentials (TWICs).

Section 1302(a) of the 9/11 Act, codified at 49 U.S.C. 114(u),[1] authorizes the Secretary of Homeland Security to impose civil penalties of up to $10,000 per violation of any surface transportation requirement under 49 U.S.C. or any requirement related to TWICs under 46 U.S.C. chapter 701. TSA exercises this function under delegated authority from the Secretary. *See* DHS Delegation No. 7060–2.

Under 49 U.S.C. 114(u)(7)(A), TSA is required to provide the public with an annual summary of all enforcement actions taken by TSA under this subsection; and include in each such summary the identifying information of each enforcement action, the type of alleged violation, the penalty or penalties proposed, and the final assessment amount of each penalty. This summary is for calendar year 2020. TSA will publish a summary of all enforcement actions taken under the statute in the beginning of the new calendar year to cover the previous calendar year.

Document Availability

You can get an electronic copy of both this notice and the enforcement actions summary on the internet by—

(1) Searching the electronic Federal Docket Management System (FDMS) web page at *http://www.regulations.gov,* Docket No. TSA–2009–0024; or

(2) Accessing the Government Printing Office's web page at *http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR* to view the daily published **Federal Register** edition; or accessing the ''Search the **Federal Register** by Citation'' in the ''Related Resources'' column on the left, if you need to do a Simple or Advanced search for information, such as a type of document that crosses multiple agencies or dates.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this action.

Dated: December 2, 2021.

Kelly D. Wheaton,

Deputy Chief Counsel, Enforcement and Incident Management.

December 2, 2021

Annual Summary of Enforcement Actions Taken Under 49 U.S.C. 114(u)

Annual Report

Pursuant to 49 U.S.C. 114(u)(7)(A), TSA provides the following summary of enforcement actions taken by TSA in calendar year 2020 under section 114(u).[2]

Background

Section 114(u) of 49 U.S.C. gives the TSA authority to assess civil penalties for violations of any surface transportation requirements under 49 U.S.C. and for any violations of chapter 701 of 46 U.S.C., which governs TWICs. Specifically, section 114(u) authorizes the Secretary of Homeland Security to impose civil penalties of up to $10,000 per violation [3] for violations of any surface transportation requirement under 49 U.S.C. or any requirement related to TWIC under 46 U.S.C. chapter 701.[4]

TSA case No.	Type of violation [5]	Penalty proposed/assessed
2019SAN0156	Fraud/Falsification (49 CFR 1570.5(b))	$1,000/$1,000.
2021SLC0056	Security Coordinator (49 CFR 1570.201(d)(e)	None (Notice of Noncompliance).
2021JAX0030	TWIC Access Control (49 CFR 1570.301(c))	None (Warning Notice).
2021MSP0003	TWIC Access Control (49 CFR 1570.301(c))	None (Warning Notice).
2021SAN0007	TWIC Access Control (49 CFR 1570.301(c))	None (Warning Notice).
2021SAN0012	TWIC Access Control (49 CFR 1570.301(c))	None (Warning Notice).
2021OAK0017	TWIC Access Control (49 CFR 1570.7(a)(1) and (a)(2))	None (Warning Notice).
2021CLT0020	TWIC Access Control (49 CFR 1570.7(a)(1))	None (Warning Notice).
2017MSY0184	TWIC Access Control (49 CFR 1570.7(c))	None (Warning Notice).
2017MSY0189	TWIC Access Control (49 CFR 1570.7(c))	None (Warning Notice).

[1] Pursuant to division K, title I, sec. 1904(b)(1)(I), of Public Law 115–254, (132 Stat. 3186, 3545; October 5, 2018), the TSA Modernization Act—part of the FAA Reauthorization Act of 2018, former 49 U.S.C. 114(v) was redesignated as 49 U.S.C. 114(u).

[2] 49 U.S.C. 114(u)(7)(A) states: In general.—the Secretary of Homeland Security shall—(i) provide an annual summary to the public of all enforcement actions taken by the Secretary under this subsection; and (ii) include in each such summary the docket number of each enforcement action, the type of alleged violation, the penalty or penalties proposed, and the final assessment amount of each penalty.

[3] Pursuant to title VII, sec. 701 of Public Law 114–74 (129 Stat. 583, 599; Nov. 2, 2015), the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015—part of the Bipartisan Budget Act of 2015, this $10,000 civil penalty maximum is adjusted for inflation annually. *See* 49 CFR 1503.401(b).

[4] TSA exercises this function under delegated authority from the Secretary. *See* DHS Delegation No. 7060–2.

[5] On March 23, 2020, TSA promulgated a final rule which, among other things, reorganized Title 49 Chapter XII Subpart D, Maritime and Surface Transportation Security. For example, the regulation 49 CFR 1570.7, pertaining to fraudulent use and manufacture of credentials, is now located at 49 CFR 1570.301. This report cites to the regulatory violations as alleged in TSA's enforcement actions at the time of issuance.

TSA case No.	Type of violation [5]	Penalty proposed/assessed
2017OAK0359	TWIC Access Control (49 CFR 1570.7(c))	None (Warning Notice).
2018SAN0067	TWIC Access Control (49 CFR 1570.7(c))	$250/$250.
2021ALB0009	TWIC Fraudulent Use (49 CFR 1570.301(a))	None (Warning Notice).
2021MCO0041	TWIC Fraudulent Use (49 CFR 1570.301(c) and(d))	None (Warning Notice).
2021JAX0026	TWIC Fraudulent Use (49 CFR 1570.301(c))	None (Warning Notice).
2021JAX0029	TWIC Fraudulent Use (49 CFR 1570.301(c))	None (Warning Notice).
2021SAN0018	TWIC Fraudulent Use (49 CFR 1570.301(c))	None (Warning Notice).
2021SAN0014	TWIC Fraudulent Use (49 CFR 1570.301(d))	None (Warning Notice).
2021SAN0019	TWIC Fraudulent Use (49 CFR 1570.301(d))	None (Warning Notice).
2020CLE0170	TWIC Fraudulent Use (49 CFR 1570.7(a) and (c))	None (Warning Notice).
2020MIA0077	TWIC Fraudulent Use (49 CFR 1570.7(a) and (c))	None (Warning Notice).
2020MIA0149	TWIC Fraudulent Use (49 CFR 1570.7(a) and (c))	None (Warning Notice).
2017MSY0190	TWIC Fraudulent Use (49 CFR 1570.7(a))	None (Warning Notice).
2017MSY0191	TWIC Fraudulent Use (49 CFR 1570.7(a))	None (Warning Notice).
2018BTR0009	TWIC Fraudulent Use (49 CFR 1570.7(a))	None (Warning Notice).
2018SAN0173	TWIC Fraudulent Use (49 CFR 1570.7(a))	$250/$250.
2018SEA0179	TWIC Fraudulent Use (49 CFR 1570.7(a))	$5,000/$2,000.
2020JAX0036	TWIC Fraudulent Use (49 CFR 1570.7(a))	None (Warning Notice).
2021OAK0001	TWIC Fraudulent Use (49 CFR 1570.7(a))	None (Warning Notice).
2020BOS0069	TWIC Fraudulent Use (49 CFR 1570.7(b))	$1,170/$1,170.
2020BWI0038	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020BWI0042	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020BWI0044	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020BWI0058	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020HOU0029	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020HOU0077	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020HOU0079	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020MCO0110	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020MCO0111	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020MCO0156	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020MCO0162	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020MCO0180	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020MCO0181	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020MCO0182	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020PDX0027	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	$1,170/$500.
2020RIC0039	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020RIC0044	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2020RIC0075	TWIC Fraudulent Use (49 CFR 1570.7(c) and (d))	None (Warning Notice).
2019HOU0126	TWIC Fraudulent Use (49 CFR 1570.7(c))	$1,140/$500.
2019HOU0149	TWIC Fraudulent Use (49 CFR 1570.7(c))	$1,170/$100.
2019JAX0124	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2019LAX0258	TWIC Fraudulent Use (49 CFR 1570.7(c))	$500/$500.
2019LAX0259	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2019MSY0071	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2019OAK0146	TWIC Fraudulent Use (49 CFR 1570.7(c))	$4,650/$4,650.
2019SAN0064	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2019SAN0077	TWIC Fraudulent Use (49 CFR 1570.7(c))	$3,420/$3,420.
2020BOS0070	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020BOS0103	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020BWI0071	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020BWI0076	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020CLT0099	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020CLT0177	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020CLT0186	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020CLT0187	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020EWR0039	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020EWR0040	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020EWR0093	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020EWR0102	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020HOU0009	TWIC Fraudulent Use (49 CFR 1570.7(c))	$3,500/$2,000.
2020JAX0041	TWIC Fraudulent Use (49 CFR 1570.7(c))	$1,170/$1,170.
2020JAX0042	TWIC Fraudulent Use (49 CFR 1570.7(c))	$1,170/$1,170.
2020JAX0043	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020JAX0082	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020JAX0111	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020MCO0109	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020MCO0155	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020OAK0045	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020OAK0065	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020OAK0068	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020OAK0069	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020OAK0072	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020OAK0119	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020OAK0131	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).

TSA case No.	Type of violation [5]	Penalty proposed/assessed
2020RIC0040	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020RIC0048	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020RIC0050	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020RIC0076	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020SAN0058	TWIC Fraudulent Use (49 CFR 1570.7(c))	$800/$800.
2020SAT0052	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020SEA0068	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020SEA0132	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020SEA0171	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020SEA0184	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020STL0134	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2021RIC0004	TWIC Fraudulent Use (49 CFR 1570.7(c))	None (Warning Notice).
2020CLE0176	TWIC Fraudulent Use (49 CFR 1570.7(d))	None (Warning Notice).
2020HOU0068	TWIC Fraudulent Use (49 CFR 1570.7(d))	None (Warning Notice).
2020HOU0078	TWIC Fraudulent Use (49 CFR 1570.7(d))	None (Warning Notice).
2020MIA0076	TWIC Fraudulent Use (49 CFR 1570.7(d))	None (Warning Notice).
2020SEA0067	TWIC Fraudulent Use (49 CFR 1570.7(d))	None (Warning Notice).
2020SEA0183	TWIC Fraudulent Use (49 CFR 1570.7(d))	None (Warning Notice).
2020SEA0053	TWIC Inspection of Credential (49 CFR 1570.9(a))	None (Warning Notice).

[FR Doc. 2021–26534 Filed 12–7–21; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7034–N–70]

30-Day Notice of Proposed Information Collection: Energy Efficient Mortgages (EEMs); OMB Control No: 2502–0561

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date: January 7, 2022.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/Start* Printed Page 15501PRAMain. 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: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400 (this is not a toll-free number).

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on December 11,2020, at 85 FR 80132.

A. Overview of Information Collection

Title of Information Collection: Energy Efficient Mortgages.

OMB Approval Number: 2502–0561.

Type of Request: Reinstatement of a currently approved collection.

Form Number: N/A.

Description of the need for the information and proposed use:

FHA offers the Energy Efficient Mortgage (EEM) as an approved mortgage insurance product under section 513 of the Housing and Community Development Act of 1992 (section 106 of the Energy Policy Act of 1992). Section 2123 of the Housing and Economic Recovery Act of 2008 (HERA) (Pub. L. 110–289, approved July 30, 2008) amended section 106 of the Energy Policy Act of 1992 by revising the maximum dollar amount that can be added to an FHA-insured mortgage for energy efficient improvements.

The EEM program allows the mortgagors to finance cost-effective energy efficient improvements to an existing property at the time of purchase or refinancing, or for upgrades above the established residential building code for new construction.

Respondents: Business or other for-profit (FHA-approved lenders).

Estimated Number of Respondents: 40.

Estimated Number of Responses: 90.

Frequency of Response: On occasion.

Average Hours per Response: 1.35.

Total Estimated Burdens: 122 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 2 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2021–26555 Filed 12–7–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7034–N–69]

30-Day Notice of Proposed Information Collection: Operating Fund Shortfall Program Financial Reporting and Monitoring, OMB Control No.: 2577-New

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 7, 2022.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/Start* Printed Page 15501PRAMain. 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: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 17, 2021 at 86 FR 51011.

A. Overview of Information Collection

Title of Information Collection: OpFund Shortfall Program Financial Reporting and Monitoring.

OMB Control Number: 2577-New.

Type of Request: New.

Agency Form Numbers: HUD–XXXXX, HUD–XXXXX, HUD–XXXXX, HUD–XXXXX, HUD–52574.

Description of the Need for the Information and Proposed Use: The Shortfall Program has been in operation for two years and was created through annual Appropriations laws providing a $25 million set-aside in the Public Housing Fund to assist Public Housing Agencies (PHAs) experiencing or at risk of financial shortfalls. The program targets PHAs with the lowest Public Housing reserves. Funding is allocated to raise PHAs' reserves to two months of expenses. The calculation that determines this value is outlined in Section 4 of the Shortfall Notice: PIH–2021–12. Along with the infusion of funds, PHAs create Improvement Plans to improve their financial situation and address financial issues. However, without a Paperwork Reduction Act (PRA) approved information collection, it is difficult to monitor the PHAs financial changes and successes in an expeditious way. OMB requested that PIH begin to collect enough information from PHAs to evaluate the efficacy of the program in improving PHA's financial situation. This PRA information collection is being submitted to improve the effectiveness of the program (through monitoring and risk management) which ultimately helps the PHAs reach sustainable financial success. This PRA information collection will include a short-form budget for PHAs to report their budget and actuals through the year so that financial and operational performance can be evaluated; an Action Item Template, which will increase accountability towards making financial improvements; and Shortfall Program Application and Appeal forms. These forms will be accessible to PHA and HUD staff through a web-based portal to increase operational efficiency.

Respondents (i.e. affected public): Public Housing Agencies.

Estimated Number of Respondents: 3,300.

Estimated Number of Responses: 4,274.

Frequency of Response: Varies.

Average Hours per Response: .55.

Total Estimated Burdens: 537.5.

Burden hours for form(s) showing zero burden hours in this collection are reflected in the OMB approval number cited or do not have a reportable burden.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the pubic and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of burden of the proposed collection of information;

(3) Ways to enhance the quality, utility and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2021–26556 Filed 12–7–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7046–C–06]

Privacy Act of 1974; System of Records: Correction

AGENCY: Office of the Chief Financial Officer, HUD.

ACTION: Notice of a modified system of records; correction.

SUMMARY: Line of Credit Controls System (LOCCS), an Office of the Chief Financial Officer (OCFO) system, is a disbursement and cash management system that services the funding needs of HUD's grant, loan, and subsidy clients. Under the Privacy Act of 1974, the Department of Housing and Urban Development, the Office of the Chief Financial Officer proposes to update the system of records titled, Line of Credit Controls System. This system of records allows the Department of Housing and Urban Development OCFO's LOCCS to collect and maintain records on grantees. Because of a review of this system, information has been updated within the System Location section of the SORN and the authorities to collect information for LOCCS has been updated. This notice replaces the notice HUD published on November 18, 2021 at 86 FR 64511.

DATES: This notice action shall be applicable immediately, which will become effective January 7, 2022.

Comments will be accepted on or before: January 7, 2022.

ADDRESSES: You may submit comments, identified by docket number by one of these methods:

Federal e-Rulemaking Portal: http://www.regulations.gov. Follow the instructions provided on that site to submit comments electronically.

Fax: 202–619–8365;

Email: www.privacy@hud.gov;

Mail: Attention: Privacy Office; Ladonne L. White; The Executive Secretariat; 451 Seventh Street SW, Room 10139; Washington, DC 20410–1001.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov.* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: LaDonne White, Chief Privacy Officer, 451 Seventh Street SW, Room 10139; Washington, DC 20410; telephone number 202–708–3559 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The following are to be updated:

- The system location is being changed. LOCCS records are no longer in South Charleston, WV. It is at HUD Headquarters; the National Center for Critical Information Processing and Storage (NCCIPS) Stennis Space Center in Mississippi; and in the Mid-Atlantic Data Center in Clarksville, Virginia.
- Remove instances of Program Accounting System (PAS) because it has been decommissioned. A new module has been added to LOCCS. LOCCS incorporated the entire Program Accounting System (PAS) functionality in this new Award Funding module. PAS users now access LOCCS to perform their daily tasks in the LOCCS Award Funding Module. However, no new Personally Identifiable Information (PII) is being collected, stored, maintained, or disclosed because of the PAS module being incorporated. Social Security Numbers have been removed from the system.
- *Authority for Maintenance of the System:* Replace ''Sec. 113 of the Budget and Accounting Act of 1951 (31 U.S.C.66a)'' with ''31 U.S.C. 3511''.
- Updated Categories of Individuals Covered by System.
- Updated Policies and Practices for Retention and Disposal of Records.
- Routine uses previously included by reference are not explicitly listed in the SORN. This change adds no new routine uses, but merely reorganizes them. The routine uses included by reference to HUD's Appendix I are now explicitly listed.
- Slight changes to the Record Access Procedures, Contesting Records Procedures, and Notification Procedures sections have been made. Minor non-substantive changes have been made to these sections to more accurately describe HUD's practices for accessing, contesting, and notifying.

SYSTEM NAME AND NUMBER:

Line of Credit Control System (LOCCS, A67).

SECURITY CLASSIFICATION:

Sensitive but Unclassified.

SYSTEM LOCATION:

HUD Headquarters, 451 7th Street SW, Washington, DC 20410 and National Center for Critical Information Processing and Storage (NCCIPS), Stennis Space Center, MS 39529. The backup data center is at Mid-Atlantic Data Center in Clarksville, VA 23927.

SYSTEM MANAGER(S):

Assistant Chief Financial Officer for Systems, Office of the Chief Financial Officer, Department of Housing and Urban Development, 451 Seventh Street SW, Room 3100, Washington, DC 20410.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

- 31 U.S.C. 3511
- The Chief Financial Officers Act of 1990 (31 U.S.C. 901, *et seq.*)
- Executive Order 9397, as amended by Executive Order 13478
- Housing and Community Development Act of 1987, 42 U.S.C. 3543

PURPOSES OF THE SYSTEM:

The system is to process and make grant, loan, and subsidy disbursements. LOCCS ensures that payments are made promptly thus achieving efficient cash management practices. It creates accounting transactions with the appropriate accounting classification elements to correctly record disbursements and collections to the grant/project level subsidiary.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Section 8 Contract Administrators (S8CA) and grant recipients (excludes Section 8 Voucher Program).

CATEGORIES OF RECORDS IN THE SYSTEM:

Vendor name, Vendor Number (*e.g.,* EIN, SSN, or TIN), address, DUNS, Banking Account/Routing numbers, and financial data.

RECORD SOURCE CATEGORIES:

Section 8 Contract Administrators and grant recipients provide data to Ft. Worth Accounting Center to enter into LOCCS.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The Privacy Act allows HUD to disclose records from its systems of records, from these headings (1)–(13), to appropriate agencies, entities, and persons, when the records being disclosed are compatible with the purpose for which the system was developed. The routine use statements specified in this notice shall not be used to construe, limit, or waive any other routine use condition or exemption specified in the text of an individual system of records, and may overlap sometimes. The routine use statements and their conditions for disclosure are categorized below.

(1) General Service Administration Information Disclosure Routine Use:

To the National Archives and Records Administration (NARA) and the General Services Administration (GSA) for records having sufficient historical or other value to warrant its continued preservation by the United States Government, or for inspection under authority of title 44, chapter 29, of the United States Code.

(2) Congressional Inquiries Disclosure Routine Use:

To a congressional office from the record of an individual, in response to an inquiry from the congressional office made at the request of that individual.

(3) Health and Safety Prevention Disclosure Routine Use:

To appropriate Federal, State, and local governments, or persons, under showing compelling circumstances affecting the health or safety or vital interest of an individual or data subject, including assisting such agencies or organizations in preventing the exposure to or transmission of a communicable or quarantinable disease, or to combat other significant public health threats, if upon such disclosure appropriate notice was transmitted to the last known address of such individual to identify the health threat or risk.

(4) Consumer Reporting Agency Disclosure Routine Use:

To a consumer reporting agency, when trying to collect a claim owed on behalf of the Government, under 31 U.S.C. 3711(e).

(5) Computer Matching Program Disclosure Routine Use:

To Federal, State, and local agencies, their employees, and agents to conduct computer matching programs as regulated by the Privacy Act of 1974, as amended (5 U.S.C. 552a).

(6) Prevention of Fraud, Waste, and Abuse Disclosure Routine Use:

To Federal agencies, non-Federal entities, their employees, and agents (including contractors, their agents or employees; employees or contractors of the agents or designated agents); or contractors, their employees or agents with whom HUD has a contract, service agreement, grant, cooperative agreement, or computer matching agreement for: (1) Detection, prevention, and recovery of improper payments; (2) detection and prevention of fraud, waste, and abuse in major Federal programs administered by a Federal agency or non-Federal entity; (3) detection of fraud, waste, and abuse by individuals in their operations and programs, but only if the information shared is necessary and relevant to verify pre-award and prepayment requirements before the release of Federal funds, prevent and recover improper payments for services rendered under programs of HUD or of those Federal agencies and non-Federal entities to which HUD provides information under this routine use.

(7) Research and Statistical Analysis Disclosure Routine Uses:

(a) To contractors, grantees, experts, consultants, Federal agencies, and non-Federal entities, including, but not limited to, State and local governments and other research institutions or their parties, and entities and their agents with whom HUD has a contract, service agreement, grant, or cooperative agreement, when necessary to accomplish an agency function, related to a system of records, for statistical analysis and research supporting program operations, management, performance monitoring, evaluation, risk management, and policy development, or to otherwise support the Department's mission. Records under this routine use may not be used in whole or in part to make decisions that affect the rights, benefits, or privileges of specific individuals. The results of the matched information may not be disclosed in identifiable form.

(b) To a recipient who has provided the agency with advance, adequate written assurance that the record provided from the system of records will be used solely for statistical research or reporting purposes. Records under this condition will be disclosed or transferred in a form that does not identify an individual.

(8) Information Sharing Environment Disclosure Routine Uses:

To contractors, grantees, experts, consultants and their agents, or others performing or working under a contract, service, grant, or cooperative agreement with HUD, when necessary to accomplish an agency function related to a system of records. Disclosure requirements are limited to only those data elements considered relevant to accomplishing an agency function. Individuals provided information under these routine use conditions are subject to Privacy Act requirements and disclosure limitations imposed on the Department.

(9) Data Testing for Technology Implementation Disclosure Routine Use:

To contractors, experts and consultants with whom HUD has a contract, service agreement, or other assignment of the Department, when necessary to utilize data to test new technology and systems designed to enhance program operations and performance.

(10) Data Breach Remediation Purposes Routine Use:

(a) To appropriate agencies, entities, and persons when (1) HUD suspects or has confirmed there has breached the system of records; (2) HUD has determined that because of the suspected or confirmed breach there is a risk of harm to individuals, HUD, the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist with HUD's efforts to respond to the suspected or confirmed breach to prevent, minimize, or remedy such harm.

(b) To another Federal agency or Federal entity, when HUD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

(11) Disclosures for Law Enforcement Investigations Routine Uses:

(a) To appropriate Federal, State, local, tribal, or governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would help to enforce civil or criminal laws.

(b) To third parties during a law enforcement investigation, to the extent to obtain information pertinent to the investigation, disclosed such information is appropriate to the proper performance of the official duties of the officer making the disclosure.

(12) Court or Law Enforcement Proceedings Disclosure Routine Uses:

(a) To a court, magistrate, administrative tribunal, or arbitrator while presenting evidence, including disclosures to opposing counsel or witnesses in civil discovery, litigation, mediation, or settlement negotiations; or in connection with criminal law proceedings; or in response to a subpoena or to a prosecution request when such records to be released are specifically approved by a court provided order.

(b) To appropriate Federal, State, local, tribal, or governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would help to enforce civil or criminal laws.

(c) To third parties during a law enforcement investigation to the extent to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

(d) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency that maintains the record, specifying the particular portion desired and the law enforcement activity for which the record is sought.

(13) Department of Justice for Litigation Disclosure Routine Use:

To the Department of Justice (DOJ) when seeking legal advice for a HUD initiative or in response to DOJ's request for the information, after either HUD or DOJ determine that such information relates to DOJ's representatives of the United States or any other components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines before disclosure that disclosure of the records to DOJ is a use of the information in the records that is compatible with the purpose for which HUD collected the records. HUD on its

own may disclose records in this system of records in legal proceedings before a court or administrative body after determining that disclosing the records to the court or administrative body is a use of the information in the records that is compatible with the purpose for which HUD collected the records.

(14) The U.S. Treasury Disclosure Routine Use:

To the U.S. Treasury for transactions such as disbursements of funds and related adjustments;

(15) The Internal Revenue Service Routine Use:

To the IRS for reporting payments for goods and services and for reporting of discharge indebtedness;

(16) The Consumer Reporting Agencies Routine Use:

Disclosures under 5 U.S.C. 552a(b)(12). Disclosures may be made from the system to consumer reporting agencies as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f) or the Federal Claims Collection Act of 1966, 31 U.S.C. 3701(a)(3)). The disclosure is limited to information to establish the identity of the individual, including name, social security number, and address; the amount, status, history of the claim, and the agency or program under which the claim arose solely to allow the consumer reporting agency to prepare a credit report.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic files are stored on servers. Paper printouts or original input documents are stored in locked file cabinets at HUD or as imaged documents on magnetic media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by business partner name, tax ID number, schedule number, voucher number, and contract number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

General Records Schedule 1:1; Financial Management and Reporting Records. This schedule covers records created by Federal agencies in carrying out the work of financial management. Temporary. Destroy 6 years after final payment or cancellation, but longer retention is authorized if required for business use.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

All HUD employees have undergone background investigations. HUD buildings are guarded and monitored by security personnel, cameras, ID checks, and other physical security measures. Access is restricted to authorized personnel or contractors whose responsibilities require access. System users must take the mandatory security awareness training annually as mandated by the Federal Information Security Modernization Act (FISMA) (44 U.S.C. 3541, *et seq.*). Users must also sign a Rules of Behavior form certifying that they agree to comply with the requirements before they are granted access to the system. LOCCS resides on the HUD OCIO Unisys Mainframe. The HUD OCIO Infrastructure and Operations Office (IOO) secures the Stennis and Clarksville Data Centers where the Unisys mainframe resides. The system is limited to those with a business need to know. LOCCS Authorizing Officials authorize LOCCS access for users, and OCFO ensures the user is eligible for access (*e.g.,* suitability, System Security Administrator approval), which allow for segregation of duties. Also, system user recertifications is conducted semi-annually for external users and quarterly for internal users.

RECORD ACCESS PROCEDURES:

Individuals seeking to determine whether this System of Records contains information on themselves should address written inquiries to the Department of Housing Urban and Development, 451 7th Street SW, Washington, DC. For verification, individuals should provide full name, current address, and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made under 28 U.S.C. 1746, in the following format: If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

The HUD rule for accessing, contesting, and appealing agency determinations by the individual concerned are published in 24 CFR part 16 or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Department of Housing Urban Development Chief Financial Officer, 451 7th Street SW, Washington, DC 20410–0001. For verification, individuals should provide full name, office or organization where assigned, if applicable, and current address and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made under 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

[Docket No. FR–5763–N–03].

LaDonne White,

Departmental Privacy Officer.

[FR Doc. 2021–26554 Filed 12–7–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R6–ES–2021–0096; FF06E11000–212–FXES11130600000]

Incidental Take Permit Application; Habitat Conservation Plan Amendment for Montana Department of Natural Resources Lazy-Swift Addition and Wolf Creek Land Exchange; Flathead and Lincoln Counties, Montana

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of documents related to an application to amend an existing incidental take permit (ITP) under the Endangered Species Act. Montana Department of Natural Resources and Conservation has applied for an amendment to their existing ITP, which, if granted, would add lands for coverage under their Forest Management Habitat Conservation Plan (HCP), and which would effectively extend the permit take coverage to these lands for three federally listed species, the grizzly bear,

Canada lynx, and bull trout, and two unlisted species, the westslope cutthroat trout and Columbia redband trout. We invite comments from the public and Federal, Tribal, State, and local governments.

DATES: We will accept comments received or postmarked on or before January 7, 2022. Comments submitted online at *Regulations.gov* (see **ADDRESSES**) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES:

Obtaining Documents: The documents this notice announces, as well as associated background documents and any comments and other materials that we receive, will be available for public inspection online in Docket No. FWS–R6–ES–2021–0096 at *http://www.regulations.gov.*

Submitting Comments: You may submit comments by one of the following methods:

• *Online: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R6–ES–2021–0096.

• *U.S. Mail:* Public Comments Processing, Attn: Docket No. FWS–R6–ES–2021–0096; U.S. Fish and Wildlife Service Headquarters, MS: PERMA; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

We request that you send comments by only the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Ben Conard, by phone at 406–758–6882, by email at *Ben_Conard@fws.gov,* or via the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), have received an application from the Montana Department of Natural Resources and Conservation (DNRC) to amend their incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The amendment would add lands for coverage under the existing forest management habitat conservation plan (HCP) and extend the permit take coverage to these lands for species covered by the HCP: Three federally listed species, the grizzly bear, Canada lynx, and bull trout, and two unlisted species, the westslope cutthroat trout and Columbia redband trout. Take authorization of an unlisted species only becomes effective upon a final listing determination.

The new document available for review and comment is the applicant's requested amendment to the habitat conservation plan (HCP), which is part of their ITP amendment application. The previously finalized HCP and the Service's 2018 final supplemental environmental impact statement (SEIS) and record of decision (ROD) included analysis of potential permit amendments to add lands to the HCP under the National Environmental Policy Act (NEPA), are also available online for reference (see **ADDRESSES**, above). We have reviewed the prior NEPA analysis and determined that the 2018 final SEIS and associated ROD include the appropriate analysis necessary for this ITP amendment, and that no further NEPA documentation is needed.

Applicant's Proposed Amendment

The additional lands include 14,642 acres of acquired forested land now part of the Stillwater State Forest near Olney, Montana, and in the Wolf Creek watershed on DNRC Libby Unit. A 2018 final SEIS considered the environmental effects of amending the HCP and permit as a result of adding acquired lands within the HCP planning area, and addressed public comments received on the 2017 draft SEIS. The DNRC proposes to add 14,642 acres into the HCP planning area for ESA incidental take coverage for DNRC's forest management activities on these lands. Prior to DNRC acquisition, private entities conducted forest management activities on the 14,642 acres of forested lands.

In general, all conservation commitments would be applied specifically as stated in the HCP (as amended in 2018), and all lands that would be added to the HCP fall within the bounds of the original HCP planning area. Some modifications are necessary to accommodate the Lazy-Swift acquisition lands and existing conservation constraints associated with established conservation easements on the properties (*e.g.,* create a new Lynx Management Area, incorporate associated road systems into the existing transportation plan, and accommodate some areas permanently deferred from commercial logging). However, these modifications do not result in a substantial change from conservation commitments made in the HCP and analyzed in the 2018 FEIS.

Background

In 2012, we issued an ITP to DNRC for take of the grizzly bear, Canada lynx, bull trout, westslope cutthroat trout, and Columbia redband trout incidental to forest management activities covered in their HCP (75 FR 57059). The grizzly bear, Canada lynx, and bull trout are listed as threatened under the ESA, while the westslope and Columbia redband trout are not federally listed species. The original permit covered approximately 548,500 acres of forested State trust lands in western Montana. The HCP addressed the process and contingencies for DNRC to transfer, exchange, or add lands for their forest management activities in the future. Thus, the Service had considered in the 2011 final EIS the potential effects of amending the HCP and permit to cover such actions, but was not able to analyze effects from adding specific lands that had not yet been identified.

The 2018 final SEIS (83 FR 24335) analyzed potential effects to the human and natural environment from the preferred alternative to amend the permit to cover take from DNRC's forest management activities on an additional 81,416 acres and the potential future addition of lands within the HCP planning area, including the current amendment request for the addition of 14,642 acres.

Public Comments

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy 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 submissions on *http://www.regulations.gov.*

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.

Authority

We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations for incidental take permits (50 CFR 17.32) and NEPA (42 U.S.C. 4371 *et seq.*) and its implementing regulations (40 CFR 1506.6; 43 CFR part 46).

Stephen Small,

Assistant Regional Director, Ecological Services, Mountain-Prairie Region, U.S. Fish and Wildlife Service.

[FR Doc. 2021–26564 Filed 12–7–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2021–N212; FXES11130300000–201–FF03E00000]

Endangered and Threatened Species; Receipt of Recovery 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, have received applications for permits to conduct activities intended to enhance the propagation or survival of endangered or threatened species under the Endangered Species Act. We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before January 7, 2022.

ADDRESSES: *Document availability and comment submission:* Submit requests for copies of the applications and related documents, as well as any comments, by one of the following methods. All requests and comments should specify the applicant name(s) and application number(s) (*e.g.,* TEXXXXXX; see table in **SUPPLEMENTARY INFORMATION**):

- *Email: permitsR3ES@fws.gov.* Please refer to the respective application number (*e.g.,* Application No. TEXXXXXX) in the subject line of your email message.
- *U.S. Mail:* Regional Director, Attn: Nathan Rathbun, U.S. Fish and Wildlife Service, Ecological Services, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437–1458.

FOR FURTHER INFORMATION CONTACT: Nathan Rathbun, 612–713–5343 (phone); *permitsR3ES@fws.gov* (email). Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), prohibits certain activities with endangered and threatened species unless authorized by a Federal permit. The ESA and our implementing regulations in part 17 of title 50 of the Code of Federal Regulations (CFR) provide for the issuance of such permits and require that we invite public comment before issuing permits for activities involving endangered species.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

We invite local, State, and Federal agencies; Tribes; and the public to comment on the following applications:

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
PER0026145	Zachary Kaiser, Independence, MO.	Indiana bat (*Myotis sodalis*), gray bat (*M. grisescens*), and northern long-eared bat (*M. septentrionalis*).	AL, AR, CT, DC, DE, FL, GA, IA, IL, IN, KS, KY, LA, ME, MA, MD, MI, MN, MO, MS, MT, NC, ND, NE, NH, NJ, NY, OK, OH, PA, RI, SC, SD, TN, VA, VT, WI, WV, WY.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture with mist-nets, handle, identify, radio-tag, light-tag, band, collect non-intrusive measurements, collect hair samples, fungal lift tape, pellets, swab samples, wing punch and release, and salvage.	Renew.
ESPER0003023	Samuel Schratz, Villa Park, IL.	Add one new species, Indiana bat (*Myotis sodalis*), to existing authorized species: Gray bat (*M. grisescens*) and northern long-eared bat (*M. septentrionalis*).	Add: AL, AR, CT, GA, IL, IN, IA, KS, KY, MD, MA, MI, MS, MO, NJ, NY, NC, OH, OK, PA, TN, VT, VA, WV to existing authorized states: DE, DC, FL, LA, ME, MN, MT, NE, NH, ND, RI, SC, SD, WI, WY.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture with mist-nets, handle, identify, radio-tag, band, collect non-intrusive measurements, release.	Amend.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
ES206781	Environmental Solutions & Innovations, Inc., Cincinnati, OH.	Add two new species—Dakota Skipper (*Hesperia dacotae*) and Poweshiek Skipperling (*Oarisma poweshiek*)—to existing authorized species: Gray bat (*Myotis grisescens*), Indiana bat (*M. sodalis*), northern long-eared bat (*M. septentrionalis*), Ozark big-eared bat (*Corynorhinus townsendii ingens*), Virginia big-eared bat (*C. t. virginianus*), Amber darter (*Percina antesella*), blackside dace (*Phoxinus cumberlandensis*), candy darter (*Etheostoma osburni*) Cherokee darter (*Etheostoma scotti*), Conasauga logperch (*Percina jenkinsi*), Diamond darter (*Crystallaria cincotta*), Etowah darter (*Etheostoma etowahae*), Maryland darter (*Etheostoma sellare*), Ozark cavefish (*Amblyopsis rosea*), Niangua darter (*Etheostoma nianguae*), Roanoke logperch (*Percina rex*), Topeka shiner (*Notropis topeka*), Rusty patched bumble bee (*Bombus affinis*), Karner blue butterfly (*Lycaeides melissa samuelis*), Mitchell's satyr butterfly (*Neonympha mitchellii mitchellii*), Running buffalo clover (*Trifolium stoloniferum*), northeastern bulrush (*Scirpus ancistrochaetus*), and American burying beetle (*Nicrophorus americanus*).	AL, AR, CN, DE, DC, GA, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MO, MS, MT, NE, NH, NJ, NY, NC, ND, OK, OH, PA, RI, SC, SD, TN, VT, VA, WV, WI, WY.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture; harp trap; handle; temporary hold; band; radio tag; enter hibernacula; release; electrofish; collect fecal, DNA, and pollen samples.	Amend.
ES206781	EcoAnalysts, Inc., O'Fallon, MO.	Fifty-nine freshwater mussel species	AR, CO, CN, DE, IL, IN, IA, KS, KY, ME, MD, MA, MI, MN, MO, NE, NH, NJ, NY, OK, OH, PA, RI, SD, TN, TX, VA, VT, WV, WI.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture, handle, release	Renew.
ES88224B	Joe Snavely, Chambersburg, PA.	Sixteen freshwater mussel species	IL, IN, IA, MI, MN, MO, NC, OH, WI.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture, handle, release, relocation and marking due to stranding.	Renew.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. 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 request in your comment that we withhold your personal identifying information from public review, 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.

Next Steps

If we decide to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Lori Nordstrom,

Assistant Regional Director, Ecological Services.

[FR Doc. 2021–26566 Filed 12–7–21; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[223.LLID957000.L14400000.BJ0000.241A00]

Notice of Filing of Plats of Survey, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The Bureau of Land Management (BLM) has officially filed the plats of survey of the lands described below in the BLM Idaho State Office, Boise, Idaho. The plats described in this notice were filed on June 28, 2021, and September 22, 2021. The surveys, which were executed at the request of the BLM and the Bureau of Indian Affairs, are necessary for the management of these lands.

ADDRESSES: A copy of the plats may be obtained from the Public Room at the Bureau of Land Management, Idaho State Office, 1387 S Vinnell Way, Boise, Idaho 83709, upon required payment.

FOR FURTHER INFORMATION CONTACT: Timothy A. Quincy, Branch of Cadastral Survey, Bureau of Land Management, 1387 South Vinnell Way, Boise, Idaho, 83709–1657; telephone (208) 373–3981; email: *tquincy@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at (800) 877–8339 to contact Mr. Quincy during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The plat, in one sheet, incorporating the field notes of the dependent resurvey of a portion of the subdivisional lines and Mineral Survey Number 891 in Township 7 North, Range 6 East, Boise Meridian, Idaho, was accepted June 28, 2021.

The plat, in two sheets, incorporating the field notes of the dependent resurvey of portions of the 7th Standard Parallel North and subdivisional lines, and subdivision of sections 5, 15 and 26, Township 35 North, Range 2 East,

Boise Meridian, Idaho, was accepted September 22, 2021.

The plat, in two sheets, incorporating the field notes of the dependent resurvey of portions of the subdivisional lines and the 1885 Meanders of Grays Lake in sections 28, 29, 33 and 34 and certain metes-and-bounds surveys in sections 28, 29, 33 and 34, Township 3 South, Range 43 East, Boise Meridian, Idaho, was accepted September 22, 2021.

The plat, in one sheet, incorporating the field notes of the dependent resurvey of portions of the south boundary and subdivisional lines, and the subdivision of sections 26 and 35, Township 35 North, Range 3 East, Boise Meridian, Idaho, was accepted September 22, 2021.

A person or party who wishes to protest one or more plats of survey identified above must file a written notice with the Chief Cadastral Surveyor for Idaho, Bureau of Land Management, at the address listed in the **ADDRESSES** section of this notice. The protest must identify the plat(s) of survey that the person or party wishes to protest and contain all reasons and evidence in support of the protest. A protest is considered filed on the date it is received by the Chief Cadastral Surveyor for Idaho during regular business hours; if received after regular business hours, a protest will be considered filed the next business day.

Before including your address, phone number, email address, or other personal identifying information in a protest, you should be aware that the documents you submit, including your personal identifying information, may be made publicly available in their entirety at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 43 U.S.C., Chapter 3)

Timothy A. Quincy,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 2021–26600 Filed 12–7–21; 8:45 am]

BILLING CODE 4310–GG–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1296 (Final)]

Hot-Rolled Steel Flat Products From Turkey; Request for Comments Regarding the Institution of a Section 751(b) Review Concerning the Commission's Affirmative Determination; Correction

AGENCY: U.S. International Trade Commission.

ACTION: Notice; correction.

SUMMARY: Correction is made to the deadline for filing comments.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of December 2, 2021 (86 FR 68513) in FR Doc. 2021–26222, on page 68513, in the second column, in the *Written submissions* section, the date of the deadline for filing comments should be January 3, 2022.

Issued: December 2, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26539 Filed 12–7–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1274]

Certain Optical Enclosures, Components Thereof, and Products Containing the Same; Notice of a Commission Determination Not To Review an Initial Determination Terminating the Investigation; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined not to review an initial determination (''ID'') (Order No. 8) of the presiding administrative law judge (''ALJ''), terminating the investigation based on withdrawal of the complaint. This investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Benjamin S. Richards, Esq., 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 (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on August 10, 2021, based on a complaint filed by Criterion Technology, Inc. of Thomaston, GA (''Criterion''). 86 FR 43678 (Aug. 10, 2021). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States or the sale of certain optical enclosures, components thereof, and products containing the same by reason of the misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure a domestic industry. *Id.* The Commission's notice of investigation named as respondents Velodyne Lidar USA, Inc. of San Jose, CA and Fujian Fran Optics Co., Ltd. of Fujian, China. *Id.* The Office of Unfair Import Investigations is also a party to the investigation. *Id.*

On October 27, 2021, Criterion moved, unopposed, to terminate this investigation in its entirety based on withdrawal of the complaint. On November 2, 2021, the ALJ issued the subject ID, Order No. 8, which granted Criterion's motion and terminated the investigation. No petitions for review of the ID were received.

The Commission has determined not to review the subject ID. This investigation is terminated in its entirety.

The Commission vote for this determination took place on December 1, 2021.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: December 2, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–26541 Filed 12–7–21; 8:45 am]

BILLING CODE 7020–02–P

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee; Meeting

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Joint Board for the Enrollment of Actuaries gives notice of a teleconference meeting of the Advisory Committee on Actuarial Examinations (a portion of which will be open to the public) on January 6–7, 2022.

DATES: Thursday, January 6, 2022, from 9:00 a.m. to 5:00 p.m. (EST), and Friday January 7, 2022, from 8:30 a.m. to 5:00 p.m. (EST).

ADDRESSES: The meeting will be held by teleconference.

FOR FURTHER INFORMATION CONTACT: Elizabeth Van Osten, Designated Federal Officer, Advisory Committee on Actuarial Examinations, at 202–317–3648 or *elizabeth.j.vanosten@irs.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will meet by teleconference on Thursday, January 6, 2022, from 9:00 a.m. to 5:00 p.m. (EST), and Friday, January 7, 2022, from 8:30 a.m. to 5:00 p.m. (EST).

The purpose of the meeting is to discuss topics and questions that may be recommended for inclusion on future Joint Board examinations in actuarial mathematics and methodology referred to in 29 U.S.C. 1242(a)(1)(B) and to review the November 2021 Pension (EA–2F) Examination in order to make recommendations relative thereto, including the minimum acceptable pass score. Topics for inclusion on the syllabus for the Joint Board's examination program for the May 2022 Basic (EA–1) Examination and the May 2022 Pension (EA–2L) Examination also will be discussed.

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, that the portions of the meeting dealing with the discussion of questions that may appear on the Joint Board's examinations and the review of the November 2021 Pension (EA–2F) Examination fall within the exceptions to the open meeting requirement set forth in 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such portions be closed to public participation.

The portion of the meeting dealing with the discussion of the other topics will commence at 1:00 p.m. (EST) on January 6, 2022 and will continue for as long as necessary to complete the discussion, but not beyond 3:00 p.m. (EST). Time permitting, after the close of this discussion by Advisory Committee members, interested persons may make statements germane to this subject. Persons wishing to make oral statements should contact the Designated Federal Officer at *NHQJBEA@IRS.GOV* and include the written text or outline of comments they propose to make orally. Such comments will be limited to 10 minutes in length. Persons who wish to attend the public session should contact the Designated Federal Officer at *NHQJBEA@IRS.GOV* to obtain teleconference access instructions. Notifications of intent to make an oral statement or to attend the meeting must be sent electronically to the Designated Federal Officer by no later than December 31, 2021. In addition, any interested person may file a written statement for consideration by the Joint Board and the Advisory Committee by sending it to *NHQJBEA@ IRS.GOV.*

Dated: December 2, 2021.

Thomas V. Curtin,

Executive Director, Joint Board for the Enrollment of Actuaries.

[FR Doc. 2021–26535 Filed 12–7–21; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Tamika Mayo, M.D.; Decision and Order

On July 23, 2019, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Tamika Mayo, M.D. (hereinafter, Respondent), of Baton Rouge, Louisiana. Request for Final Agency Action (hereinafter, RFAA), Exhibit (hereinafter RFAAX) A (OSC), at 1 and 5. The OSC proposed to revoke Respondent's DEA Certificate of Registration, Control No. BM7946835 and to deny any pending applications for a new registration or for renewal pursuant to 21 U.S.C. 824(a)(4) and 823(f), because Respondent had ''committed acts which render [her] registration inconsistent with the public interest.'' *Id.* at 1.

The OSC alleged that Respondent had issued thousands of prescriptions for controlled substances in Louisiana during periods when her Louisiana Controlled Dangerous Substance (hereinafter, CDS) license was expired. *Id.* at 2–3. Specifically, the OSC alleged that between September 1, 2016, and January 17, 2017, Respondent issued over 1,850 prescriptions for controlled substances while her CDS license was expired; between September 1, 2017, and June 13, 2018, Respondent issued over 1,730 prescriptions for controlled substances while her CDS license was expired; and between September 1, 2018, and February 15, 2019, Respondent issued over 400 prescriptions for controlled substances while her CDS license was expired. *Id.* According to the OSC, because Respondent was not authorized to issue prescriptions for controlled substances during these periods, the prescriptions were issued in violation of state and federal law. *Id.* at 3 (citing La. Stat. §§ 40:967(A)(1)(a) & 40:973; La. Admin. Code tit. 46, §§ 2705 & 2707(B)(3)–(4); 21 U.S.C. 841(a)(1); 21 CFR 1306.03 & 1306.04). The OSC concluded that ''[b]y issuing more than 3,900 prescriptions for controlled substances without state authorization, and therefore in violation of state and federal law, [Respondent has] committed such acts as would render [her] continued registration inconsistent with the public interest.'' *Id.* (citing 21 U.S.C. 824(a)(4) & 823(f)(2) & (4)).

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 4 (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. *Id.* at 4–5 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated August 17, 2019, Respondent offered an explanation in response to the allegations and stated that she was ''not waving [sic] [her] right to a hearing.'' RFAAX B. On August 20, 2019, Administrative Law Judge Mark M. Dowd (hereinafter, the ALJ) issued an Order Directing Clarification, in which the ALJ instructed Respondent, if she was seeking a hearing, to ''submit a document affirmatively and unconditionally requesting a hearing'' and stated that if the new document was timely filed, the initial filing would be deemed a timely hearing request. RFAAX C, at 3. By email dated August 27, 2019, Respondent requested a hearing. RFAAX D. On August 28, 2019, the ALJ issued an Order for Prehearing Statements. RFAAX E, at 1. The Government timely filed its prehearing statement on September 9, 2019. *Id.* at 2. On September 30, 2019, the ALJ

issued an Order Terminating Proceedings, in which the ALJ found that based on Respondent's failure to comply with the Order for Prehearing Statements, ''Respondent has implicitly withdrawn her request for a hearing'' and ordered the proceedings terminated. *Id.* at 4. The ALJ noted that Respondent had contacted the Office of Administrative Law Judges on September 20, 2019, and in response she had received: Specific instructions on where to call if she had questions, an additional copy of the Order for Prehearing Statements and an additional request for Respondent to provide a phone number where she could be reached for the conference, which she never provided. *Id.* at 2. On October 2, 2019, Respondent sent multiple emails to the Tribunal offering an explanation and requesting that the proceedings be reopened. ALJX 13–17. However, on October 2, 2019, the ALJ issued an Order Denying Respondent's Request to Reopen These Proceedings, in which the ALJ found that Respondent had not demonstrated sufficient good cause to reopen the matter. RFAAX F, at 4. I have reviewed and agree with the procedural rulings of the ALJ.

On March 30, 2020, the Government forwarded its RFAA, along with the evidentiary record for this matter, to my office. Having considered the record in its entirety, I find that the record established, by substantial evidence, that Respondent committed acts that render her continued registration inconsistent with the public interest. Accordingly, I conclude that the appropriate sanction is to revoke Respondent's DEA registration and to deny any pending applications for renewal or new registration in Louisiana. I make the following findings of fact.

I. Findings of Fact

A. Respondent's DEA Registration

Respondent is registered with the DEA as a practitioner authorized to handle controlled substances in schedules II–V under DEA registration number BM7946835 at 4336 North Blvd., Suite 101, Baton Rouge, LA 70806. RFAAX G–1. Respondent filed a renewal of her DEA registration ''on or about December 5, 2019.'' RFAAX G, at 1.[1]

B. Government's Case

The Government's RFAA includes 18 attached exhibits consisting of copies of hearing procedural documents and orders, a declaration from a DEA Diversion Investigator (hereinafter, DI), a copy of Respondent's DEA certificate of registration, various documents pertaining to the status of Respondent's Louisiana CDS license, and various prescription records from Respondent. *See* RFAAX A–G–11.

In a Declaration dated February 27, 2020, a DI assigned to the New Orleans Field Division described the service of the OSC on Respondent as well as the investigation activities involved in the current matter, including the collection of the Government's exhibits. RFAAX G, at 1–4.

On November 3, 2016, the Louisiana Board of Pharmacy (hereinafter, the Board) provided Respondent with a Termination Notice, notifying her that her CDS license had been terminated because she had failed to renew her license within 30 days after its expiration on September 1, 2016. RFAAX G–3. Respondent's CDS license remained in an expired status until it was renewed, effective January 17, 2017. RFAAX G–2 (Expiration Summary Memo from the Louisiana Board of Pharmacy, dated June 27, 2019).[2] Nonetheless, from September 1, 2016, to January 17, 2017, Respondent issued approximately 1,850 prescriptions for controlled substances in the State of Louisiana. RFAAX G–6 and G–9.

On November 3, 2017, the Board provided Respondent with a second Termination Notice, notifying her that her CDS license had been terminated, because she had failed to renew her license within 30 days after its expiration on September 1, 2017. RFAAX G–4. Respondent's CDS licensed remained in an expired status until it was renewed, effective June 13, 2018. RFAAX G–2. Nonetheless, from September 1, 2017, to June 13, 2018, Respondent issued approximately 1,730 prescriptions for controlled substances in the State of Louisiana. RFAAX G–7 and G–10.

On November 6, 2018, the Board provided Respondent with a third Termination Notice, notifying her that her CDS license had been terminated because she had failed to renew her license within 30 days after its expiration on September 1, 2018. RFAAX G–5. Respondent's CDS licensed remained in an expired status until it was renewed, effective February 15, 2019. RFAAX G–2. Nonetheless, from September 1, 2018, to February 15, 2019, Respondent issued approximately 400 prescriptions for controlled substances in the State of Louisiana. RFAAX G–8 and G–11.

II. Discussion

A. Government's Position

In its RFAA, the Government sought to revoke Respondent's DEA registration and to deny any pending applications for renewal or modification of Respondent's DEA registration because Respondent ''[had] committed acts which render her continued registration inconsistent with the public interest, in violation of 21 U.S.C. 824(a) and 823(f).'' RFAA, at 1. Specifically, the Government argued that Respondent had repeatedly violated state and federal law by issuing thousands of prescriptions for controlled substances while she lacked the authority to do so due to the expiration of her Louisiana CDS license. *Id.* at 7–11. The Government concluded its RFAA by requesting that Respondent's DEA registration be revoked and that any pending applications for modification or renewal of Respondent's DEA registration be denied. *Id.* at 11.

B. Respondent's Position

The only statements from Respondent regarding the allegations appear in the initial letter that Respondent submitted in response to the OSC, which offers some explanation as to her misconduct, but offers no supporting evidence or ability for me to assess the credibility of her unsworn statements. *See* RFAAX B. In her letter, Respondent stated that, as to the first period when she was issuing prescriptions while her license was expired, she was under a lot of stress due to an ongoing divorce and from working two jobs. *Id.* Respondent stated that she did not know that her license was expired, and that ''when [she] was notified in early 2017 that the license had expired, [she] immediately got it renewed.'' *Id.* As to the second period

[1] It appears from Agency records that Respondent's registration is in retired status, although it is unclear exactly what precipitated that status. Regardless, the fact that a registration has expired during the pendency of an OSC does not impact my jurisdiction or prerogative under the Controlled Substances Act (hereinafter, CSA) to adjudicate the OSC to finality. *Jeffrey D. Olsen, M.D.,* 84 FR 68474 (2019). Adjudicating this matter to finality will create an official record the Agency can use in any future interactions with Respondent. As additionally noted in *Olsen,* ''a final adjudication is a public record of the Agency's expectations for current and prospective members of that community,'' and adjudications inform stakeholders, such as legislators and the public, about the Agency's work and allow them to provide feedback to the Agency, thereby helping shape how the Agency carries out its responsibilities under the CSA. *Id.* Adjudicating this matter to finality will create a public record to educate current and prospective registrants about the Agency's expectations regarding the responsibilities of registrants under the CSA and allow stakeholders to provide feedback regarding the Agency's enforcement priorities and practices.

[2] According to the Expiration Summary Memo, the Board was only able to verify periods of expiration after 2007 because prior to 2007, the CDS program was overseen by another agency. *Id.*

when she was issuing prescriptions while her license was expired, Respondent stated that due to personal family issues, ''[she] wasn't even thinking about the CDS license since [she] knew [she] had just gotten it renewed in the early part of the year 2017.'' *Id.* Respondent again stated that she did not realize her license was expired, and that as soon as she was notified in early 2018 that the license was expired, she immediately got it renewed. *Id.* Respondent did not offer an explanation as to the third period when she was issuing prescriptions while her license was expired. *Id.*

Respondent noted that she has practiced medicine in Louisiana for 20 years, she has never had a problem with her CDS license, her medical license has never expired, and her DEA license has never expired. *Id.* Respondent stated that her misconduct was unintentional and that because ''[she] was commuting and not in the office every day, [she] missed the renewal dates.'' *Id.* Respondent also noted that she was ''under horrible levels of stress'' and apologized for ''the license having expired'', stating that it would ''never happen again.'' Respondent concluded her letter by describing corrective action that she had taken, specifically that she had ''logged the expiration date in several places, even on [her] personal cell phone'' and that she was ''renewing on the date that [she receives] the renewal letter.'' *Id.* Respondent also stated that she had already completed the most recent renewal in July 2019. *Id.* Finally, Respondent stated that she was ''not waving [sic] [her] right to a hearing'' and that ''[i]f the DEA wish[ed] to pursue [the matter] after [her] explanation, [she] still would like to come to a hearing.'' *Id.*

As for Respondent's failure to comply with the Order for Prehearing Statements that led to the termination of the proceedings without a hearing, Respondent offered some explanation in her subsequent emails to the Tribunal, in which she requested that the proceedings be reopened. *See* ALJX 13–17. Specifically, Respondent stated that she did not realize that she had to provide additional documents, noting that she did not have a lawyer and was unfamiliar with the course of the proceedings. ALJX 17.

I do not find this explanation regarding her noncompliance with the proceedings to be persuasive. As the ALJ noted in the Order Denying Respondent's Request to Reopen These Proceedings, the Respondent was given clear instructions in the Order for Prehearing Statements to file a Prehearing Statement, as well as the logistics and deadlines for doing so. RFAAX F, at 2–3; *see also* ALJX 5. Further, ''the Respondent's argument that she does not have a lawyer and is not familiar with these proceedings does not provide sufficient cause for her failure to file a Prehearing Statement.'' RFAAX F, at 3; *see also* ALJX 17. There was also ample evidence that the instructions to provide a telephone number were clear and that the date to file a prehearing statement was clear. *See* ALJX 5, at 2–4. Respondent also was in receipt of the Government's Prehearing Statement, so it would be difficult for her to credibly argue ignorance as to what a prehearing statement was. *See* ALJX 6 (Email: Government's Pre-Hearing Statement).

Respondent's statements in her hearing request notably do not refute the allegations in the OSC; therefore, I find that the facts in the record remain uncontested.

C. Analysis

Under Section 304 of the CSA, ''[a] registration . . . to . . . dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts that would render his [or her] registration under section 823 of this title inconsistent with the public interest as determined by such section.'' 21 U.S.C. 824(a)(4). In the case of a ''practitioner,'' defined in 21 U.S.C. 802(21) to include a ''physician,'' Congress directed the Attorney General to consider the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. 21 U.S.C. 823(f).

The DEA considers these public interest factors in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). Each factor is weighed on a case-by-case basis. *Morall* v. *Drug Enf't Admin.,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). Any one factor, or combination of factors, may be decisive. *David H. Gillis, M.D.,* 58 FR 37507, 37508 (1993). Thus, there is no need to enter findings on each of the factors. *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Furthermore, there is no requirement to consider a factor in any given level of detail. *Trawick* v. *Drug Enf't Admin.,* 861 F.2d 72, 76–77 (4th Cir. 1988). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest. . . .'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). When deciding whether registration is in the public interest, the DEA must consider the totality of the circumstances. *See generally Joseph Gaudio, M.D.,* 74 FR 10083, 10094–95 (2009) (basing sanction on all evidence on record).

The Government has the burden of proving that the requirements for revocation of a DEA registration in 21 U.S.C. 824(a) are satisfied. 21 CFR 1301.44(e). When the Government has met its *prima facie* case, the burden then shifts to the Respondent to show that revoking registration would not be appropriate, given the totality of the facts and circumstances on the record. *Med. Shoppe-Jonesborough,* 73 FR 364, 387 (2008).

While I have considered all of the public interest factors,[3] the Government's case invoking the public interest factors of 21 U.S.C. 823(f) seeks revocation of Respondent's registration based solely under Public Interest Factors Two and Four. I find that the Government's evidence with respect to Factors Two and Four satisfies its *prima*

[3] As to Factor One, there is no evidence in the record of any recommendation from Respondent's state licensing board or professional disciplinary authority. 21 U.S.C. 823(f)(1). ''The fact that the record contains no evidence of a recommendation by a state licensing board does not weigh for or against a determination as to whether continuation of Respondent's DEA certification is consistent with the public interest.'' *Roni Dreszer, M.D.,* 76 FR 19434, 19444 (2011).

As to Factor Three, there is no evidence in the record that Respondent has been convicted of an offense under either federal or state law ''relating to the manufacture, distribution, or dispensing of controlled substances.'' 21 U.S.C. 823(f)(3). However, as Agency cases have noted, there are a number of reasons why a person who has engaged in criminal misconduct may never have been convicted of an offense under this factor, let alone prosecuted for one. *Dewey C. MacKay, M.D.,* 75 FR 49956, 49973 (2010). Agency cases have therefore found that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is therefore not dispositive. *Id.*

As to Factor Five, the Government's allegations fit squarely within the parameters of Factors Two and Four and do not raise ''other conduct which may threaten the public health and safety.'' 21 U.S.C. 823(f)(5). Accordingly, Factor Five does not weigh for or against Respondent.

facie burden of showing that Respondent's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). Specifically, I find that the record contains substantial evidence that Respondent violated both Louisiana state law and federal law when she issued thousands of prescriptions for controlled substances in Louisiana during periods when she lacked state authorization to do so. I further find that Respondent failed to provide evidence to rebut the Government's *prima facie* case.

1. Factors Two and Four

The DEA often analyzes Factors Two and Four together. See, *e.g., Fred Samimi, M.D.,* 79 FR 18698, 18709 (2014); *John V. Scalera, M.D.,* 78 FR 12092, 12098 (2013). Under Factor Two, the DEA analyzes a registrant's ''experience in dispensing controlled substances.'' 21 U.S.C. 823(f)(2). Factor Two analysis focuses on a registrant's acts that are inconsistent with the public interest, rather than on a registrant's neutral or positive acts and experience. *Randall L. Wolff, M.D.,* 77 FR 5106, 5121 n.25 (2012) (explaining that ''every registrant can undoubtedly point to an extensive body of legitimate prescribing over the course of [the registrant's] professional career'' (quoting *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 463 (2009))). Similarly, under Factor Four, the DEA analyzes an applicant's compliance with federal and state controlled substance laws. 21 U.S.C. 823(f)(4). The Factor Four analysis focuses on violations of state and federal laws and regulations concerning controlled substances. *Volkman* v. *Drug Enf't Admin.,* 567 F.3d 215, 223–24 (6th Cir. 2009) (citing *Gonzales* v. *Oregon,* 546 U.S. 243, 272, 274 (2006)); *Gaudio,* 74 FR 10090–91.

In this case, Respondent dispensed thousands of prescriptions without a controlled substance license in violation of both state and federal law. Although there are not specific allegations regarding the legitimacy of these prescriptions, I find that dispensing controlled substances without a license constitutes negative dispensing experience and weighs against Respondent's continued registration. In fact, during one year, Respondent's CDS had lapsed for 9 months—the majority of the year.

Regarding Factor Four, the Government alleged that Respondent repeatedly violated state and federal laws related to controlled substances by issuing thousands of prescriptions for controlled substances in Louisiana during periods when her Louisiana CDS license was expired. OSC, at 2–3 (citing La. Stat. §§ 40:967(A)(1)(a) & 40:973; La. Admin. Code tit. 46, §§ 2705 & 2707(B)(3)–(4); 21 U.S.C. 841(a)(1); 21 CFR 1306.03 & 1306.04). According to Louisiana statute, ''[e]very person who conducts research with, manufactures, distributes, procures, possesses, prescribes, or dispenses any controlled dangerous substance within this state . . . shall obtain a controlled dangerous substance license issued by the Louisiana Board of Pharmacy in accordance with the rules and regulations promulgated by the board prior to engaging in such activity.'' La. Stat. Ann. § 40:973(A)(1) (West 2021). Moreover, Louisiana law states that ''[a] licensee shall not engage in any activity requiring a valid CDS license while his license is expired.'' [4] La. Admin. Code tit. 46, § 2707(B)(3) (2021). As for federal law, ''[a] prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). Further, federal law defines an ''individual practitioner'' as ''a physician . . . licensed, registered, or otherwise permitted by . . . the jurisdiction in which he/she practices, to dispense a controlled substance in the course of professional practice.'' 21 CFR 1300.01(b). Additionally, federal law states that ''[a] prescription for a controlled substance may be issued only by an individual practitioner who is . . . authorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession.'' 21 CFR 1306.03(a)(1).

Respondent issued thousands of prescriptions for controlled substances in Louisiana during three separate periods when her Louisiana CDS license was expired. Thus, I find that Respondent violated both federal and Louisiana state law related to controlled substances. *See Lisa Hamilton, N.P.,* 84 FR 71465, 71472 (2019) (finding that prescriptions issued during the lapse of the respondent's Massachusetts Controlled Substances Registration violated state and federal law). In this case, given the repeated and extensive nature of Respondent's violations of federal and state law related to controlled substances, I find that Factors Two and Four weigh against Respondent such that I find Respondent's continued registration to be inconsistent with the public interest and, therefore, that a ground for revocation exists under 21 U.S.C. 824(a)(4). Where, as here, the Government has met its *prima facie* burden of showing that a ground for revocation exists, the burden shifts to the Respondent to show why she can be entrusted with a registration. *See Jeffrey Stein, M.D.,* 84 FR 46968, 46972 (2019).

[4] The Government argues that under state law, the period of expiration during which a Louisiana practitioner cannot prescribe includes the 30 day renewal window because the license has technically expired. *See* RFAA, at 9. This position is supported by the plain language of the statute and the Louisiana Board of Pharmacy's memorandum to DEA, in which it included the initial 30-day window in the listed periods of expiration for Respondent's CDS. *See* RFAAX G–2.

III. Sanction

The Government has established grounds to deny a registration; therefore, I will review any evidence and argument the Respondent submitted to determine whether or not the Respondent has presented ''sufficient mitigating evidence to assure the Administrator that [she] can be trusted with the responsibility carried by such a registration.'' *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller, M.D.,* 53 FR 21931, 21932 (1988)). '''Moreover, because ''past performance is the best predictor of future performance,'' *ALRA Labs, Inc.* v. *Drug Enf't Admin.,* 54 F.3d 450, 452 (7th Cir. 1995), [the Agency] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [the registrant's] actions and demonstrate that [registrant] will not engage in future misconduct.' '' *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009) (quoting *Medicine Shoppe,* 73 FR 364, 387 (2008)); *see also Samuel S. Jackson, D.D.S.,* 72 FR 23853; *John H. Kennnedy,* M.D., 71 FR 35705, 35709 (2006); *Prince George Daniels, D.D.S.,* 60 FR 62884, 62887 (1995). The issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual respondent; therefore, the Agency looks at factors, such as the acceptance of responsibility and the credibility of that acceptance as it relates to the probability of repeat violations or behavior and the nature of the misconduct that forms the basis for sanction, while also considering the Agency's interest in deterring similar acts. *See Arvinder Singh, M.D.,* 81 FR 8247, 8248 (2016).

A. Acceptance of Responsibility

As previously discussed, Respondent effectively waived her right to a hearing and therefore there is no credible evidence on the record regarding acceptance of responsibility for me to consider. Even if I could consider the

initial letter she submitted in response to the OSC, it does not demonstrate sufficient acceptance of responsibility or remedial measures that would aid me in entrusting Respondent with a registration. *See* RFAAX B. In her letter, Respondent offers some explanation as to why she repeatedly failed to renew her Louisiana CDS license in a timely manner, and while the stressful circumstances that she described certainly garner sympathy, Respondent did not unequivocally acknowledge her own error in failing to keep track of the status of her CDS license, which was essential to her ability to lawfully prescribe controlled substances. *Id.*

Respondent stated in her letter that she had logged the expiration date for her CDS license in multiple places, that going forward, she would renew on the date she receives the renewal letter, and that she had already completed the most recent renewal in July 2019. RFAAX B. However, Respondent has not provided any supporting documentation as to these statements. The fact that she repeatedly allowed this lapse to happen year-after-year, does not demonstrate confidence in her future compliance. Moreover, Respondent's errors regarding the prehearing process—errors that ultimately led to the termination of the proceedings—do not inspire confidence that she has improved upon the underlying issue of responsibility regarding her professional licensure.

B. Specific and General Deterrence

In addition to acceptance of responsibility, the Agency considers both specific and general deterrence when determining an appropriate sanction. *Daniel A. Glick, D.D.S.,* 80 FR 74800, 74810 (2015). Specific deterrence is the DEA's interest in ensuring that a registrant complies with the laws and regulations governing controlled substances in the future. *Id.* General deterrence concerns the DEA's responsibility to deter conduct similar to the proven allegations against the respondent for the protection of the public at large. *Id.* In this case, I believe revocation of her DEA registration would deter Respondent and the general registrant community from ignoring the serious state and federal requirements to have specific licensure in order to be entrusted with the responsibility of issuing prescriptions for controlled substances.

C. Egregiousness

The Agency also looks to the egregiousness and the extent of the misconduct as significant factors in determining the appropriate sanction. *Garrett Howard Smith, M.D.,* 83 FR 18910 (collecting cases). Although Respondent's actions in failing to renew her CDS might seem minor or transactional, the extent of the misconduct was not. She issued thousands of prescriptions for controlled substances in Louisiana during three separate periods when her Louisiana CDS license was expired, with these three separate periods occurring successively and each ranging from 4 to 9 months. The record evidence demonstrates that Respondent had been given timely notice via letter that her license was terminated because she had failed to renew it within 30 days after its expiration date, and Respondent did not provide any documentation or explanation to support her claim that she was not made aware until much later. *See* RFAAX B and G–2–G–11. Moreover, the multiple and successive occurrences suggest that Respondent did not take sufficient measures to ensure that her mistake would not be repeated.

As discussed above, to maintain a registration when grounds for revocation exist, a respondent must convince the Administrator that her acceptance of responsibility is sufficiently credible to demonstrate that the misconduct will not reoccur and that she can be entrusted with a registration. I find that Respondent has not met this burden. Respondent has not offered any credible evidence on the record to rebut the Government's case for revocation. Further, Respondent's description of corrective measures was unsupported by evidence, and given Respondent's subsequent errors regarding the prehearing process, Respondent has not demonstrated that she can be trusted with the responsibility of registration at this time. Accordingly, I will order the revocation of Respondent's certificate of registration.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a) and 21 U.S.C. 823(f), I hereby revoke DEA Certificate of Registration No. BM7946835 issued to Tamika Mayo, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a) and 21 U.S.C. 823(f), I hereby deny any pending application of Tamika Mayo, M.D. to renew or modify this registration, as well as any other pending application of Tamika Mayo, M.D. for registration in Louisiana. This Order is effective January 7, 2022.

Anne Milgram,

Administrator.

[FR Doc. 2021–26533 Filed 12–7–21; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Third Amendment To Consent Decree Under the Clean Air Act

On December 2, 2021, the Department of Justice lodged a proposed Third Amendment to Consent Decree (''Amendment'') with the United States District Court for the Northern District of Indiana in the lawsuit entitled *United States and the State of Indiana* v. *BP Products North America Inc.,* Civil Action No. 2:12–CV–207.

The Amendment relates to alleged violations of a 2012 Consent Decree (''Decree'') by BP Products North America Inc., (''BP Products'') at its refinery in Whiting, Indiana (''Whiting Refinery'').

The Amendment will resolve BP Products' violations of particulate matter (''PM'') limits contained in the Decree and at 40 CFR part 60, subpart Ja that are applicable to two fluidized catalytic cracking units (''FCCUs'') at the Whiting Refinery, and a motion to enforce the Decree filed by several Plaintiff-Intervenors.

The Amendment requires more frequent PM testing, revised PM testing parameters, operating parameters for emissions and opacity monitors and for electrostatic precipitators (''ESPs''), a PM emissions control technology, and the installation of various process analyzers. BP Products will also undertake a study to evaluate stack testing and ESP operation during unit startup and shutdown. BP Products will pay $512,450 in stipulated penalties after the Amendment is entered.

The publication of this notice opens a period for public comment on the Amendment. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States and the State of Indiana* v. *BP Products North America Inc.,* D.J. Ref. No. 90–5–2–1–09244. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Amendment may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Amendment upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $8.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Susan M. Akers,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2021–26526 Filed 12–7–21; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

On November 17, 2021, the Department of Justice lodged a proposed consent decree with the United States District Court for the Northern District of West Virginia in the lawsuit entitled *United States and the State of West Virginia by and through the West Virginia Department of Environmental Protection* v. *Berkeley County Public Service Sewer District and Berkeley County Public Service Storm Water District,* Civil Action No. 3:21–CV–179.

This is a civil action for injunctive relief and civil penalties brought against the Berkeley County Public Service Sewer District (the ''Sewer District'') pursuant to Sections 309(b) and (d) of the Clean Water Act (''CWA''), 33 U.S.C. 1319 (b) and (d); and Chapter 16, Article 1, Section 9a of the West Virginia Code, W. Va. Code 16–1–9a. The claims are based on violations of the CWA and the West Virginia Water Pollution Control Act (''WPCA'') in connection with the Sewer District's ownership and operation of sewage collection systems, a pretreatment plant and multiple wastewater treatment plants, and a municipal separate storm sewer system (''MS4'') in Berkeley County, West Virginia. The Berkeley County Public Service Storm Water District (''Storm Water District'') is included as a party to implement injunctive relief measures, because it has taken over operation of the MS4 from the Sewer District.

Under the consent decree, the Sewer District will implement: Comprehensive performance evaluations, corrective action plans, and standard operating procedures for certain treatment plants; a sewage collection systems inspection and maintenance program; pump station compliance requirements; a fats, oil, and grease public education program; and an asset management software system designed to record and track each asset through its life cycle. The Storm Water District will develop and implement an MS4 Manual detailing general programmatic requirements and including plans for implementing measures to ensure compliance with the MS4 Permit. Both Defendants will implement regular training programs. In addition, the Sewer District will pay a civil penalty of $432,000 to the United States and $86,400 to the West Virginia Department of Environmental Protection, and will complete a state supplemental environmental project which will ensure treatment of sewage from two facilities that regularly operate in noncompliance with the West Virginia Water Pollution Control Act.

A **Federal Register** notice opening a period for public comment on the proposed consent decree was published on November 23, 2021. 86 FR 66590 (Nov. 23, 2021). The Justice Department website referenced in the **Federal Register** notice did not provide a link to the relevant complaint and consent decree until November 29, 2021. To ensure a complete comment period, the publication of this second notice opens a new period for public comment on the proposed consent decree.

Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States and the State of West Virginia by and through the West Virginia Department of Environmental Protection* v. *Berkeley County Public Service Sewer District and Berkeley County Public Service Storm Water District,* D.J. Ref. No. 90–5–1–1–11893. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the consent decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $24.00 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the exhibits and signature pages, the cost is $16.75.

Jeffrey Sands,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2021–26577 Filed 12–7–21; 8:45 am]

BILLING CODE 4410–15–P

NUCLEAR REGULATORY COMMISSION

[NRC–2021–0132]

Information Collection: NRC Insider Threat Program for Licensees and Others Requiring Access to Classified Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a proposed collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''NRC Insider Threat Program for Licensees and Others Requiring Access to Classified Information.''

DATES: Submit comments by January 7, 2022. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this

notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David C. Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2021–0132 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov/* and search for Docket ID NRC–2021–0132.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The supporting statement is available in ADAMS under Accession No. ML21330A041.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov/* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a proposed collection of information to OMB for review entitled ''NRC Insider Threat Program for Licensees and Others Requiring Access to Classified Information.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on September 22, 2021 (86 FR 52697).

1. *The title of the information collection:* ''NRC Insider Threat Program for Licensees and Others Requiring Access to Classified Information.''
2. *OMB approval number:* An OMB control number has not yet been assigned to this proposed information collection.
3. *Type of submission:* New.
4. *The form number, if applicable:* There are no forms required under the Insider Threat Program.
5. *How often the collection is required or requested:* Annually or as events occur.
6. *Who will be required or asked to respond:* All licensees or stakeholders who have been granted access to classified information under part 95 of title 10 of the *Code of Federal Regulations* ''Facility Security Clearance and Safeguarding of National Security Information and Restricted Data.''
7. *The estimated number of annual responses:* 99 (71 Reporting + 28 Recordkeepers).
8. *The estimated number of annual respondents:* 28.
9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 3,828 (2,630 Reporting hrs. + 1,198 Recordkeeping hrs.).
10. *Abstract:* The NRC-regulated facilities and their contractors who are authorized to access and possess classified matter are required to provide information and maintain records to demonstrate they have established and are maintaining an Insider Threat Program to identify and protect classified information against a potential insider threat.

Dated: December 3, 2021.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2021–26594 Filed 12–7–21; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93709; File No. SR–NSCC–2021–013]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Proposed Rule Change To Provide for a Passive Acknowledgment Process, Codify Certain Settlement Processes and Make Technical, Clarifying and Conforming Changes to the NSCC Rules & Procedures

December 2, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 18, 2021, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would amend NSCC's Rules & Procedures (''Rules'') [3] in order to (i) provide for a passive acknowledgment process whereby any settling bank that does not timely acknowledge that it will settle its settlement balance with NSCC (*i.e.,* acknowledge its intention to pay to or collect from NSCC), or refuse to settle for one or more Members or Limited Members (collectively, ''NSCC Members'') or AIP Non-Member Funds for which it is the designated Settling Bank or AIP Settling Bank (collectively, ''NSCC Settling Banks'') and has not otherwise been in contact with NSCC, would be deemed to have acknowledged its settlement balances, (ii) amend the definition of ''AIP Settling Bank'' to correspond with the definition of ''Settling Bank'' and remove AIP Settling Bank Only Member as a membership category, (iii) codify certain settlement processes and (iv) make certain technical, clarifying and conforming changes.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to (i) provide for a passive acknowledgment process whereby any settling bank that does not timely acknowledge that it will settle its settlement balance with NSCC (*i.e.,* acknowledge its intention to pay to or collect from NSCC), or refuse to settle for one or more NSCC Members or AIP Non-Member Funds for which it is the designated NSCC Settling Bank and has not otherwise been in contact with NSCC, would be deemed to have acknowledged its settlement balances, (ii) amend the definition of ''AIP Settling Bank'' to correspond with the definition of ''Settling Bank'' and remove AIP Settling Bank Only Member as a membership category, (iii) codify certain settlement processes and (iv) make certain technical, clarifying and conforming changes.

Background

NSCC Membership; Settling Banks and AIP Settling Banks—Settlement Processes

NSCC membership consists of Members that have access to NSCC's guaranteed central counterparty services and Limited Members that have access to NSCC's non-guaranteed services, such as Mutual Fund Services and Alternative Investment Product Services (''AIP'').[4] Limited Members that only have access to AIP are referred to as AIP Members.[5] For purposes of this filing, all Members and Limited Members, including AIP Members, are referred to collectively as NSCC Members. AIP Non-Member Funds are entities that are not AIP Members but that NSCC has approved to settle AIP Payments as described in Rule 53.[6]

NSCC provides a standardized, automated method for money settlement obligations, between NSCC and NSCC Settling Banks acting on behalf of NSCC Members and AIP Non-Member Funds. NSCC's settlement services eliminate manual processing and reduce costs by aggregating the money settlement payments due to or from an NSCC Member or AIP Non-Member Fund, and then, automatically debiting or crediting such NSCC Member's account or AIP Non-Member Fund's account at its NSCC Settling Bank. Money settlement is effected via the Federal Reserve Banks' (''FRB'') National Settlement Service (''NSS'').[7]

NSCC provides two separate settlement processes—(i) end of day settlement for Members and Limited Members other than AIP Members (''EOD Settlement'') and (ii) daily settlement for AIP Members and AIP Non-Member Funds (''AIP Settlement''). Both settlement processes require each NSCC Member or AIP Non-Member Fund to designate a settling bank to effect money settlement on its behalf at NSCC.[8] Settling Banks settle on behalf of Members and Limited Members with respect to EOD Settlement and AIP Settling Banks settle on behalf of AIP Members and AIP Non-Member Funds with respect to AIP Settlement. All AIP money settlement is effected on a gross basis, where on the applicable settlement date, AIP debits are collected first, and in the afternoon all contra-side credits, where the corresponding debits have been collected, are paid.[9]

Each NSCC Settling Bank is required by the NSCC Rules to enter into a settling bank agreement with the NSCC Member or AIP Non-Member Fund on whose behalf it settles and to abide by the Rules.[10] The Rules require Settling Banks to acknowledge to NSCC their settlement balances and their intention to settle with NSCC or their refusal to settle by the settlement deadline.[11] The Rules do not explicitly require AIP Settling Banks to affirmatively acknowledge or refuse to settle, however, since the inception of AIP in 2008, NSCC's settlement procedures have required AIP Settling Banks to affirmatively acknowledge or refuse to settle in the same manner as required by Settling Banks. On a daily basis, NSCC calculates settlement payment amounts for EOD Settlement and for AIP Settlement and reports to NSCC Members and their respective NSCC Settling Banks, a settlement balance.[12] Then, through the Fed Funds Settlement system (''FFS''),[13] the Settling Banks and AIP Settling Banks must submit their acknowledgment of their intent to settle or refusal to settle such amounts on behalf of their respective NSCC Members or AIP Non-Member Funds by a deadline established by NSCC.[14] EOD

[3] Capitalized terms not defined herein are defined in the Rules, *available at https://dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[4] *See* Section 2 of Rule 2, *supra* note 3.

[5] *Id.*

[6] Definition of ''AIP Non-Member Fund'' in Rule 1, *supra* note 3.

[7] Section D.2. of Procedure VIII of the Rules (''Procedure VIII''), *supra* note 3.

[8] *See* Section 1 of Rule 12, *supra* note 3 and Section 7(h) of Rule 53.

[9] *See* Section 7 of Rule 53, *supra,* note 3.

[10] Section 1 of Rule 55, *supra* note 3.

[11] Section D of Procedure VIII, *supra* note 3. A Settling Bank that is a Member and settles solely for its own accounts may opt to not acknowledge its settlement balance. *Id.*

[12] For EOD Settlement, Settling Banks are provided a net-net debit or net-net credit number. Section 2 of Rule 55, *supra* note 3. For AIP Settlement, each AIP Settling Bank is provided an aggregate gross debit number and an aggregate gross credit number with respect to each AIP Member or AIP Non-Member Fund on whose behalf it settles because for AIP Settlement, debits and credits are settled separately. Section 7 of Rule 55, *supra* note 3. For AIP Settlement, the net debts are paid first by AIP Settling Banks at approximately 11 a.m. and then net credits are paid to AIP Settling Banks at approximately 2 p.m. AIP settlement times are posted on NSCC's website.

[13] Section D of Procedure VIII requires Settling Banks to acknowledge settlement balances via ''the terminal system'' which is currently FFS. Section D of Procedure VIII, *supra* note 3.

[14] Section D.1 of Procedure VIII, *supra* note 3. The Rules do not explicitly require AIP Settling Banks to affirmatively acknowledge or refuse to settle, however, NSCC's settlement procedures have required AIP Settling Banks to affirmatively acknowledge or refuse to settle in the same manner as required by Settling Banks.

Settlement occurs at the end of the day and, from an operational perspective, is centralized with DTC's end-of-day money settlement (''DTC Settlement'').[15] For both EOD Settlement and AIP Settlement, if all of the NSCC Settling Banks submit acknowledgments of their intent to settle, then the Settlement Agent will submit the requisite file to the FRB for processing through the NSS.

If an NSCC Settling Bank notifies the Settlement Agent that the NSCC Settling Bank refuses to pay the settlement balance for an NSCC Member or AIP Non-Member Fund, then NSCC will exclude that NSCC Member's or AIP Non-Member Fund's amount and the Settlement Agent will provide the NSCC Settling Bank with a new settlement balance that no longer includes the excluded amount. The NSCC Settling Bank must then immediately send a message to the Settlement Agent acknowledging the new amount.[16] The Settlement Agent will then submit the requisite file to the FRB for processing through the NSS.

If a Settling Bank does not acknowledge or refuse by the settlement acknowledgment deadline, the Settlement Agent will use the most recent contact information available to contact the NSCC Settling Bank. If the Settlement Agent is unable to contact the NSCC Settling Bank or does not receive a response from the NSCC Settling Bank as to the acknowledgment or refusal, NSCC needs to determine whether to request an NSS extension while also determining whether to remove the Settling Bank's settlement balance from the NSS file.

Today, failure of an NSCC Settling Bank to timely respond to the Settlement Agent by the settlement acknowledgment deadline could create uncertainty with respect to timely completion of settlement at NSCC. This is because today, NSCC is not permitted under the Rules and its settlement procedures[17] to submit the NSS file (through the Settlement Agent) unless all NSCC Settling Banks in the file that are required to acknowledge,[18] have acknowledged. NSCC must therefore determine whether it should remove the settlement balance of the unresponsive NSCC Settling Bank from the NSS file in order to allow the processing of the rest of the NSS file for the other NSCC Settling Banks that are part of the NSS file. If NSCC does not remove the settlement balance of the unresponsive NSCC Settling Bank from the NSS file, then the NSS file cannot be created and settlement cannot be completed for the other NSCC Settling Banks that are part of the NSS file. As such, today, NSCC may need to remove the settlement balance of the unresponsive NSCC Settling Bank from the NSS file in order to submit the NSS file and complete settlement for the other NSCC Settling Banks that are part of the NSS file, thus potentially delaying settlement of the NSS file. Such potential delay would arise from the time needed to remove the figure of the unresponsive NSCC Settling Bank and then re-establish the NSS file. Moreover, with respect to the NSCC Members or AIP Non-Member Funds who were using the particular NSCC Settling Bank, NSCC would need to settle individually with those NSCC Members or AIP Non-Member Funds via the Fedwire Funds Service, which also presents the possibility of a delay because of the time it may take to complete this process individually with each affected NSCC Member.

NSCC is proposing to implement a passive acknowledgment process for EOD Settlement and AIP Settlement to address the situation discussed above where an NSCC Settling Bank is unresponsive and cannot be reached. This would allow NSCC to submit the NSS file (through the Settlement Agent) for NSS processing more promptly, and thereby allow settlement to be completed for the other NSCC Settling Banks that are part of the NSS file.

Until 2016, DTC's rules also required settling banks that settled on behalf of DTC Participants for DTC Settlement to affirmatively acknowledge or to refuse to settle. In 2016, DTC amended the Settlement Service Guide to provide for a passive acknowledgment process, such that a settling bank which does not timely affirmatively acknowledge its settlement balance or refuse to settle would be deemed to have acknowledged its settlement balance.[19] In 2020, Fixed Income Clearing Corporation (''FICC'') also filed a rule filing to provide for similar passive acknowledgment process for FICC settling banks.[20] The passive acknowledgment process being proposed by NSCC is the same process that DTC and FICC have put in place.

NSCC Passive Acknowledgment Process

NSCC proposes to introduce a settling bank passive acknowledgment process in the Rules for Settling Banks and for AIP Settling Banks to manage the collection or payment of settlement amounts in the event that any Settling Bank or AIP Settling Bank does not timely provide an affirmative acknowledgment or refusal with respect to its settlement payment amounts by the settlement acknowledgment deadline. If a Settling Bank or an AIP Settling Bank does not acknowledge or refuse its settlement amount by the settlement acknowledgment deadline and NSCC is unable to establish contact with the Settling Bank or AIP Settling Bank, NSCC proposes to deem the Settling Bank's or AIP Settling Bank's final settlement balance as acknowledged. Through this proposed passive acknowledgment process, NSCC will assume that the Settling Bank or AIP Settling Bank that has failed to acknowledge its figures or refused to settle by the settlement acknowledgment deadline, intends to settle for its respective NSCC Members or AIP Non-Member Funds. The Settling Bank's or AIP Settling Bank's final debit settlement balance or final credit settlement balance would then be debited from or credited to its account at the Federal Reserve Bank through the NSS process.

Even with the implementation of the proposed passive acknowledgment process, NSCC must retain the discretion to remove the settlement balance of an NSCC Settling Bank from the NSS file.[21] In other words, currently, NSCC may remove the NSCC Settling Bank's figure from the NSS file in the situation where an NSCC Settling Bank is unresponsive and cannot be reached. Under the proposal, the need for NSCC to do so would arise in the event that an NSCC Settling Bank advises the Settlement Agent that it cannot yet determine whether to acknowledge or refuse. In such a circumstance, passive acknowledgment would not apply (as described below); however, as it gets closer to the NSS processing time, NSCC may need to remove the NSCC Settling Bank's settlement balance from the NSS

[15] DTC Settlement procedures and timing are set forth in the Settlement Service Guide of DTC (''Settlement Service Guide'') *available at https://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Settlement.pdf.* Because EOD Settlement and DTC Settlement are centralized, the timing and processes for NSCC Settlement are the same as those set forth in the Settlement Service Guide.

[16] Section D.1 of Procedure VIII, *supra* note 3. The Rules do not explicitly require acknowledgment of the new settlement balance for AIP Settling Banks, however, since the inception of AIP in 2008, NSCC's settlement procedures have required AIP Settling Banks to affirmatively acknowledge or refuse to settle in the same manner as required by Settling Banks.

[17] *Id.*

[18] A Settling Bank that is a Member and settles solely for its own accounts may opt to not acknowledge its settlement balance. Section D of Procedure VIII, *supra* note 3.

[19] *See* Securities Exchange Act Release No. 76887 (January 13, 2016), 81 FR 3218 (January 20, 2016) (SR–DTC–2015–011).

[20] *See* Securities Exchange Act Release No. 89593 (August 18, 2020), 85 FR 52164 (August 24, 2020) (SR–FICC–2020–006).

[21] This practice is currently not codified in the Rules.

file in order to allow settlement to be completed for the other NSCC Settling Banks that are part of the NSS file and have affirmatively or passively acknowledged their figure. NSCC is proposing to codify its ability to remove the settlement balance of the NSCC Settling Bank from the NSS file. As NSCC would be codifying this current practice with this proposed rule change, this proposed rule change would not change the current settlement process of NSCC Settling Banks that are excluded from the NSS file. This proposed change is discussed below.

(i) Proposed Change To Introduce Passive Acknowledgment Process for NSCC Settling Banks

Proposed Passive Acknowledgment Process

NSCC proposes to establish an ''Acknowledgment Cutoff Time'' for EOD Settlement and an ''AIP Acknowledgment Cutoff Time'' for AIP Settlement after which NSCC would apply the passive acknowledgment process if it is unable to reach an NSCC Settling Bank. Since EOD Settlement is centralized with DTC Settlement, the Acknowledgment Cutoff Time will be the Acknowledgment Cutoff Time established in the Settlement Service Guide for DTC Settlement.[22] To conform with current practice, the ''Acknowledgment Cutoff Time'' would be defined in Rule 1 as the time set forth as the Acknowledgment Cutoff Time in the DTC Settlement Service Guide which can be found on NSCC's website at *https://www.dtcc.com/legal/rules-and-procedures.* The ''AIP Acknowledgement Cutoff Time'' would be defined in Rule 1, with respect to each AIP Settling Bank regarding AIP Settlement of AIP Debit Balances and AIP Credit Balances, as the later of (i) 30 minutes after the AIP Settling Bank has been notified of its AIP Debit Balance or AIP Credit Balance (or, the new AIP Debit Balance or new AIP Credit Balance, if readjusted as set forth herein), as applicable, and (ii) 30 minutes prior to the settlement deadline established by NSCC. NSCC would add a statement that it would post the settlement deadlines for AIP Settlement on the NSCC website which it currently does.

If an NSCC Settling Bank does not submit either (1) an acknowledgment that it will settle the settlement balance with NSCC or (2) a refusal to pay the settlement balance by the Acknowledgment Cutoff Time or the AIP Acknowledgment Cutoff Time, as applicable, and has not been in contact with the Settlement Agent, then the Settlement Agent would attempt to contact the NSCC Settling Bank. If the Settlement Agent is able to contact the NSCC Settling Bank and it notifies the Settlement Agent that the NSCC Settling Bank cannot, at that time, submit its acknowledgment or refusal to pay its settlement balance and that it needs more time, then the NSCC Settling Bank would not be deemed to have acknowledged that it will settle such settlement balance with NSCC. However, if the NSCC Settling Bank cannot be reached, then the NSCC Settling Bank would be deemed to have acknowledged that it will settle such settlement balance with NSCC.

The passive acknowledgment process described herein would also apply in situations where an NSCC Settling Bank is provided with a new settlement balance after such NSCC Settling Bank's refusal to pay the settlement balance for one or more NSCC Members or AIP Non-Member Funds.

NSCC would also revise the Rules to state that each NSCC Settling Bank must ensure that it maintains accurate contact details with the Settlement Agent so that the Settlement Agent may contact the NSCC Settling Bank regarding this settlement process and any settlement issues.

Proposed Changes to Rule 1, Rule 55 and Procedure VIII

The proposed passive acknowledgment process will require changes to Rule 1, Rule 55 with respect to AIP Settlement and Procedure VIII with respect to EOD Settlement. Specifically, NSCC proposes to add proposed new defined terms ''Acknowledgment Cutoff Time'' and ''AIP Acknowledgment Cutoff Time'' in Rule 1 as discussed above. NSCC proposes to add a phrase at the end of new subsection (b) of Section D.1. of Procedure VIII that would apply to Settling Banks that settle solely for their own accounts to state that if they choose to opt out of having to acknowledge their settlement balance, new subsections (c) and (e) (described below) of Section D.1. of Procedure VIII would not apply to them.[23]

NSCC proposes to add a new subsection (c) in Section 9 of Rule 55 and in Section D.1 of Procedure VIII to provide that if the NSCC Settling Bank does not acknowledge its settlement balance or notify the Settlement Agent that it refuses to settle, then at the AIP Acknowledgment Cutoff Time or Acknowledgment Cutoff Time, as applicable, the NSCC Settling Bank is deemed to have acknowledged its settlement balance.

NSCC proposes to amend the language in new subsection (d) of Section D.1 of Procedure VIII to delete the requirement that Settling Banks must send a message immediately after sending a refusal message acknowledging the new amount if it is a credit and its intention to settle if it is debit and instead provide that if the Settling Bank sends refusal messages, it must acknowledge to the Settlement Agent by the Acknowledgment Cutoff Time, its new settlement balance and its intention to settle by the settlement deadline. In addition, a sentence would be added stating that the new subsection (c) would apply with respect to the new settlement balances of the Settling Bank that sent refusal messages. Similar language would be added as a new subsection (d) of Section 9 in Rule 55 with respect to AIP Settling Banks and AIP Settlement.

NSCC proposes to amend Section 9 of Rule 55 and Section D.1 of Procedure VIII to add new subsection (e) which would provide that the Settlement Agent would attempt to contact the NSCC Settling Bank if no acknowledgment or notice of refusal to settle on behalf of one or more NSCC Member or AIP Non-Member Fund, as applicable, for which it is designated as the NSCC Settling Bank is received by

[22] The Acknowledgment Cutoff Time established in the Settlement Service Guide is currently the later of 4:15 p.m. and the time that is 30 minutes after net-net settlement balances are first made available. Page 19 of the Settlement Service Guide, *supra* note 15. For AIP, the current deadline for debit acknowledgment in NSCC's settlement procedures is 9:30 a.m. and the current deadline for credit acknowledgment is 12:30 p.m. Such times are posted on NSCC's website.

[23] Proposed subsections (c) and (e) describe the proposed passive acknowledgment process. As described above, if a Settling Bank that is a Member settles solely for its own account opts to not acknowledge its own settlement balance, the passive acknowledgment process would not apply to such Settling Banks because such Settling Banks cannot refuse to settle for their own accounts. For operational convenience, Settling Banks that are Members may choose to not acknowledge their own settlement balance because they cannot refuse to settle for their own accounts. Members are also required to be Participants at DTC and the Settlement Service Guide provides that a DTC Participant that acts as its own Settling Bank may not refuse to settle for itself. *See* p. 18 of the Settlement Service Guide, *supra,* note 15. As set forth below, NSCC is proposing to codify the practice in the Rules with respect to Members by adding a statement that a Settling Bank that is a Member may not refuse to settle for itself in Section D.1 of Procedure VIII. Therefore, proposed subsections (c) and (e) would not apply to such Settling Banks.

the AIP Acknowledgment Cutoff Time or Acknowledgment Cutoff Time, as applicable. The new subsections would provide that if (i) the Settlement Agent is able to contact the NSCC Settling Bank and (ii) the NSCC Settling Bank notifies the Settlement Agent that it cannot, at that time, acknowledge or refuse their settlement balance, then the NSCC Settling Bank will not be deemed to have acknowledged its settlement balance. The new subsections would provide that if the NSCC Settling Bank cannot be reached, the NSCC Settling Bank will be deemed to have acknowledged its settlement balance. In the new subsection (e) of Section D.1 of Procedure VIII, NSCC would also state that the new proposed subsection (e) would not apply to a Settling Bank that settles solely for its own account and opts not to acknowledge its settlement balance.[24] As discussed in more detail below, the new subsection (e) of Section 9 of Rule 55 and Section D.1 of Procedure VIII would also contain a provision relating to NSCC's ability to exclude an NSCC Settling Bank's settlement balances from the NSS file if the NSCC Settling Bank has not acknowledged or been deemed to have acknowledged its settlement balance under certain circumstances.

NSCC proposes to add a new subsection (g) of Section 9 in Rule 55 and a new subsection (g) of Section D.1 of Procedure VIII which would provide the Settlement Agent uses the most recent contact information provided by the NSCC Settling Bank to the Settlement Agent. These proposed subsections would also include a requirement that each NSCC Settling Bank maintains up-to-date and accurate contact details with the Settlement Agent on an ongoing basis.

NSCC proposes to delete language in Section D.1 of Procedure VIII that states that if NSCC has not received funds from the Settling Bank with a net-net debit and the Settling Bank has not sent refusal messages and/or an acknowledgment message to NSCC by the deadline, NSCC begins failure to settle procedures in respect to the Settling Bank at this time. NSCC is proposing to delete this language to reflect the new passive acknowledgment process.

(ii) Amend the Definition of ''AIP Settling Bank'' To Correspond With the Definition of ''Settling Bank'' and Remove AIP Settling Bank Only Member as a Membership Category.

The proposed change would amend the definition of AIP Settling Bank to correspond with the definition of Settling Bank and remove AIP Settling Bank Only Member as a membership category. AIP Settling Bank is currently defined as either (i) an AIP Member which is a bank or trust company meeting certain criteria or (ii) an AIP Settling Bank Only Member meeting certain criteria and which have entered into an effective Appointment of AIP Settling Bank and AIP Settling Bank Agreement. Since the inception of AIP, AIP Members have used (a) Members that are banks or trust companies meeting certain criteria and (b) Settling Bank Only Members meeting certain criteria and which have entered into Appointments of AIP Settling Bank and AIP Settling Bank Agreements as AIP Settling Banks. Since the inception of AIP, there have been no AIP Members that have acted as AIP Settling Banks and there have been no entities that have become AIP Settling Bank Only Members.

The proposed change would amend the definition of AIP Settling Bank in Rule 1 to provide that an AIP Settling Bank would be either (i) a Member which is a bank or trust company meeting certain criteria or (ii) a Settling Bank Only Member meeting certain criteria and which has entered into an effective Settling Bank Agreement which would be identical to the definition of Settling Bank. The definition of Settling Bank Agreement distinguishes between Settling Banks and AIP Settling Banks by indicating that in the Settling Bank Agreement entered into by an AIP Settling Bank, the AIP Settling Bank undertakes to perform settlement services for the AIP Member or the AIP Non-Member Fund which is a party thereto whereas Settling Banks make such undertakings with respect to Members and Limited Members that are not AIP Members. In addition, NSCC would delete the definition of AIP Settling Bank Only Member in Rule 1 and remove the term throughout the Rules, including a description of AIP Settling Bank Only Members in Section 2.(ii)(i) of Rule 2. NSCC would also change the reference to 2.(ii)(i) of Rule 2 in the definition of AIP Settling Bank to 2.(ii)(f) of Rule 2 to reflect that is referring to a Member which would qualify as a Settling Bank Only Member rather as an AIP Settling Bank Only Member. In addition, NSCC would amend Section 5 of Rule 3 to provide that NSCC shall maiCtain a list of Members and Settling Bank Only Members that have agreed to act as AIP Settling Banks to reflect that AIP Members would use Members and Settling Bank Only Members as AIP Settling Banks, as discussed above. Section 1 of Rule 55 would also be amended to reflect that an AIP Settling Bank shall be a Member or a Settling Bank Only Member. Addendum B would be amended to remove the references to AIP Settling Bank Only Members and to delete Section 11 which relates to membership requirements for AIP Settling Bank Only Members.

(iii) Codify Certain Settlement Processes

The proposed rule change would codify certain settlement processes that are currently being used by NSCC.

Proposed Change to Codify Certain Settlement Processes for AIP Settlement

Currently there are a number of settlement processes used in AIP Settlement that are not explicitly set forth in the Rules. These processes are the same processes that are set forth in the Section D.1 of Procedure VIII with respect to EOD Settlement and would be added in Section 9 of Rule 55 as follows:

- A statement that DTC will act as Settlement Agent for NSCC and the AIP Settling Banks in a new subsection (b)
- A requirement that AIP Settling Banks must acknowledge by the AIP Acknowledgment Cutoff Time via the terminal system their AIP Debit Balance and their AIP Credit Balance and their intention to settle or refusal to settle by the AIP Acknowledgment Cutoff Time in a new subsection (b); as proposed above, there would be an AIP Acknowledgment Cutoff Time with respect to AIP Settlement for the AIP Debit Balances and the AIP Credit Balances
- A statement that if the AIP Settling Bank has an AIP Debit Balance, then the AIP Settling Bank's account at the Federal Reserve Bank will be debited; if the AIP Settling Bank has an AIP Credit Balance, then the AIP Settling Bank's Federal Reserve Bank account will be credited in new subsection (c)
- A statement that if the AIP Settling Bank sends a refusal message it must acknowledge its new AIP Debit Balance and AIP Credit Balance by the AIP Acknowledgment Cutoff Time via the terminal system and its intention to settle in new subsection (d)
- A statement that the AIP Settling Bank that cannot send an

[24] Section D.1 of Procedure VIII provides that Settling Bank that is a Member and settles solely for its own accounts may opt to not acknowledge it settlement balance. Section D.1 of Procedure VIII, *supra,* note 3.

acknowledgment or refusal message may contact the Settlement Agent and instruct the Settlement Agent to act on its behalf in new subsection (f)

Proposed Change To Allow NSCC To Exclude NSCC Settling Bank Balance From NSS file

The proposed rule change would provide that if (1) passive acknowledgment does not apply because the NSCC Settling Bank has notified the Settlement Agent that it cannot yet acknowledge or refuse its settlement balance and (2) the payment deadline established by NSCC is approaching, then NSCC would have the ability to exclude the NSCC Settling Bank's settlement balance from the NSS file. This would allow settlement to be completed for the other NSCC Settling Banks that are part of the NSS file. As described above, as it gets closer to the payment deadline, NSCC may need to remove the NSCC Member's balance from the NSS file in order to allow settlement to be completed for the other NSCC Settling Banks that are part of the NSS file. As NSCC would be codifying its current practice with this proposed rule change, this proposed change would not change the current settlement process of NSCC Settling Banks that are excluded from the NSS file.

This proposed change is reflected in the second paragraph of new subsection (e) of Section 9 of Rule 55 and new subsection (e) of Section D.1 of Procedure VIII.

(iv) Proposed Technical, Clarifying and Conforming Changes

NSCC is proposing to make the following technical, clarifying and conforming changes in the Rules to better clarify the meaning of certain provisions and to be consistent with other provisions in the Rules:

- Remove the space after ''Section 2.'' in the new proposed reference to ''Section 2. (ii)(f)'' in two places in the definition of AIP Settlement Bank in Rule 1 for clarity
- Add a definition of ''FRB'' as the Board of Governors of the Federal Reserve System and each Federal Reserve Bank, as appropriate, to reflect the usage of FRB in the Rules
- Add a definition of FRBNY as the Federal Reserve Bank of New York, to reflect the usage of FRBNY in the Rules
- Change the reference of ''2. (ii)(j)'' to ''2.(ii)(i)'' in the definition of Investment Manager/Agent Member in Rule 1 to reflect the proposed renumbering of that section
- Add AIP Settling Banks in the definition of Settlement Agent in Rule 1 to clarify that the Settlement Agent also acts on behalf of AIP Settling Banks with respect to AIP Settlement
- Add quotation marks to TPP Member in the definition of Third Party Provider Member to conform usage of quotation marks in other defined terms in the Rules
- Change the reference of ''2. (ii)(k)'' to ''2.(ii)(j)'' in the definition of Third Party Provider Member in Rule 1 to reflect the proposed renumbering of that section
- Renumber Sections 2.(ii)(j) and 2.(ii)(k) to reflect the deletion of AIP Settling Bank Only Member in Section 2.(ii)(i)
- Add ''Rule 55'' in Section 7(a) of Rule 53 to acknowledge that certain AIP settling processes are set forth in Rule 55
- Add subsection references to Section 9 of Rule 55 for clarity
- Replace ''the Procedures'' with ''Section 9 above'' in Section 10 of Rule 55 to reflect that the manner and time specified for AIP Refusal is set forth in Section 9 of Rule 55
- Change ''Refusal'' to ''AIP Refusal'' in Sections 10, 11 and 12 of Rule 55 to reflect the proper defined term for refusals with respect to AIP Settlement
- Add ''or the Settlement Agent'' in two places in Section 10 of Rule 55 to reflect that the bank used for settlement and the manner of payment of settlement may be specified by NSCC or the Settlement Agent
- Remove ''provided in the Procedures'' and ''in the Procedures'' and add ''specified in accordance with settlement procedures adopted by the Corporation or the Settlement Agent'' in Section 10 of Rule 55 to reflect that the bank account and manner of payment may be specified in settlement procedures adopted by NSCC or the Settlement Agent
- Replace ''net debit'' and ''debit balance'' with ''AIP Debit Balance'' in Section 10 of Rule 55 to reflect the existing defined term
- Add ''settlement'' before ''procedures'' in Section 10 of Rule 55 to clarify that the reference is to settlement procedures
- Change ''Settling Bank'' to ''AIP Settling Bank'' in Section 11 of Rule 55 to reflect the proper defined term for settling banks with respect to AIP Settlement
- Change ''Settling AIP Bank'' to ''AIP Settling Bank'' in Section 12 of Rule 55 to reflect the proper defined term
- Add a defined term ''Settlement Member'' in new subsection (a) in Section D.1 of Procedure VIII which would be a Member, Mutual Fund/Insurance Service Member, Insurance Carrier/Retirement Service Member or Fund Member for which a Settling Bank is the designated Settling Bank to replace the reference to ''each of its participant's accounts''
- Add a defined term ''Settlement Balance'' in new subsection (a) in Section D.1. of Procedure VIII which would be the Settling Bank's final settlement balance and replace the phrase ''settlement figure'' with ''settlement balance'' to reflect usage elsewhere when referring to the settlement balance
- Replace ''NSCC'' with ''Settlement Agent'' in new subsection (b) in D.1 of Procedure VIII to reflect that the Settling Banks acknowledge to the Settlement Agent their intention to settle
- Replace ''settlement figures'' with ''Settlement Balances'' in new subsection (b) in Section D.1. of Procedure VIII to reflect the new defined term
- Replace the list of Members and Limited Members that may use a Settling Bank with the new defined term ''Settlement Members'' in new subsection (b) in Section D.1 of Procedure VIII to reflect the new defined term.
- Remove the sentence in new subsection (b) in D.1 of Procedure VIII that states that an acknowledgment must be sent even if the Settling Bank has wired the amount of its net net debit prior to the cut off time because the statement is unnecessary as it is unlikely that situation would occur
- Add a statement in new subsection (b) in D.1 of Procedure VIII to codify current practice set forth in the Settlement Service Guide with respect to Participants that applies to Members that a Settling Bank that is a Member may not refuse to settle for itself
- Revise new subsection (f) in Section D.1. of Procedure VIII to remove outdated references to NSCC, the telephone as the only means of contact and a number for Settlement Operations in the membership directory to reflect the current procedures such that a Settling Bank that cannot send an acknowledgment or refusal message may contact the Settlement Agent and instruct the Settlement Agent act on its behalf
- Replace ''NSCC'' with ''Settlement Agent'' in two places in new subsection (h) in Section D.1 of Procedure VIII to reflect that Settling Banks send their acknowledgments to the Settlement Agent

- Replace ''this time'' with ''the settlement deadline'' in the new subsection (h) in Section D.1 of Procedure VIII to clarify that it is referring to the settlement deadline
- Replace the list of Members and Limited Members for which a Settling Bank may send a refusal with ''Settlement Member'' to reflect the proposed new defined term in the new subsection (i) in Section D.1 of Procedure VIII
- Replace ''Corporation'' with ''Settlement Agent'' in new subsection (j) in Section D.1 of Procedure VIII to reflect that the Settlement Agent will receive funds and initiate payments to Settling Banks
- Replace ''Federal Reserve Bank's National Settlement Service'' with ''NSS'' in Section D.2. of Procedure VIII to reflect that NSCC is proposing to move the defined term NSS earlier in the Rules
- Capitalize ''balance'' in Section D.2. of Procedure VIII to reflect the new defined term Settlement Balance
- Make ''Settlement'' lowercase in Section D.3 of Procedure VIII to reflect that Settlement is not a defined term
- Add the word ''operations'' before ''department'' in Section D.3 of Procedure VIII to reflect that the name of the department is the settlement operations department
- Capitalize ''settlement balance'' in Section D.3 of Procedure VIII to reflect the new defined term

2. Statutory Basis

NSCC believes this proposal is consistent with the requirements of the Act, and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, NSCC believes this proposal is consistent with Section 17A(b)(3)(F) of the Act.[25]

Section 17A(b)(3)(F) of the Act requires, in part, that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.[26] The EOD Settlement and AIP Settlement processes at NSCC reflect cash debits and credits of payments that are associated with securities transactions that will ultimately be subject to securities settlement. NSCC believes that failure by an NSCC Settling Bank to timely acknowledge that it will settle its settlement balance with NSCC or to refuse to pay its settlement balance creates uncertainty with respect to the timely completion of settlement at NSCC. NSCC believes that the introduction of the proposed passive acknowledgment process described in Item II.(A)1.(i) above would help promote the prompt and accurate clearance and settlement of securities transactions in circumstances where an NSCC Settling Bank has not responded by the Acknowledgment Cutoff Time or the AIP Acknowledgment Cutoff Time, as applicable, and cannot be reached by the Settlement Agent. In such circumstances, as described above, NSCC would deem that such NSCC Settling Bank has acknowledged that it will settle settlement balances. This would enable NSCC to submit the NSS file (through the Settlement Agent) as is for processing in a timely manner, and thereby enhance certainty with respect to the timely completion of settlement. Timely completion of such settlement at NSCC for as many members as possible promotes the prompt and accurate clearance and settlement of securities transactions as a general matter, because the EOD Settlement and AIP Settlement processes at NSCC involve debits and credits that will ultimately be subject to securities settlement. As such, NSCC believes the proposed change to introduce the passive acknowledgment process described in Item II.(A)1.(i) above is designed to promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[27]

NSCC also believes that the proposal to (a) amend the definition of ''AIP Settling Bank'' to correspond with the definition of ''Settling Bank'' and remove AIP Settling Bank Only Member as a membership category described in Item II.(A)1.(ii) above and (b) codify certain settlement processes for AIP Settlement described in Item II.(A)1.(iii) above are designed to promote the prompt and accurate clearance and settlement of securities transactions.[28] As discussed above settling banks used for AIP Settlement have historically been Members or Settling Bank Only Members and not AIP Members or AIP Settling Bank Only Members. In addition, there have been no entities that have become AIP Settling Bank Only Members. The existing processes related to AIP Settlement that are being added as described in Item II.(A)1.(iii) above are existing processes in AIP Settlement. NSCC believes that in each case making such provisions explicit in the Rules is consistent with Section 17(A)(b)(3)(F) of the Act[29] because such changes would enhance the clarity and transparency of the Rules with respect to AIP Settlement. By enhancing the clarity and transparency of the Rules, the proposed changes would allow AIP Members and AIP Non-Member Funds to more efficiently and effectively conduct their business in accordance with the Rules, which NSCC believes would promote the prompt and accurate clearance and settlement of securities transactions. As such, NSCC believes that the proposed changes would be consistent with Section 17A(b)(3)(F) of the Act.[30]

NSCC also believes that the proposal to codify NSCC's ability to exclude an NSCC Settling Bank's balance from the NSS file described in Item II.(A)1.(iii) above is designed to promote the prompt and accurate clearance and settlement of securities transactions.[31] If an NSCC Settling Bank notifies the Settlement Agent that it cannot yet acknowledge or refuse, NSCC would not be able to submit the NSS file (through the Settlement Agent) with that NSCC Settling Bank's settlement balance included. If the NSCC Settling Bank does not ultimately respond with either an acknowledgment or refusal, then NSCC must have the ability to exclude such NSCC Settling Bank's settlement balance from the NSS file. In this way, settlement can be completed for all other NSCC Members. Therefore, NSCC believes the proposed changes to codify NSCC's ability to exclude an NSCC Settling Bank's balance from the NSS file described in in Item II.(A)1.(iii) above is designed to promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[32]

NSCC also believes that the proposed rule changes to make the technical, clarifying and conforming changes, as described in Item II.(A)1.(iv) above, are designed to promote the prompt and accurate clearance and settlement of securities transactions by ensuring that the Rules remain clear and accurate to NSCC Members and that NSCC Members understand EOD Settlement and AIP Settlement. Having clear and accurate Rules would facilitate members' understanding of those Rules and provide members with increased predictability and certainty regarding their obligations. As such, NSCC believes these proposed changes would promote the prompt and accurate clearance and settlement of securities,

[25] 15 U.S.C. 78q–1(b)(3)(F).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

consistent with Section 17A(b)(3)(F) of the Act.[33]

(B) Clearing Agency's Statement on Burden on Competition

NSCC does not believe that the proposed rule changes described in Item II.(A)1.(i) above to introduce the passive acknowledgment process for NSCC Settling Banks would have any impact on competition,[34] because the proposed passive acknowledgment process would not have an impact on the NSCC Settling Banks' current ability to timely acknowledge their settlement balances, as it is intended to address situations where an NSCC Settling Bank is not responding and cannot be reached. If an NSCC Settling Bank notifies the Settlement Agent that the NSCC Settling Bank cannot, at that time, submit its acknowledgment that it will settle its settlement balances with NSCC or its refusal to pay its settlement balances, then the NSCC Settling Bank would not be deemed to have acknowledged that it will settle such settlement balances with NSCC. Therefore, NSCC believes that the proposed passive acknowledgment process described in Item II.(A)1.(i) above would not have any impact on competition.

NSCC also does not believe that the proposal to amend the definition of ''AIP Settling Bank'' to correspond with the definition of ''Settling Bank'' and remove AIP Settling Bank Only Member as a membership category described in Item II.(A)1.(ii) above would have any impact on competition[35] because settling banks used for AIP Settlement have historically been Members or Settling Bank Only Members and not AIP Members or AIP Settling Bank Only Members. In addition, there have been no entities that have become AIP Settling Bank Only Members. As such NSCC does not believe the proposed changes to (a) amend the definition of ''AIP Settling Bank'' to correspond with the definition of ''Settling Bank'' and remove AIP Settling Bank Only Member as a membership category described in Item II.(A)1.(ii) above would affect the rights or obligations of NSCC or NSCC Members or have any impact on competition.

NSCC also does not believe that the proposed changes to exclude an NSCC Settling Bank's balance from the NSS file, as described in Item II.(A)1.(iii) above, would have any impact on competition[36] because this proposal, if invoked, would require the affected NSCC Settling Bank to send payment to NSCC by wire, which is an alternate form of payment already available to the NSCC Settling Banks. NSCC believes that ready availability of a reasonable payment alternative would result in the rights and obligations of the NSCC Settling Banks not being adversely affected. As such, NSCC does not believe that the proposed changes to exclude an NSCC Settling Bank's balance from the NSS file, as described in Item II.(A)1.(iii) above, would have any impact on competition.

NSCC also does not believe that the proposed rule changes to codify the AIP Settlement processes described in Item II.(A)1.(iii) or to make the technical, clarifying and conforming changes described in Item II.(A)1.(iv) above would have an impact on competition.[37] These changes would simply provide additional clarity within the Rules and not affect NSCC Members' rights and obligations.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NSCC has not received or solicited any written comments relating to this proposal. If any written comments are received, they will be publicly filed as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, available at *https://www.sec.gov/regulatory-actions/how-to-submit-comments.* General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

NSCC reserves the right not to respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

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 (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSCC–2021–013 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–NSCC–2021–013. 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 (*http://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,

[33] *Id.*

[34] 15 U.S.C. 78q–1(b)(3)(I).

[35] *Id.*

[36] *Id.*

[37] *Id.*

Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2021–013 and should be submitted on or before December 29, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26531 Filed 12–7–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No 270–488, OMB Control No. 3235–0542]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 605 of Regulation NMS

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) ("PRA"), the Securities and Exchange Commission ("Commission") is soliciting comments on the existing collection of information provided for in Rule 605 of Regulation NMS ("Rule 605") (17 CFR 242.605),[1] 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. Rule 605, formerly known as, Rule 11Ac1–5, requires market centers to make available to the public monthly order execution reports in electronic form. The Commission believes that many market centers retain most, if not all, of the underlying raw data necessary to generate these reports in electronic format. Once the necessary data is collected, market centers could either program their systems to generate the statistics and reports, or transfer the data to a service provider (such as an independent company in the business of preparing such reports or a self-regulatory organization) that would generate the statistics and reports.

The collection of information obligations of Rule 605 apply to all market centers that receive covered orders in national market system securities. The Commission estimates that approximately 319 market centers are subject to the collection of information obligations of Rule 605. Each of these respondents is required to respond to the collection of information on a monthly basis.

The Commission staff estimates that, on average, Rule 605 causes each respondent to spend 6 hours per month to collect the data necessary to generate the reports, or 72 hours per year. With an estimated 319 market centers subject to Rule 605, the total data collection time burden to comply with the monthly reporting requirement is estimated to be 22,968 hours per year.

Based on discussions with industry sources, the Commission staff estimates that an individual market center could retain a service provider to prepare a monthly report using the data collected for approximately $2,978 per month or $35,736 per year. This per-respondent estimate is based on the rate that a market center could expect to obtain if it negotiated on an individual basis. Based on the $2,978 estimate, the monthly cost to all 319 market centers to retain service providers to prepare reports would be approximately $949,982, and the total annual cost for all 319 market centers would be approximately $11,399,784.

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 estimate of the burden of the 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 in writing within 60 days of this publication.

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: December 3, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26595 Filed 12–7–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–22, OMB Control No. 3235–0006]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Form 13F

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), the Securities and Exchange Commission (the "Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Section 13(f)[1] of the Securities Exchange Act of 1934[2] (the "Exchange Act") empowers the Commission to: (1) Adopt rules that create a reporting and disclosure system to collect specific information; and (2) disseminate such information to the public. Rule 13f–1[3] under the Exchange Act requires institutional investment managers that exercise investment discretion over accounts that have in the aggregate a fair market value of at least $100,000,000 of certain U.S. exchange-traded equity

---

[38] 17 CFR 200.30–3(a)(12).

[1] Regulation NMS, adopted by the Commission in June 2005, redesignated the national market system rules previously adopted under Section 11A of the Exchange Act. Rule 11Ac1–5 under the Exchange Act was redesignated Rule 605 of Regulation NMS. *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005). In 2018, Commission amended Rule 605(a)(2) to require market centers to keep reports required pursuant to Rule 605(a)(1) posted on an internet website that is free of charge and readily accessible to the public for a period of three years from the initial date of posting on the internet website. *See* Securities Exchange Act Release No. 84528 (November 2, 2018), 83 FR 58338 (November 19, 2018).

[1] 15 U.S.C. 78m(f).

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 240.13f–1.

securities, as set forth in rule 13f–1(c), to file quarterly reports with the Commission on Form 13F.[4]

The information collection requirements apply to institutional investment managers that meet the $100 million reporting threshold. Section 13(f)(6)(A) of the Exchange Act defines an ''institutional investment manager'' as any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person. Rule 13f–1(b) under the Exchange Act defines ''investment discretion'' for purposes of Form 13F reporting.

The reporting system required by Section 13(f) of the Exchange Act is intended, among other things, to create in the Commission a central repository of historical and current data about the investment activities of institutional investment managers, and to improve the body of factual data available to regulators and the public.

The currently approved burden estimates include a total hour burden of 472,521.6 hours, with an internal cost burden of $31,186,425.60, to comply with Form 13F.[5] Consistent with a recent rulemaking proposal that made adjustments to these estimates due primarily to the Commission's belief that the currently approved estimates do not appropriately reflect the information collection costs associated with Form 13F,[6] the table below reflects the revised estimates.

TABLE—FORM 13F CURRENT AND REVISED BURDEN ESTIMATES

	Initial hours	Annual hours		Wage rate	Internal time cost	External costs [1]
REVISIONS TO CURRENT PRA BURDEN ESTIMATES						
Revised Burdens for 13F–HR Filings						
Current estimated annual burden of Form 13F–HR per filer.	....	80.8 hours	×	$66 [2]	$5,332.80.	
Revised current annual estimated burden per filer.	....	10 hours [3]	×	$202.50 (blended rate for senior programmer and compliance clerk) [4].	$2,025	$789.[6]
		1 hour [3]		$368 (compliance attorney rate) [5]	$368.	
Total revised estimated burden per filer.	....	11 hours		....	$2,393	$789.
Number of filers	....	5,466 filers [7]		....	5,466 filers	5,466 filers.
Revised current annual burden of Form 13F–HR filings.	....	60,126 hours		....	$13,080,138	$4,312,674.
Revised Burdens for 13F–NT Filings						
Current estimated annual burden of Form 13F–NT.	....	80.8 hours.				
Revised current annual burden of Form 13F–NT per filer.	....	4 hours	×	$71 (wage rate for compliance clerk)	$284	$300.
Number of filers	....	1,535 filers [8]		....	1,535 filers	1,535 filers.
		6,140 hours		....	$435,940	$460,500.
Revised Burdens for Form 13F Amendment Filings						
Current estimated burden per amendment filing.	....	4 hours		$66.00	$264.	
Revised current estimated burden per amendment.	....	3.5 hours [9]	×	$202.50 (blended rate for senior programmer and compliance clerk).	$708.75	$300.
		0.5 hour [9]		$368 (compliance attorney rate)	$184.	
Total revised estimates burden per amendment.	....	4 hours		....	$892.75	$300.
Number of amendments	....	244 amendments [10]		....	244 amendments	244 amendments.
Revised current annual estimated burden of all amendments.	....	976 hours		....	$217,831	$73,200.
TOTAL ESTIMATED FORM 13F BURDEN						
Currently approved burden estimates	472,521.6 hours			....	$31,186,425.60	$0.
Revised current burden estimates	67,242 hours			....	$13,733,909	$4,846,374.

Notes:

[4] 17 CFR 249.325.

[5] This estimate is based on the last time the rule's information collection was submitted for PRA renewal in 2018.

[6] *See* Electronic Submission of Applications for Orders under the Advisers Act and the Investment Company Act, Confidential Treatment Requests for Filings on Form 13F, and Form ADV–NR; Amendments to Form 13F, Investment Company Release No. (Nov. 4, 2021).

[1] The external costs of complying with Form 13F can vary among filers. Some filers use third-party vendors for a range of services in connection with filing reports on Form 13F, while other filers use vendors for more limited purposes such as providing more user-friendly versions of the list of section 13(f) Securities. For purposes of the PRA, we estimate that each filer will spend an average of $300 on vendor services each year in connection with the filer's four quarterly reports on Form 13F–HR or Form 13F–NT, as applicable, in addition to the estimated vendor costs associated with any amendments. In addition, some filers engage outside legal services in connection with the preparation of requests for confidential treatment or analyses regarding possible requests, or in connection with the form's disclosure requirements. For purposes of the PRA, we estimate that each manager filing reports on Form 13F–HR will incur $489 for one hour of outside legal services each year.

[2] $66 was the estimated wage rate for a compliance clerk in 2018.

[3] The estimate reduces the total burden hours associated with complying with the reporting requirements of Form 13F–HR from 80.8 to 11 hours. We believe that this reduction adequately reflects the reduction in the time managers spend complying with Form 13F–HR as a result of advances in technology that have occurred since Form 13F was adopted. The revised estimate also assumes that an in-house compliance attorney would spend 1 hour annually on the preparation of the filing, as well as determining whether a 13(f) Confidential Treatment Request should be filed. The remaining 10 hours would be divided equally between a senior programmer and compliance clerk.

[4] The $202.50 wage rate reflects current estimates of the blended hourly rate for an in-house senior programmer ($334) and in-house compliance clerk ($71). $202.50 is based on the following calculation: ($334+$71)/2 = $202.50. The $334 per hour figure for a senior programmer is based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2013 (''SIFMA Report''), modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The $71 per hour figure for a compliance clerk is based on salary information from the SIFMA Report, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

[5] The $368 per hour figure for a compliance attorney is based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2013 (''SIFMA Report''), modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[6] $789 includes an estimated $300 paid to a third-party vendor in connection with the Form 13F–HR filing as well as an estimated $489 for one hour of outside legal services. We estimate that Form 13F–HR filers will require some level of external legal counsel in connection with these filings.

[7] This estimate is based on the number of 13F–HR filers as of December 2019.

[8] This estimate is based on the number of Form 13F–NT filers as of December 2019.

[9] The revised estimate assumes that an in-house compliance attorney would spend 0.5 hours annually on the preparation of the filing amendment, as well as determining whether a 13(f) Confidential Treatment Request should be filed. The remaining 3.5 hours would be divided equally between a senior programmer and compliance clerk.

[10] This estimate is based on the number of Form 13F amendments filed as of December 2019.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view the background documentation for this information collection at the following website, *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Lindsay.M.Abate@omb.eop.gov;* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John R. Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.* Written comments and recommendations for the proposed information collection should be sent within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Dated: December 3, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26596 Filed 12–7–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93710 File No. SR–MEMX–2021–17]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Juneteenth National Independence Day a Holiday of the Exchange

December 2, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 22, 2021, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 the Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to amend Exchange Rule 11.1 (Hours of Trading and Trading Days) to make Juneteenth National Independence Day a holiday of the Exchange. Juneteenth National Independence Day was designated a legal public holiday in June 2021. The text of the proposed rule change is provided in Exhibit 5.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend paragraph (b) of Exchange Rule 11.1 (Hours of Trading and Trading Days) to make Juneteenth National Independence Day a holiday of the Exchange. This rule filing is based on a proposal recently submitted by the New York Stock Exchange LLC (''NYSE'') and its affiliated exchanges.[3] On June 17, 2021, Juneteenth National Independence Day was designated a legal public holiday.[4] Consistent with industry sentiment,[5] the approach recommended by the Securities Industry and Financial

[3] *See* Securities Exchange Act Release No. 93183 (September 30, 2021), 86 FR 55068 (October 5, 2021) (SR–NYSE–2021–56) (amending NYSE Rule 7.2 to include Juneteenth as an exchange holiday).

[4] Public Law 117–17.

[5] *See, e.g.,* Bank of America Makes Juneteenth a Holiday, Joining JPMorgan, Wells Fargo.

Markets Association (''SIFMA''),[6] and MEMX's own determination that MEMX's rules should recognize this important date in American history, the Exchange proposes to add ''Juneteenth National Independence Day'' to the existing list of holidays in paragraph (b) of MEMX Rule 11.1. As a result, the Exchange will not be open for the transaction of business on Juneteenth National Independence Day, which falls on June 19 of each year. In accordance with paragraph (b) of MEMX Rule 11.1, when any holiday observed by the Exchange falls on a Saturday, the Exchange will not be open for business on the preceding Friday, and when it falls on a Sunday, the Exchange will not be open for business on the following Monday, unless otherwise indicated by the Exchange.[7]

Accordingly, as proposed, paragraph (b) of MEMX Rule 11.1 would be revised to read as follows (proposed additions below):

The Exchange will be open for the transaction of business on business days. The Exchange will not be open for business on the following holidays: New Year's Day, Dr. Martin Luther King Jr. Day, Presidents Day, Good Friday, Memorial Day, *Juneteenth National Independence Day,* Independence Day, Labor Day, Thanksgiving Day or Christmas. When any holiday observed by the Exchange falls on a Saturday, the Exchange will not be open for business on the preceding Friday. When any holiday observed by the Exchange falls on a Sunday, the Exchange will not be open for business on the following Monday, unless otherwise indicated by the Exchange.

The Exchange also notes that several other national securities exchanges have added Juneteenth National Independence Day as an exchange holiday as well.[8]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Specifically, 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 proposed amended rule would clearly state that the Exchange will not be open for business on Juneteenth National Independence Day, which is a federal holiday, and would address what day would be taken off if June 19 fell on a Saturday or Sunday. The change would thereby promote clarity and transparency in the Exchange Rules by updating the list of holidays of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue but rather to amend the Exchange rule regarding holidays.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative prior to 30 days after the date of the filing. The Exchange states that waiver of the operative delay would be consistent with the protection of investors and the public interest because the proposed rule change, as described above, would state that the Exchange will not be open for business on Juneteenth National Independence Day, which is a federal holiday, and would address what day would be taken off if June 19 fell on a Saturday or Sunday. The Exchange further states that the proposed change does not raise any new or novel issues. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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:

[6] SIFMA recommends a full market close in observance of Juneteenth National Independence Day. *See* SIFMA Revises 2022 Fixed Income Market Close Recommendations in the U.S. to Include Full Close for Juneteenth National Independence Day.

[7] The Exchange might otherwise indicate if unusual business conditions exist such as the ending of a monthly or yearly accounting period.

[8] *See* BOX Exchange LLC Rule 7020(e); Miami International Securities Exchange LLC Rule 501; MIAX Emerald, LLC Rule 501; MIAX Pearl, LLC Rule 501; NYSE Rule 7.2; NYSE American LLC Rule 7.2E; NYSE Arca, Inc. Rules 7.2–E and 7.2–O; NYSE Chicago, Inc. Rule 7.2 and NYSE National Rule 7.2.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Electronic Comments

• Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–MEMX–2021–17 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–MEMX–2021–17. 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 (*http://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 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MEMX–2021–17 and should be submitted on or before December 29, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26529 Filed 12–7–21; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93705; File No. SR–ICC–2021–021]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change Relating to the Counterparty Monitoring Procedures and the Credit Rating System Model Description and Parameterization

December 2, 2021.

I. Introduction

On October 13, 2021, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4,[2] a proposed rule change to adopt the ICC Counterparty Monitoring Procedures (the ''Procedures'') and the ICC Credit Rating System Model Description and Parameterization (the ''CRS Policy''). The proposed rule change was published for comment in the **Federal Register** on November 1, 2021.[3] The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

A. Introduction

The new Procedures would describe ICC's policies and practices for monitoring its counterparties, specifically its Clearing Participants and the entities to which ICC has actual or potential credit exposure, such as settlement banks and custodians (collectively, ''Financial Service Providers'' or ''FSPs'').[4] The new CRS Policy would describe ICC's Credit Rating System (''CRS''), which ICC uses to analyze the risks associated with counterparties.

B. Procedures

The new Procedures would be a consolidation of two existing ICC procedures with respect to counterparty credit risk—the ICC CDS Clearing Counterparty Monitoring Procedures: Bank Counterparties (''Bank CMPs'') and the ICC CDS Clearing Counterparty Monitoring Procedures: FCM Counterparties (''FCM CMPs''). Although the new Procedures would be substantially the same as these two existing policies, the Procedures would contain some changes from the existing policies, as further described below.

The Procedures would consist of eleven sections, each of which is described below: (i) Introduction and overview; (ii) roles and responsibilities; (iii) standards for counterparty relationships; (iv) monitoring scope and procedures; (v) counterparty credit rating system; (vi) watch list criteria; (vii) actions available to the clearing house; (viii) information privacy; (ix) record keeping; (x) referenced documentation; (xi) revision history.

Section one would provide an introduction to, and overview of, the Procedures. This section would note that the performance of ICC depends on the financial stability of its Clearing Participants and FSPs, and accordingly, ICC monitors its relationships with such counterparties. Section one would note further that a variety of entities could be Clearing Participants and FSPs, such as broker-dealers and futures commission merchants in the case of Clearing Participants, and settlement banks and repo counterparties in the case of FSPs. Using the CRS, ICC would rate its counterparties and identify counterparties that exhibit inconsistent financial and operational performance, or that show signs of weakness and require more intensive examination. Section one of the new Procedures would be largely the same as the introductory sections of the Bank CMPs and FCM CMPs.

Section two would describe the roles and responsibilities of ICC personnel and committees. With respect to the counterparties themselves, the Procedures would note that Clearing Participants and FSPs are responsible for providing information requested by ICC, and that Clearing Participants in particular must comply with the qualifications and requirements set out in the ICC Rules. With respect to ICC, the Risk Department would monitor all counterparties intra-day, daily, and monthly and would implement the CRS. The Risk Department also would present information regarding counterparties to the Participant Review Committee and the Credit Review Subcommittee. The Participant Review Committee would be responsible for (i) reviewing applications for membership at ICC; (ii) monitoring ongoing compliance with ICC membership

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to the Counterparty Monitoring Procedures and the Credit Rating System Model Description and Parameterization; Exchange Act Release No. 34–93429 (Oct. 26, 2021); 86 FR 60305 (Nov. 1, 2021) (SR–ICC–2021–021) (''Notice'').

[4] Capitalized terms not otherwise defined herein have the meanings assigned to them in the Procedures, the CRS Policy, or the ICE Clear Credit Rules, as applicable.

requirements (including financial, operational, legal, and compliance requirements); (iii) overseeing the due diligence and approval of FSPs; (iv) recommending to the ICC Chief Risk Officer (''CRO'') a counterparty for suspension/termination or for placement on or removal from the Watch List; and (v) overseeing the withdrawal process for Clearing Participants and FSPs. The Credit Review Subcommittee of the Participant Review Committee would assist in carrying out these responsibilities, review reports, and present recommendations to the Participant Review Committee or CRO. The CRO would be responsible for reviewing and validating the Risk Department's counterparty credit findings and recommendations and for determining if a counterparty should be added to, or removed from, the Watch List. Finally, the Operations Department would be responsible for monitoring the operational and settlement process performance of all counterparties, and the Treasury Department would be responsible for monitoring the money movements between Clearing Participants and ICC. The information in Section two of the new Procedures would be largely the same as what is currently found in the Bank CMPs and FCM CMPs, with a few changes. For example, under the new Procedures, the Participant Review Committee would be responsible for overseeing the due diligence and approval of FSPs, while this responsibility is not explicitly assigned under the current Bank CMPs and FCM CMPs. Moreover, the new Procedures would assign responsibility for implementing the CRS explicitly to the Risk Department.

Section three would describe the minimum standards applicable to counterparties as well as the onboarding and withdrawal of counterparties. The Procedures would note that the minimum standards for Clearing Participants are found in Chapter 2 of the ICC Rules, as well as certain other ICC policies and procedures. With respect to FSPs, the Procedures would explain that all FSPs must meet the following minimum requirements: (i) Approval by the Participant Review Committee; (ii) satisfaction of all the operational requirements of the ICC Treasury Department; and (iii) subject to regulation and supervision by a competent authority. Section three also would note that the onboarding and withdrawal process is found in certain other ICC policies and procedures and would describe the responsibilities of the Risk Department and Participant Review Committee with respect to onboarding and withdrawal of FSPs. Specifically, for FSPs the Risk Department would: (i) Collect all relevant financial and market information necessary to compute credit scores; (ii) require the potential new FSP to complete the risk review questionnaire; (iii) present the completed risk review questionnaire including the final credit score to the Credit Review Subcommittee and Participant Review Committee; and (iv) obtain approval from the Participant Review Committee for the new FSP. With respect to the withdrawal of FSPs, the Participant Review Committee would: (i) Obtain written confirmation from the ICC Treasury Department that at all exposures to the FSP have been closed out and (ii) obtain written confirmation from the ICC Legal Department that all legal agreements with the FSP have been terminated. Section three would be a new section under the Procedures.

Section four of the Procedures would describe how ICC monitors counterparties. Section four would first describe what ICC monitors counterparties for—financial stability, creditworthiness, operational capability, and competence. Section four also would note that the financial stability elements of such monitoring are set out in ICC Rule 201. Section four would note further that in addition to those financial elements, ICC would monitor Clearing Participants for: (i) Material breach of the rules or regulations of any regulatory, self-regulatory, or other entity to which the Clearing Participant is subject; (ii) participation in the End of Day price discovery process; (iii) participation in disaster recovery and default management simulations. Moreover, specific to FSPs, ICC also would review their liquidity and cash management.

ICC would conduct this monitoring intra-day and daily, monthly, and periodically as needed. With respect to intra-day and daily monitoring, the ICC Risk Department would, among other things, (i) monitor the Risk Filter Threshold, meaning the intraday risk associated with incoming real-time position changes to a portfolio that may require pre-funding; (ii) review end-of-day changes to Initial Margin and Guaranty Fund requirements; and (iii) monitor the daily news and market metrics for Clearing Participants and FSPs. The Risk Department would escalate to the Chief Risk Officer any issues identified during the intra-day and daily monitoring.

For monthly monitoring, the Risk Department would prepare a credit report on the financial condition of all counterparties. The Chief Risk Officer and the Credit Review Subcommittee would each review the report. The report would include, among other things, information on the exposure of ICC to counterparties and the watch list. Monthly monitoring also would include, among other things, review of ICC's overall exposure to each Clearing Participant and FSP and their credit scores and review of investment allocation for investment counterparties. The Risk Department would escalate to the Chief Risk Officer any issues identified during the monthly monitoring.

As part of this intra-day, daily, and monthly monitoring, ICC would monitor its aggregate exposure to counterparties. This aggregate exposure would include all exposure ICC has to an entity and its affiliates, including exposure resulting from multiple relationships with an entity (such as a Clearing Participant that is also a FSP). ICC would manage its exposures to FSPs using investment allocations and its exposures to Clearing Participants using Risk Filter Threshold (''RFT'') allocations. Investment allocations would be the limit established by the Risk Department for each FSP. The Risk Department would review the investment allocations annually, or more frequently as needed (such as when a FSP is placed on the watch list). The Risk Department would review RFT allocations monthly, or more frequently as needed (such as when a Clearing Participant is placed on the watch list).

In addition to intra-day, daily, and monthly monitoring, ICC also would conduct periodic risk reviews of counterparties. ICC would conduct an initial risk review of all counterparties as part of the onboarding process for new counterparties. After the initial risk review, the Risk Department would periodically update and amend any relevant information related to the review. Section four of the Procedures would describe this update process as a Periodic Risk Review, and the Risk Department would complete a Periodic Risk Review for each counterparty within a four-year timeframe. The Periodic Risk Review would be specific to the type of counterparty, Clearing Participant or FSP, and with respect to FSPs, specific to the service provided by the FSP. Section four of the Procedures would describe the process for completing a Periodic Risk Review, which would include, among other steps, sending a questionnaire to the counterparty and reviewing the information provided by the counterparty. A Periodic Risk Review

could result in: (i) A satisfactory finding, meaning the counterparty has the process and procedures in place to provide reasonable assurance that the counterparty will be able to perform as required under the counterparty contractual obligations, or (ii) an unsatisfactory finding, meaning the counterparty does not have the process and procedures in place to provide reasonable assurance that it will be able to perform as required under the contractual obligations. Finally, ICC could perform more frequent Periodic Risk Reviews where: (i) The latest Periodic Risk Review was considered unsatisfactory or (ii) the counterparty was recently placed on the highest watch list level.

The information in section four of the new Procedures would be substantively the same as the information currently found in the Bank CMPs and FCM CMPs, with additional detail. For example, the details regarding the monitoring of the RFT threshold consumption and the description of how issues are escalated and resulting actions are documented, would be new, but ICC represents these would not be a material change to current ICC practice.[5] The description of ICC's monitoring and management of aggregate exposure to entities with which ICC maintains multiple counterparty relationships, the procedures associated with FSP investment allocation and RFT limits, and the description of the periodic risk reviews also would be new, additional details versus the current Bank CMPs and FCM CMPs.[6] The current Bank CMPs and FCM CMPs contain a list of general information maintained for each counterparty, and while ICC still maintains this information, the new Procedures describe the responsibilities associated with maintaining this information rather than listing all of the information.[7] Moreover, the current Bank CMPs and FCM CMPs contain a description of annual monitoring, and this annual monitoring would be part of the monthly monitoring under the new Procedures.[8]

Section five would provide a summary description of ICC's CRS. The CRS Policy, as described below, would provide the specific details with respect to the CRS. Section five of the new Procedures would be largely the same as the corresponding sections of the Bank CMPs and FCM CMPs.

[5] Notice, 86 FR at 60307.

[6] Notice, 86 FR at 60307.

[7] Notice, 86 FR at 60307.

[8] Notice, 86 FR at 60307.

Section six would describe ICC's watch list. The watch list is a list of counterparties that could pose additional risk to ICC; thus, it is a tool that ICC uses to separate counterparties that pose a greater risk than others. ICC would automatically place counterparties on the watch list if they have certain credit scores under the CRS. Moreover, ICC would consider certain qualitative factors for placing counterparties on the watch list, such as decreasing levels of capitalization. Except for automatic placements resulting from certain credit scores under the CRS, the Chief Risk Officer would determine whether to add a counterparty to the watch list. The Chief Risk Officer also would determine whether to remove a counterparty from the watch list, but counterparties would need to have a stable credit score below 3.0 for at least three months to be removed from the watch list. The information in this section would be largely the same as the corresponding sections of the Bank CMPs and FCM CMPs, except that the new Procedures would provide additional information about automatic placement on the watch list.

Section seven would describe the actions that ICC could take for counterparties placed on the watch list. As an initial matter, the Chief Risk Officer would review ICC's exposure relative to the counterparty's risk profile to determine if any action is necessary. With respect to a Clearing Participant, the Chief Risk Officer would review the Clearing Participant's net positions, collateral held, market movements and magnitude of the Clearing Participant in the relevant marketplace. The Risk Department would contact the counterparty to discuss the activity that raised the concern. The Chief Risk Officer would document the details, rationale, and criteria used in determining the actions taken against the CP, and present this documentation to the Credit Review Subcommittee. With respect to FSPs, concerns would be escalated to the ICC Senior Management, who would evaluate the issues and determine what, if any, additional actions should be taken. Among other actions, the Chief Risk Officer could determine to increase initial margin requirements, reduce a Clearing Participant's positions, or terminate a relationship with a FSP. The information in this section would be largely the same as the corresponding sections of the Bank CMPs and FCM CMPs.

Section eight would describe how ICC maintains the confidentiality and privacy of credit scores and other information related to counterparties. This would be a new section under the Procedures.

Section nine would summarize how ICC maintains the documents, reports, and other records required under the Procedures, in accordance with its overall document retention policy. This would be a new section under the Procedures.

Section ten would provide a list of other ICC documentation referenced by the Procedures. This would be a new section under the Procedures.

Finally, section eleven would describe the revision history of the Procedures. This would be a new section under the Procedures.

C. CRS Policy

The CRS Policy would describe ICC's CRS. The CRS Policy would consist of nine sections, each of which is described below: (i) Executive summary; (ii) credit rating system scope; (iii) model foundations and approach; (iv) model specification; (v) credit rating system data description; (vi) model performance testing; (vii) assessment of assumptions and limitations; (viii) bibliography and appendices; (ix) revision history.

Like the new Procedures, the CRS Policy would incorporate certain sections from the Bank CMPs and FCM CMPs. These sections would include information on internal ratings, data sources, and the CRS model. While the CRS Policy would take the same approach as currently found in the Bank CMPs and FCM CMPs, the CRS Policy would contain additional detail with respect to: (i) ICC's credit scoring approach in section one; (ii) model foundations and selection of credit risk factors and metrics in section three; (iii) testing of the weights between metrics and model performance testing in sections four and six; (iv) data sources and data quality in section five; and (v) assumptions and limitations of the CRS in section seven.[9]

The first section would summarize the CRS, including its purpose, assumptions, and limitations. As mentioned above, ICC uses the CRS to analyze the risks associated with counterparties. The CRS would do so by estimating a credit score for each counterparty. The credit score would range from one to five, with one being the best and five being the worst. Credit scores themselves would be a weighted combination of scores under seven individual credit risk factors. As would be noted, credit scores would not be intended to estimate probabilities of

[9] Notice, 86 FR at 60307.

default or forecast counterparty defaults and would depend on the quality and stability of the input data used to compute the credit scores.

The second section would describe the scope of the CRS. The CRS would consist of two credit scoring models: (i) One for counterparties that are banks and investment subsidiaries engaged in the business of buying and selling securities and other financial products as well as custodian and depository services, including Self-Clearing Members, which do not solicit or accept orders from customers; (ii) and another for Clearing Participants that solicit or accept orders from customers. Each credit scoring model would consist of seven credit risk factors, with a different percentage weight assigned to each credit risk factor under the two different models. Moreover, section two would describe the interpretation of credit scores, ranging from one to five, and would summarize the data required to compute the credit scores. Finally, section two would describe where the CRS fits in ICC's technology structure.

Section three would describe the foundations and approach of the CRS model, which, as discussed, consistent of seven credit risk factors. The credit risk factors would be divided into financial and market metrics. Financial metrics would provide a point-in-time view of the state of the company, while market metrics would be used to capture frequent changes in the market sentiment of the companies facing ICC. Section three would include descriptions of the credit risk factors. For each credit risk factor, section three would specify corresponding metrics, relevant definitions, formulas, applicability based on type of counterparty, and key regulatory requirements, among other information. The CRS also would consider a qualitative assessment, which allows flexibility to incorporate additional information (*e.g.,* business risk, litigation risk, management actions) regarding the counterparty into the credit score, and provides a range of possible qualitative assessment scores and qualitative assessment score interpretations. Furthermore, section three would explain that ICC could use other data as a proxy for certain financial metrics that some counterparties may not report.

Section four would detail the specifications of the CRS model, including the calibration of model weights and parameterization. Each credit risk factor would receive its own credit risk factor-specific weight. Section four would note how credit risk factor weights are determined and would discuss the testing of the weights between the financial and market metrics to measure the effectiveness of the scoring model in identifying early signs of weakness. Section four also would discuss metric parameterization for each credit risk factor and would describe, among other things, input values, metric descriptions, graphical representations, assumptions, parameter sets, and calibrated values.

Section five would describe the data that the CRS would use to calculate credit scores. This section also would describe the sources for that data, and how ICC would ensure the adequacy of the data and the remediation of any inconsistencies. Section five also would describe how ICC adjusts and reallocates component weights based on the availability of data.

Section six would describe how ICC tests the performance of the CRS model. ICC would review the credit risk factors, corresponding metrics, and parameterization at least once a year to assess the model's discriminative power. This assessment would include reviewing the historical performance of the model.

Section seven would describe the assumptions and limitations of the CRS. Among other things, section seven would note that credit scores would not represent a probability of default or forecast company defaults and further that the CRS assumes that market data upon which scores are based is reliable and is representative of the current market conditions.

Section eight would contain a list of references and section nine would describe the revision history of the CRS Policy.

Finally, there would be four appendices to the CRS Policy, which would include other relevant information for the CRS, such as a list of systemically important financial institutions.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[10] For the reasons discussed below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act,[11] and Rules 17Ad–22(e)(2)(v) and (e)(3)(i).[12]

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICC be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible.[13]

The Commission believes that taken together, the Procedures and CRS Policy would help ICC to manage the risk arising from its exposures to counterparties. For example, the Commission believes that the Procedures would help to ensure that ICC personnel are engaged in reviewing and limiting ICC's exposure to counterparties, by making various ICC personnel responsible for rating and monitoring counterparties, and for taking mitigating actions as needed. Moreover, the Commission believes that the minimum standards for counterparties, such as being subject to regulation and supervision by a competent authority, would help to ensure that all Clearing Participants and FSPs have a baseline of financial and operational reliability. The Commission further believes that intra-day, daily, monthly, and periodic monitoring, as well as the use of the watch list, would help to ensure that ICC identifies counterparties at risk of financial or operational difficulty. Reviewing end-of-day changes to Initial Margin and Guaranty Fund requirements and monitoring overall aggregate exposure, through the Risk Filter Threshold and Investment Allocations, should similarly help ICC to measure its exposure to counterparties. Monitoring and measuring ICC's exposure to counterparties should in turn trigger mitigating actions also needed to help ICC to reduce or eliminate its exposure to a Clearing Member or FSP. Finally, the Commission believes that the CRS Policy, in describing the CRS and ICC's credit scoring models, would be an essential part of ICC's monitoring and mitigation of the risk arising from its exposures to Clearing Participants and FSPs.

The Commission believes that counterparty credit risk poses a risk to ICC's financial resources because

[10] 15 U.S.C. 78s(b)(2)(C).

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 17 CFR 240.17Ad–22(e)(2)(v) and (e)(3)(i).

[13] 15 U.S.C. 78q–1(b)(3)(F).

default by a Clearing Participant could leave ICC under-collateralized and default by an FSP could cause ICC to lose its investments or expected return of cash. The Commission therefore believes that default by a Clearing Participant and default by an FSP could cause ICC to lose default resources and operational capital. The Commission believes that such losses could, in turn, threaten ICC's ability to operate and therefore clear and settle transactions and assure the safeguarding of securities and funds.

Thus, the Commission believes that effective management of ICC's counterparty credit risk could help ICC to control risks to the financial resources needed to clear and settle transactions and to assure the safeguarding of securities and funds in its custody or control. The Commission therefore believes that, by establishing the actions ICC would take to assess, monitor, and mitigate counterparty credit risk, the Procedures and CRS Policy would help ICC to manage counterparty credit risk and thereby would promote the prompt and accurate clearance and settlement of securities transactions and assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible.

Therefore, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act.[14]

B. Consistency With Rule 17Ad–22(e)(2)(v)

Rule 17Ad–22(e)(2)(v) requires that ICC establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that specify clear and direct lines of responsibility.[15] As discussed above, the Procedures would assign roles and responsibilities to various ICC groups and personnel. For example, the Risk Department would monitor all counterparties intra-day, daily, and monthly and would implement the CRS; the Operations Department would monitor the operational and settlement process performance of all counterparties; the Treasury Department would monitor money movements between Clearing Participants and ICC; and the CRO would be responsible for reviewing and validating the Risk Department's counterparty credit findings and recommendations and for determining if a counterparty should be added to, or removed from, the Watch List. The Commission believes that these provisions, as well as the other roles and responsibilities described above, would specify clear and direct lines of responsibility for ICC groups and personnel.

Therefore, the Commission finds that the proposed rule change is consistent with Rule 17Ad–22(e)(2)(v).[16]

C. Consistency With Rule 17Ad–22(e)(3)(i)

Rule 17Ad–22(e)(3)(i) requires that ICC establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by ICC, which, among other things, includes risk management policies, procedures, and systems designed to identify, measure, monitor, and manage the range of risks that arise in or are borne by ICC, that are subject to review on a specified periodic basis and approved by the board of directors annually.[17]

As discussed above, the Procedures and CRS Policy would describe how ICC evaluates and monitors risks posed by its counterparties, and how ICC mitigates such risks. The Commission believes that together these documents would allow ICC to measure comprehensively the credit risk posed by Clearing Participants and FSPs through, among other things, assessing the financial status of Clearing Participants and FSPs and determining ICC's aggregate exposure to Clearing Participants and FSPs. The Commission further believes that the CRS, watch list, periodic monitoring, and exposure limits would provide ICC a comprehensive means of monitoring the credit risk posed by Clearing Participants and FSPs. Finally, the Commission believes that the mitigating actions discussed above would reduce or eliminate ICC's exposure to a Clearing Participant or FSP, thereby helping ICC manage overall credit risk.

Therefore, the Commission finds that the proposed rule change is consistent with Rule 17Ad–22(e)(3)(i).[18]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) of the Act[19] Rules 17Ad–22(e)(2)(v) and (e)(3)(i).[20]

It is therefore ordered pursuant to Section 19(b)(2) of the Act[21] that the proposed rule change (SR–ICC–2021–021), be, and hereby is, approved.[22]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26530 Filed 12–7–21; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78q–1(b)(3)(F).

[15] 17 CFR 240.17Ad–22(e)(2)(v).

[16] 17 CFR 240.17Ad–22(e)(2)(v).

[17] 17 CFR 240.17Ad–22(e)(3)(i).

[18] 17 CFR 240.17Ad–22(e)(3)(i).

[19] 15 U.S.C. 78q–1(b)(3)(F).

[20] 17 CFR 240.17Ad–22(e)(2)(v) and (e)(3)(i).

[21] 15 U.S.C. 78s(b)(2).

[22] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34432; File No. 812–15015]

Apollo Investment Corporation, et al.

December 3, 2021.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

Summary of Application: Applicants request an order to permit certain business development companies (''BDCs'') and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment funds and accounts.

Applicants: Apollo Investment Corporation (''AIC''), Apollo Tactical Income Fund Inc. (''AIF''), Apollo Debt Solutions BDC (''ADS''), Apollo Investment Management, L.P. (''AIM''), Apollo Credit Management, LLC (''ACM''), Apollo Senior Floating Rate Fund Inc. (''ASFRF''), Merx Aviation Finance, LLC (''Merx''), Athene Holding Ltd. (''Athene''), MidCap FinCo Holdings Limited (''MidCap''), the Existing Affiliated Funds set forth on Appendix A to the application, and the investment advisers to the Existing Affiliated Funds set forth on Appendix A to the application (the ''Existing Advisers to Affiliated Funds''; together with AIC, AIF, AIM, ACM, ASFRF,

ADS, Merx and the Existing Affiliated Funds, the ''Applicants'').

Filing Dates: The application was filed on April 1, 2019, and amended on August 15, 2019, January 2, 2020, January 28, 2021, October 19, 2021 and November 24, 2021.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on December 28, 2021, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: *steven.grigoriou@stblaw.com.*

FOR FURTHER INFORMATION CONTACT: Asen Parachkevov, Senior Counsel, at (202) 551–6908 or Trace Rakestraw, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Introduction

1. The Applicants request an order of the Commission under Sections 17(d) and 57(i) and Rule 17d–1 thereunder (the ''Order'') to permit, subject to the terms and conditions set forth in the application (the ''Conditions''), a Regulated Fund [1] and one or more other Regulated Funds and/or one or more Affiliated Funds [2] to enter into Co-Investment Transactions with each other. ''Co-Investment Transaction'' means any transaction in which a Regulated Fund (or its Wholly-Owned Investment Sub (as defined below)) participated together with one or more Affiliated Funds and/or one or more other Regulated Funds in reliance on the Order. ''Potential Co-Investment Transaction'' means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more Affiliated Funds and/or one or more other Regulated Funds without obtaining and relying on the Order.[3]

2. The Order sought by the applicants would supersede a prior order [4] (''Prior Order'') with the result that no person will continue to rely on the Prior Order if the Order is granted.

Applicants

3. AIC is a closed-end management investment company incorporated in Maryland that has elected to be regulated as a business development company (''BDC'') under the Act.[5] AIC's Board [6] currently consists of eight members, five of whom are Independent Directors.[7] ASFRF and AIF are Maryland corporations that are registered as closed-end management investment companies. Each of ASFRF's and AIF's Board currently consists of six members, five of whom are Independent Directors. ADS is a closed-end management investment company organized as a Delaware statutory trust that has elected to be regulated as a BDC under the Act. ADS' Board currently consists of five members, four of whom are Independent Directors.

4. AIM, a Delaware limited partnership that is registered under the Advisers Act, serves as the investment adviser to AIC. ACM, a Delaware limited liability company that is registered as an investment adviser under the Advisers Act, serves as investment adviser to ASFRF, ADS and AIF.

5. Merx, a Delaware limited liability company, is a special purpose vehicle owned by AIC. AIM serves as Merx's investment adviser. Applicants state that Merx engages primarily in aircraft leasing and related businesses and is thus excluded from investment company status under Section 3(a). Merx is a BDC Downstream Fund. If Applicants receive the requested Order, Merx may on occasion engage in Co-

[1] ''Regulated Funds'' means AIC, ASFRF, AIF, ADS the Future Regulated Funds and the BDC Downstream Funds (defined below). ''Future Regulated Fund'' means a closed-end management investment company (a) that is registered under the Act or has elected to be regulated as a BDC, (b) whose investment adviser (and sub-adviser, if any) is an Adviser, and (c) that intends to participate in the Co-Investment Program. ''Adviser'' means AIM, ACM and the Existing Advisers to Affiliated Funds (identified in Appendix A to the application) and any Future Adviser. ''Future Adviser'' means any future investment adviser that (i) controls, is controlled by, or is under common control with AGM, (ii) (a) is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') or (b) is a relying adviser of an investment adviser that is registered under the Advisers Act and that controls, is controlled by, or is under common control with, AGM and (iii) is not a Regulated Fund or a subsidiary of a Regulated Fund. ''Co-Investment Program'' means the proposed co-investment program that would permit one or more Regulated Funds and/or one or more Affiliated Funds to participate in the same investment opportunities where such participation would otherwise be prohibited under Section 57(a)(4) and Rule 17d–1 by (a) co-investing with each other in securities issued by issuers in private placement transactions in which an Adviser negotiates terms in addition to price; and (b) making Follow-On Investments (as defined below). The term ''private placement transactions'' means transactions in which the offer and sale of securities by the issuer are exempt from registration under the Securities Act of 1933 (the ''Securities Act'').

[2] ''Affiliated Fund'' means any Existing Affiliated Fund (identified in Appendix A to the application), any Apollo Proprietary Account (defined below) or any entity (a) whose investment adviser (and sub-adviser(s), if any) is an Adviser, (b) that either (x) would be an investment company but for Section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act or (y) relies on Rule 3a-7 of the Act, (c) that is not a BDC Downstream Fund and (d) that intends to participate in the Co-Investment Program. Applicants represent that no Existing Affiliated Fund is a BDC Downstream Fund. ''BDC Downstream Fund'' means either (a) with respect to AIC, Merx or (b) with respect to any Regulated Fund that is a BDC, an entity (i) that the BDC directly or indirectly controls, (ii) that is not controlled by any person other than the BDC (except a person that indirectly controls the entity solely because it controls the BDC), (iii) that would be an investment company but for Section 3(c)(1) or 3(c)(7) of the Act, (iv) whose investment adviser (and sub-adviser, if any) is an Adviser, (v) that is not a Wholly-Owned Investment Sub and (vi) that intends to participate in the Co-Investment Program.

[3] All existing entities that currently intend to rely on the Order have been named as Applicants and any existing or future entities that may rely on the Order in the future will comply with its terms and Conditions set forth in the application.

[4] Apollo Investment Corp., et al., (File No. 812–13754) Release No. IC–32057 (order) (March 29, 2016), Release No. IC–32019 (notice) (March 2, 2016).

[5] Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in Section 55(a)(1) through 55(a)(3) and makes available significant managerial assistance with respect to the issuers of such securities.

[6] ''Board'' means (i) with respect to a Regulated Fund other than a BDC Downstream Fund, the board of directors (or the equivalent) of the Regulated Fund and (ii) with respect to a BDC Downstream Fund, the Independent Party of the BDC Downstream Fund. ''Independent Party'' means, with respect to a BDC Downstream Fund, (i) if the BDC Downstream Fund has a board of directors (or the equivalent), the board or (ii) if the BDC Downstream Fund does not have a board of directors (or the equivalent), a transaction committee or advisory committee of the BDC Downstream Fund.

[7] ''Independent Director'' means a member of the Board of any relevant entity who is not an ''interested person'' as defined in Section 2(a)(19) of the Act. No Independent Director of a Regulated Fund (including any non-interested member of an Independent Party) will have a financial interest in any Co-Investment Transaction, other than indirectly through share ownership in one of the Regulated Funds.

Investment Transactions with other Regulated Funds and with Affiliated Funds.[8]

6. Any Adviser, and any direct or indirect, wholly- or majority-owned subsidiary of an Adviser, may hold various financial assets in a principal capacity (the ''Apollo Proprietary Accounts'').

7. The Existing Affiliated Funds are the investment funds identified in Appendix A to the application. Applicants represent that each Existing Affiliated Fund is a separate and distinct legal entity and each, other than Athene and MidCap, would be an investment company but for Section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act. Applicants state that Athene Holding does not come within the definition of investment company in Section 3(a)(1). As described in the application, Applicants state that Athene engages in the insurance business through wholly-owned subsidiary insurance companies which are excluded from investment company status by either Rule 3a–6 or Section 3(c)(3). Applicants state that Athene also invests through its affiliate MidCap, which currently is excluded from investment company status by Section 3(b)(1), 3(c)(5) or 3(c)(6).[9] As with the other Affiliated Funds, each of Athene and MidCap is advised by an Adviser pursuant to a separate investment management agreement.

8. The Existing Advisers to Affiliated Funds, identified in Appendix A to the application, are the investment advisers to the Existing Affiliated Funds. Each of the Existing Advisers to Affiliated Funds is registered as an investment adviser under the Advisers Act.

9. Each of the Applicants may be deemed to be controlled by AGM. AGM owns controlling interests in the Advisers and, thus, may be deemed to control the Regulated Funds and the Affiliated Funds. Applicants state that AGM is a holding company and does not currently offer investment advisory services to any person and is not expected to do so in the future. Applicants state that as a result, AGM has not been included as an Applicant.

10. Applicants state that a Regulated Fund may, from time to time, form one or more Wholly-Owned Investment Subs.[10] Such a subsidiary may be prohibited from investing in a Co-Investment Transaction with a Regulated Fund (other than its parent) or any Affiliated Fund because it would be a company controlled by its parent Regulated Fund for purposes of Section 57(a)(4) and Rule 17d–1. Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of the Regulated Fund that owns it and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for purposes of the Order, as though the parent Regulated Fund were participating directly.

Applicants' Representations

A. Allocation Process

11. Applicants represent that they have established processes ensuring compliance with the Prior Order and for allocating initial investment opportunities, opportunities for subsequent investments in an issuer and dispositions of securities holdings reasonably designed to treat all clients fairly and equitably. Further, Applicants represent that these processes will be extended and modified in a manner reasonably designed to ensure that the additional transactions permitted under the Order will both (i) be fair and equitable to the Regulated Funds and the Affiliated Funds and (ii) comply with the Conditions.

12. Specifically, applicants state that the Advisers are organized and managed such that the individual portfolio managers, as well as the teams and committees of portfolio managers, analysts and senior management (''Investment Teams'' and ''Investment Committees''), responsible for evaluating investment opportunities and making investment decisions on behalf of clients are promptly notified of the opportunities. Under the Prior Order, the Advisers established and implemented policies and procedures reasonably designed to ensure that, when such opportunities arise, the Advisers to the relevant Regulated Funds are promptly notified and receive the same information about the opportunity as any other Advisers considering the opportunity for their clients. If the requested Order is granted, such policies and procedures will be amended to reflect the terms of the requested Order. In particular, consistent with Condition 1, if a Potential Co-Investment Transaction falls within the then-current Objectives and Strategies [11] and any Board-Established Criteria [12] of a Regulated

[8] Applicants believe that allowing the other Regulated Funds and the Affiliated Funds to co-invest with Merx does not raise any legal or policy concerns that are not otherwise raised by allowing a Regulated Fund to co-invest with another Regulated Fund and/or one or more Affiliated Funds because, in terms of its operation and purpose, Merx differs from a private fund only in that it invests in and operates aircraft subject to leases instead of in investment securities.

[9] Applicants state that, although Athene and MidCap may not rely on section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act, as do the other Existing Affiliated Funds, Applicants do not believe that allowing Athene and MidCap to participate in Co-investment Transactions as Affiliated Funds raises any additional legal or policy concerns not otherwise raised by allowing a Regulated Fund to co-invest with one or more Affiliated Funds. Specifically, Applicants argue that Athene and MidCap are clients of Advisers the same way that an Affiliated Fund relying on Section 3(c)(1) or 3(c)(7) is a client of an Adviser. Although a relatively small portion of Athene's assets are managed by an investment adviser that is not an Adviser, only the portion of Athene's assets for which an Adviser has investment discretion will participate in Co-investment Transactions. Athene and MidCap may continue to be an Affiliated Fund in the future if it instead relies solely on Section 3(c)(1), 3(c)(5)(C) or 3(c)(7) and otherwise satisfies the criteria for an ''Affiliated Fund'' set out in the definition thereof.

[10] ''Wholly-Owned Investment Sub'' means an entity (i) that is a wholly-owned subsidiary of a Regulated Fund (with such Regulated Fund at all times holding, beneficially and of record, directly or indirectly, 95% or more of the voting and economic interests); (ii) whose sole business purpose is to hold one or more investments on behalf of such Regulated Fund (and in the case of an SBIC Subsidiary, maintain a license under the Small Business Investment Act of 1958 (''SBA Act'') and issue debentures guaranteed by the Small Business Administration (''SBA'')); (iii) with respect to which such Regulated Fund's Board has the sole authority to make all determinations with respect to the entity's participation under the Conditions; and (iv) that (A) would be an investment company but for Section 3(c)(1), 3(c)(5)(C), or 3(c)(7) of the Act, or (B) that qualifies as a real estate investment trust within the meaning of Section 856 of the Internal Revenue Code because substantially all of its assets would consist of real properties. ''SBIC Subsidiary'' means a Wholly-Owned Investment Sub that is licensed by the SBA to operate under the SBA Act as a small business investment company.

[11] ''Objectives and Strategies'' means (i) with respect to any Regulated Fund other than a BDC Downstream Fund, its investment objectives and strategies, as described in its most current registration statement on Form N–2, other current filings with the Commission under the Securities Act or under the Securities Exchange Act of 1934, as amended, and its most current report to stockholders, and (ii) with respect to any BDC Downstream Fund, those investment objectives and strategies described in its disclosure documents (including private placement memoranda and reports to equity holders) and organizational documents (including operating agreements).

[12] ''Board-Established Criteria'' means criteria that the Board of a Regulated Fund may establish from time to time to describe the characteristics of Potential Co-Investment Transactions regarding which the Adviser to the Regulated Fund should be notified under Condition 1. The Board-Established Criteria will be consistent with the Regulated Fund's Objectives and Strategies. If no Board-Established Criteria are in effect, then the Regulated Fund's Adviser will be notified of all Potential Co-Investment Transactions that fall within the Regulated Fund's then-current Objectives and Strategies. Board-Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve a discretionary assessment. The Adviser to the Regulated Fund may from time to time recommend criteria for the Board's consideration, but Board-Established

Continued

Fund, the policies and procedures will require that the relevant portfolio managers, Investment Teams and Investment Committees responsible for that Regulated Fund receive sufficient information to allow the Regulated Fund's Adviser to make its independent determination and recommendations under the Conditions.

13. The Adviser to each applicable Regulated Fund will then make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances. If the Adviser to a Regulated Fund deems the Regulated Fund's participation in such Potential Co-Investment Transaction to be appropriate, then it will formulate a recommendation regarding the proposed order amount for the Regulated Fund.

14. Applicants state that, for each Regulated Fund and Affiliated Fund whose Adviser recommends participating in a Potential Co-Investment Transaction, the Adviser will submit a proposed order amount to the internal trading function, which is comprised of a group of individual traders who collect and execute trades. Applicants state further that each proposed order amount may be reviewed and adjusted, in accordance with the Advisers' written allocation policies and procedures, by an allocation committee for the area in question (*e.g.,* credit, private equity, real estate) on which senior management, legal and compliance personnel from that area participate or, in the case of issues involving multiple areas or AGM as a whole, an AGM-wide allocation committee on which senior management, legal and compliance personnel for AGM participate.[13] The order of a Regulated Fund or Affiliated Fund resulting from this process is referred to as its ''Internal Order''. The Internal Order will be submitted for approval by the Required Majority of any participating Regulated Funds in accordance with the Conditions.[14]

15. If the aggregate Internal Orders for a Potential Co-Investment Transaction do not exceed the size of the investment opportunity immediately prior to the submission of the orders to the underwriter, broker, dealer or issuer, as applicable (the ''External Submission''), then each Internal Order will be fulfilled as placed. If, on the other hand, the aggregate Internal Orders for a Potential Co-Investment Transaction exceed the size of the investment opportunity immediately prior to the External Submission, then the allocation of the opportunity will be made pro rata on the basis of the size of the Internal Orders.[15] If, subsequent to such External Submission, the size of the opportunity is increased or decreased, or if the terms of such opportunity, or the facts and circumstances applicable to the Regulated Funds' or the Affiliated Funds' consideration of the opportunity, change, the participants will be permitted to submit revised Internal Orders in accordance with written allocation policies and procedures that the Advisers will establish, implement and maintain.[16]

B. Follow-On Investments

16. Applicants state that from time to time the Regulated Funds and Affiliated Funds may have opportunities to make Follow-On Investments[17] in an issuer in which a Regulated Fund and one or more other Regulated Funds and/or Affiliated Funds previously have invested.

17. Applicants propose that Follow-On Investments would be divided into two categories depending on whether the prior investment was a Co-Investment Transaction or a Pre-Boarding Investment.[18] If the Regulated Funds and Affiliated Funds had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Follow-On Investment would be subject to the Standard Review Follow-Ons described in Condition 8. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Follow-On Investment would be subject to the Enhanced-Review Follow-Ons described in Condition 9. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Funds and Affiliated Funds would need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer would be governed by the requirements of Standard Review Follow-Ons.

18. A Regulated Fund would be permitted to invest in Standard Review Follow-Ons either with the approval of the Required Majority under Condition 8(c) or without Board approval under Condition 8(b) if it is (i) a Pro Rata Follow-On Investment[19] or (ii) a Non-Negotiated Follow-On Investment.[20]

Criteria will only become effective if approved by a majority of the Independent Directors. The Independent Directors of a Regulated Fund may at any time rescind, suspend or qualify its approval of any Board-Established Criteria, though Applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[13] The reason for any such adjustment to a proposed order amount will be documented in writing and preserved in the records of the Advisers.

[14] ''Required Majority'' means a required majority, as defined in Section 57(o) of the Act. In the case of a Regulated Fund that is a registered closed-end fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a BDC subject to Section 57(o). In the case of a BDC Downstream Fund with a board of directors (or the equivalent), the members that make up the Required Majority will be determined as if the BDC Downstream Fund were a BDC subject to Section 57(o). In the case of a BDC Downstream Fund with a transaction committee or advisory committee, the committee members that make up the Required Majority will be determined as if the BDC Downstream Fund were a BDC subject to Section 57(o) and as if the committee members were directors of the fund.

[15] The Advisers will maintain records of all proposed order amounts, Internal Orders and External Submissions in conjunction with Potential Co-Investment Transactions. Each applicable Adviser will provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with the Conditions. ''Eligible Directors'' means, with respect to a Regulated Fund and a Potential Co-Investment Transaction, the members of the Regulated Fund's Board eligible to vote on that Potential Co-Investment Transaction under Section 57(o) of the Act (treating any registered investment company or series thereof as a BDC for this purpose).

[16] The Board of the Regulated Fund will then either approve or disapprove of the investment opportunity in accordance with condition 2, 6, 7, 8 or 9, as applicable.

[17] ''Follow-On Investment'' means an additional investment in the same issuer, including, but not limited to, through the exercise of warrants, conversion privileges or other rights to purchase securities of the issuer.

[18] ''Pre-Boarding Investments'' are investments in an issuer held by a Regulated Fund as well as one or more Affiliated Funds and/or one or more other Regulated Funds that were acquired prior to participating in any Co-Investment Transaction: (i) In transactions in which the only term negotiated by or on behalf of such funds was price in reliance on one of the JT No-Action Letters (defined below); or (ii) in transactions occurring at least 90 days apart and without coordination between the Regulated Fund and any Affiliated Fund or other Regulated Fund.

[19] A ''Pro Rata Follow-On Investment'' is a Follow-On Investment (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investments in the issuer or security, as appropriate, immediately preceding the Follow-On Investment, and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in the pro rata Follow-On Investments as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Follow-On Investments, in which case all subsequent Follow-On Investments will be submitted to the Regulated Fund's Eligible Directors in accordance with Condition 8(c).

[20] A ''Non-Negotiated Follow-On Investment'' is a Follow-On Investment in which a Regulated Fund

Applicants believe that these Pro Rata and Non-Negotiated Follow-On Investments do not present a significant opportunity for overreaching on the part of any Adviser and thus do not warrant the time or the attention of the Board. Pro Rata Follow-On Investments and Non-Negotiated Follow-On Investments remain subject to the Board's periodic review in accordance with Condition 10.

C. Dispositions

19. Applicants propose that Dispositions [21] would be divided into two categories. If the Regulated Funds and Affiliated Funds holding investments in the issuer had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Disposition would be subject to the Standard Review Dispositions described in Condition 6. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Disposition would be subject to the Enhanced Review Dispositions described in Condition 7. Subsequent Dispositions with respect to the same issuer would be governed by Condition 6 under the Standard Review Dispositions.[22]

20. A Regulated Fund may participate in a Standard Review Disposition either with the approval of the Required Majority under Condition 6(d) or without Board approval under Condition 6(c) if (i) the Disposition is a Pro Rata Disposition [23] or (ii) the securities are Tradable Securities [24] and the Disposition meets the other requirements of Condition 6(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the Board's periodic review in accordance with Condition 10.

D. Delayed Settlement

21. Applicants represent that under the terms and Conditions of the application, all Regulated Funds and Affiliated Funds participating in a Co-Investment Transaction will invest at the same time, for the same price and with the same terms, conditions, class, registration rights and any other rights, so that none of them receives terms more favorable than any other. However, the settlement date for an Affiliated Fund in a Co-Investment Transaction may occur up to ten business days after the settlement date for the Regulated Fund, and vice versa. Nevertheless, in all cases, (i) the date on which the commitment of the Affiliated Funds and Regulated Funds is made will be the same even where the settlement date is not and (ii) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other.

E. Holders

22. Under Condition 15, if an Adviser, its principals, or any person controlling, controlled by, or under common control with the Adviser or its principals, and the Affiliated Funds (collectively, the ''Holders'') own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (the ''Shares''), then the Holders will vote such Shares as required under the Condition.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit participation by a registered investment company and an affiliated person in any ''joint enterprise or other joint arrangement or profit-sharing plan,'' as defined in the rule, without prior approval by the Commission by order upon application. Section 17(d) of the Act and rule 17d–1 under the Act are applicable to Regulated Funds that are registered closed-end investment companies.

2. Similarly, with regard to BDCs, section 57(a)(4) of the Act generally prohibits certain persons specified in section 57(b) from participating in joint transactions with the BDC or a company controlled by the BDC in contravention of rules as prescribed by the Commission. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to transactions subject to section 57(a)(4). Because the Commission has not adopted any rules under section 57(a)(4), rule 17d–1 also applies to joint transactions with Regulated Funds that are BDCs.

3. Co-Investment Transactions are prohibited by either or both of Rule 17d–1 and Section 57(a)(4) without a prior exemptive order of the Commission to the extent that the Affiliated Funds and the Regulated Funds participating in such transactions fall within the category of persons described by Rule 17d–1 and/or Section 57(b), as applicable, vis-à-vis each participating Regulated Fund. Each of the participating Regulated Funds and Affiliated Funds may be deemed to be affiliated persons vis-à-vis a Regulated Fund within the meaning of section 2(a)(3) by reason of common control because (i) an Adviser, that is either AIM or an entity that controls, is controlled by, or under common control with AIM, will be the investment adviser (and sub-adviser, if any) to each of the Regulated Funds and the Affiliated Funds, (ii) AIM is the Adviser to, and may be deemed to control, AIC, (iii) ACM is the Adviser to, and may be deemed to control, AIF and ASFRF, and (iv) each BDC Downstream Fund will be deemed to be controlled by its BDC

participates together with one or more Affiliated Funds and/or one or more other Regulated Funds (i) in which the only term negotiated by or on behalf of the funds is price and (ii) with respect to which, if the transaction were considered on its own, the funds would be entitled to rely on one of the JT No-Action Letters. ''JT No-Action Letters'' means SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life Insurance Company, SEC No-Action Letter (pub. avail. June 7, 2000).

[21] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[22] However, with respect to an issuer, if a Regulated Fund's first Co-Investment Transaction is an Enhanced Review Disposition, and the Regulated Fund does not dispose of its entire position in the Enhanced Review Disposition, then before such Regulated Fund may complete its first Standard Review Follow-On in such issuer, the Eligible Directors must review the proposed Follow-On Investment not only on a stand-alone basis but also in relation to the total economic exposure in such issuer (*i.e.,* in combination with the portion of the Pre-Boarding Investment not disposed of in the Enhanced Review Disposition), and the other terms of the investments. This additional review would be required because such findings would not have been required in connection with the prior Enhanced Review Disposition, but they would have been required had the first Co-Investment Transaction been an Enhanced Review Follow-On.

[23] A ''Pro Rata Disposition'' is a Disposition (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investment in the security subject to Disposition immediately preceding the Disposition; and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in pro rata Dispositions as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Dispositions, in which case all subsequent Dispositions will be submitted to the Regulated Fund's Eligible Directors.

[24] ''Tradable Security'' means a security that meets the following criteria at the time of Disposition: (i) It trades on a national securities exchange or designated offshore securities market as defined in rule 902(b) under the Securities Act; (ii) it is not subject to restrictive agreements with the issuer or other security holders; and (iii) it trades with sufficient volume and liquidity (findings as to which are documented by the Advisers to any Regulated Funds holding investments in the issuer and retained for the life of the Regulated Fund) to allow each Regulated Fund to dispose of its entire position remaining after the proposed Disposition within a short period of time not exceeding 30 days at approximately the value (as defined by section 2(a)(41) of the Act) at which the Regulated Fund has valued the investment.

parent and/or its BDC parent's Adviser; and (v) the Advisers are under common control. Thus, each of the Regulated Fund and each Affiliated Fund may be deemed to be a person related to a Regulated Fund and each Affiliated Fund in a manner described by Section 57(b) (or Section 17(d) in the case of Regulated Funds that are registered under the Act) and therefore would be prohibited by Section 57(a)(4) (or Section 17(d) in the case of Regulated Funds that are registered under the Act) and Rule 17d–1 from participating in Co-Investment Transactions without the Order. Further, because the BDC Downstream Funds and Wholly-Owned Investment Subs are controlled by the Regulated Funds, the BDC Downstream Funds and Wholly-Owned Investment Subs are subject to Section 57(a)(4) (or Section 17(d) in the case of Wholly-Owned Investment Subs controlled by Regulated Funds that are registered under the Act), and thus also subject to the provisions of Rule 17d–1, and therefore would be prohibited from participating in Co-Investment Transactions without the Order. In addition, because the Apollo Proprietary Accounts will be controlled by an Adviser and, therefore, may be under common control with AIC, AIF, ASFRF and ADS, the Advisers, and any Future Regulated Funds, the Apollo Proprietary Accounts could be deemed to be persons related to the Regulated Funds (or a company controlled by the Regulated Funds) in a manner described by Section 17(d) or 57(b) and also prohibited from participating in the Co-Investment Program.

4. In passing upon applications under rule 17d–1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

5. Applicants state that in the absence of the requested relief, in many circumstances the Regulated Funds would be limited in their ability to participate in attractive and appropriate investment opportunities. Applicants state that, as required by Rule 17d–1(b), the Conditions ensure that the terms on which Co-Investment Transactions may be made will be consistent with the participation of the Regulated Funds being on a basis that it is neither different from nor less advantageous than other participants, thus protecting the equity holders of any participant from being disadvantaged. Applicants further state that the Conditions ensure that all Co-Investment Transactions are reasonable and fair to the Regulated Funds and their shareholders and do not involve overreaching by any person concerned, including the Advisers. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions in accordance with the Conditions will be consistent with the provisions, policies, and purposes of the Act and would be done in a manner that is not different from, or less advantageous than, that of other participants.

Applicants' Conditions

Applicants agree that the Order will be subject to the following Conditions:

1. *Identification and Referral of Potential Co-Investment Transactions.*

(a) The Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that each Adviser is promptly notified of all Potential Co-Investment Transactions that fall within the then-current Objectives and Strategies and Board-Established Criteria of any Regulated Fund the Adviser manages.

(b) When an Adviser to a Regulated Fund is notified of a Potential Co-Investment Transaction under Condition 1(a), the Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. *Board Approvals of Co-Investment Transactions.*

(a) If the Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by the Advisers to be invested in the Potential Co-Investment Transaction by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application. Each Adviser to a participating Regulated Fund will promptly notify and provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with these Conditions.

(c) After making the determinations required in Condition 1(b) above, each Adviser to a participating Regulated Fund will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and each participating Affiliated Fund) to the Eligible Directors of its participating Regulated Fund(s) for their consideration. A Regulated Fund will enter into a Co-Investment Transaction with one or more other Regulated Funds or Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its equity holders and do not involve overreaching in respect of the Regulated Fund or its equity holders on the part of any person concerned;

(ii) the transaction is consistent with:

(A) The interests of the Regulated Fund's equity holders; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Fund(s) or Affiliated Fund(s) would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from, or less advantageous than, that of any other Regulated Fund(s) or Affiliated Fund(s) participating in the transaction; provided that the Required Majority shall not be prohibited from reaching the conclusions required by this Condition 2(c)(iii) if:

(A) The settlement date for another Regulated Fund or an Affiliated Fund in a Co-Investment Transaction is later than the settlement date for the Regulated Fund by no more than ten business days or earlier than the settlement date for the Regulated Fund by no more than ten business days, in either case, so long as: (x) The date on which the commitment of the Affiliated Funds and Regulated Funds is made is the same; and (y) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other; or

(B) any other Regulated Fund or Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors, the right to have a board observer or any similar right to participate in the governance or management of the portfolio company so long as: (x) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any; (y) the Adviser agrees to, and does,

provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and (z) any fees or other compensation that any other Regulated Fund or Affiliated Fund or any affiliated person of any other Regulated Fund or Affiliated Fund receives in connection with the right of one or more Regulated Funds or Affiliated Funds to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among any participating Affiliated Funds (who may, in turn, share their portion with their affiliated persons) and any participating Regulated Fund(s) in accordance with the amount of each such party's investment; and

(iv) the proposed investment by the Regulated Fund will not involve compensation, remuneration or a direct or indirect [25] financial benefit to the Advisers, any other Regulated Fund, the Affiliated Funds or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by Condition 14, (B) to the extent permitted by Section 17(e) or 57(k), as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in Condition 2(c)(iii)(B)(z).

3. *Right to Decline.* Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. *General Limitation.* Except for Follow-On Investments made in accordance with Conditions 8 and 9 below,[26] a Regulated Fund will not invest in reliance on the Order in any issuer in which a Related Party has an investment.[27]

5. *Same Terms and Conditions.* A Regulated Fund will not participate in any Potential Co-Investment Transaction unless (i) the terms, conditions, price, class of securities to be purchased, date on which the commitment is entered into and registration rights (if any) will be the same for each participating Regulated Fund and Affiliated Fund and (ii) the earliest settlement date and the latest settlement date of any participating Regulated Fund or Affiliated Fund will occur as close in time as practicable and in no event more than ten business days apart. The grant to one or more Regulated Funds or Affiliated Funds, but not the respective Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this Condition 5, if Condition 2(c)(iii)(B) is met.

6. *Standard Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of an interest in a security and one or more Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer, then:

(i) The Adviser to such Regulated Fund or Affiliated Fund [28] will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition.

(b) *Same Terms and Conditions.* Each Regulated Fund will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated Fund.

(c) *No Board Approval Required.* A Regulated Fund may participate in such a Disposition without obtaining prior approval of the Required Majority if:

(i) (A) The participation of each Regulated Fund and Affiliated Fund in such Disposition is proportionate to its then-current holding of the security (or securities) of the issuer that is (or are) the subject of the Disposition [29]; (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such Dispositions on a pro rata basis (as described in greater detail in the application); and (C) the Board of the Regulated Fund is provided on a quarterly basis with a list of all Dispositions made in accordance with this Condition; or

(ii) each security is a Tradable Security and (A) the Disposition is not to the issuer or any affiliated person of the issuer; and (B) the security is sold for cash in a transaction in which the only term negotiated by or on behalf of the participating Regulated Funds and Affiliated Funds is price.

(d) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

7. *Enhanced Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of a Pre-Boarding Investment in a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments

[25] For example, procuring the Regulated Fund's investment in a Potential Co-Investment Transaction to permit an affiliate to complete or obtain better terms in a separate transaction would constitute an indirect financial benefit.

[26] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

[27] "Related Party" means (i) any Close Affiliate and (ii) in respect of matters as to which any Adviser has knowledge, any Remote Affiliate. "Close Affiliate" means the Advisers, the Regulated Funds, the Affiliated Funds and any other person described in Section 57(b) (after giving effect to Rule 57b–1) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) except for limited partners included solely by reason of the reference in Section 57(b) to Section 2(a)(3)(D). "Remote Affiliate" means any person described in Section 57(e) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) and any limited partner holding 5% or more of the relevant limited partner interests that would be a Close Affiliate but for the exclusion in that definition.

[28] Any Apollo Proprietary Account that is not advised by an Adviser is itself deemed to be an Adviser for purposes of Conditions 6(a)(i), 7(a)(i), 8(a)(i) and 9(a)(i).

[29] In the case of any Disposition, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Disposition.

and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that:

(i) The Disposition complies with Conditions 2(c)(i), (ii), (iii)(A), and (iv).

(ii) the making and holding of the Pre-Boarding Investments were not prohibited by Section 57 or Rule 17d–1, as applicable, and records the basis for the finding in the Board minutes.

(c) *Additional Requirements.* The Disposition may only be completed in reliance on the Order if:

(i) *Same Terms and Conditions.* Each Regulated Fund has the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated Fund;

(ii) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(iii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b–1) or Rule 17d–1, as applicable;

(iv) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial [30] in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(v) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of Section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of Section 2(a)(9) of the Act).

8. *Standard Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer and the Regulated Funds and Affiliated Funds holding investments in the issuer previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund.

(b) *No Board Approval Required.* A Regulated Fund may participate in the Follow-On Investment without obtaining prior approval of the Required Majority if:

(i) (A) The proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer or the security at issue, as appropriate,[31] immediately preceding the Follow-On Investment; and (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application); or

(ii) it is a Non-Negotiated Follow-On Investment.

(c) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority makes the determinations set forth in Condition 2(c). If the only previous Co-Investment Transaction with respect to the issuer was an Enhanced Review Disposition the Eligible Directors must complete this review of the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms of the investment.

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

9. *Enhanced Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer that is a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds holding investments in the issuer have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the

---

[30] In determining whether a holding is ''immaterial'' for purposes of the Order, the Required Majority will consider whether the nature and extent of the interest in the transaction or arrangement is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement.

[31] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of a security held by the participating Regulated Funds and Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Funds or Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority reviews the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms and makes the determinations set forth in Condition 2(c). In addition, the Follow-On Investment may only be completed in reliance on the Order if the Required Majority of each participating Regulated Fund determines that the making and holding of the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b–1) or Rule 17d–1, as applicable. The basis for the Board's findings will be recorded in its minutes.

(c) *Additional Requirements.* The Follow-On Investment may only be completed in reliance on the Order if:

(i) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(ii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b–1) or Rule 17d–1, as applicable;

(iii) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(iv) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of Section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of Section 2(a)(9) of the Act).

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

10. *Board Reporting, Compliance and Annual Re-Approval.*

(a) Each Adviser to a Regulated Fund will present to the Board of each Regulated Fund, on a quarterly basis, and at such other times as the Board may request, (i) a record of all investments in Potential Co-Investment Transactions made by any of the other Regulated Funds or any of the Affiliated Funds during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria that were not made available to the Regulated Fund, and an explanation of why such investment opportunities were not made available to the Regulated Fund; (ii) a record of all Follow-On Investments in and Dispositions of investments in any issuer in which the Regulated Fund holds any investments by any Affiliated Fund or other Regulated Fund during the prior quarter; and (iii) all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Funds or Affiliated Funds that the Regulated Fund considered but declined to participate in, so that the Independent Directors, may determine whether all Potential Co-Investment Transactions and Co-Investment Transactions during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the Conditions.

(b) All information presented to the Regulated Fund's Board pursuant to this Condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

(c) Each Regulated Fund's chief compliance officer, as defined in rule 38a–1(a)(4), will prepare an annual report for its Board each year that evaluates (and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and Conditions of the application and the procedures established to achieve such compliance. In the case of a BDC Downstream Fund that does not have a chief compliance officer, the chief compliance officer of the BDC that controls the BDC Downstream Fund will prepare the report for the relevant Independent Party.

(d) The Independent Directors (including the non-interested members of each Independent Party) will consider at least annually whether continued participation in new and existing Co-Investment Transactions is in the Regulated Fund's best interests.

11. *Record Keeping.* Each Regulated Fund will maintain the records required by Section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these Conditions were approved by the Required Majority under Section 57(f).

12. *Director Independence.* No Independent Director (including the non-interested members of any Independent Party) of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise be an "affiliated person" (as defined in the Act) of any Affiliated Fund.

13. *Expenses.* The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including,

without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the Advisers under their respective advisory agreements with the Regulated Funds and the Affiliated Funds, be shared by the Regulated Funds and the participating Affiliated Funds in proportion to the relative amounts of the securities held or being acquired or disposed of, as the case may be.

14. *Transaction Fees.*[32] Any transaction fee (including break-up, structuring, monitoring or commitment fees but excluding brokerage or underwriting compensation permitted by Section 17(e) or 57(k)) received in connection with any Co-Investment Transaction will be distributed to the participants on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by the Adviser at a bank or banks having the qualifications prescribed in Section 26(a)(1), and the account will earn a competitive rate of interest that will also be divided pro rata among the participants. None of the Advisers, the Affiliated Funds, the other Regulated Funds or any affiliated person of the Affiliated Funds or the Regulated Funds will receive any additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction other than (i) in the case of the Regulated Funds and the Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in Condition 2(c)(iii)(B)(z), (ii) brokerage or underwriting compensation permitted by Section 17(e) or 57(k) or (iii) in the case of the Advisers, investment advisory compensation paid in accordance with investment advisory agreements between the applicable Regulated Fund(s) or Affiliated Fund(s) and its Adviser.

15. *Independence.* If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the Act or applicable State law affecting the Board's composition, size or manner of election.

[32] Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–26597 Filed 12–7–21; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA 2021–0018]

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Federal Transit Administration (FTA) to request the Office of Management and Budget (OMB) to approve the extension of a currently approved information collection: Job Access and Reverse Commute Program.

DATES: Comments must be submitted before February 7, 2022.

ADDRESSES: To ensure that your comments are not entered more than once into the docket, submit comments identified by the docket number by only one of the following methods:

1. *Website: www.regulations.gov.* Follow the instructions for submitting comments on the U.S. Government electronic docket site. (**Note:** The U.S. Department of Transportation's (DOT's) electronic docket is no longer accepting electronic comments.) All electronic submissions must be made to the U.S. Government electronic docket site at *www.regulations.gov.* Commenters should follow the directions below for mailed and hand-delivered comments.
2. *Fax:* 202–366–7951.
3. *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue SE, Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue SE, Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

Instructions: You must include the agency name and docket number for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA has received your comments, include a self-addressed stamped postcard. Note that all comments received, including any personal information, will be posted and will be available to internet users, without change, to *www.regulations.gov.* You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000, (65 FR 19477), or you may visit *www.regulations.gov.* Docket: For access to the docket to read background documents and comments received, go to *www.regulations.gov* at any time. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Avenue SE, Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Elan Flippin (202) 366–3800 or email: *Elan.Fliipin@dot.gov.*

SUPPLEMENTARY INFORMATION: Interested parties are invited to send comments regarding any aspect of this information collection, including: (1) The necessity and utility of the information collection for the proper performance of the functions of the FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection.

Title: Job Access and Reverse Commute Program (OMB Number: 2132–0563).

Background: The Job Access and Reverse Commute (JARC) program, provided grants for filling gaps in employment transportation. The primary beneficiaries of this program were low-income families and families coming off welfare assistance who otherwise would have a difficult time getting to jobs and related services, such as child care and training. The program was begun in 1999 and was continued under Section 5316 of the federal transportation legislation, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), passed by Congress in 2005. The JARC program authorized two kinds of grants: Job

Access grants (aimed at developing new transportation services for low-income workers and/or filling in gaps in existing services) and Reverse Commute projects (intended to provide transportation to suburban jobs from urban, rural and other suburban locations—but not necessarily just for low-income people). The JARC program was repealed under the Moving Ahead for Progress in the 21st Century Act (MAP–21). Although the program has expired, JARC activities are eligible for funding under FTA's Urbanized Area Formula Grants (Section 5307) and the Formula Grants for Rural Areas (Section 5311) programs. However, funds previously authorized for the program repealed by MAP–21 remain available for their originally authorized purposes until the period of availability expires, the funds are fully expended, the funds are rescinded by Congress, or the funds are otherwise reallocated.

Respondents: State and local government, business or other for-profit institutions, and non-profit institutions.

Estimated Total Annual Respondents: 49.

Estimated Total Burden Hours per Respondent: 2 hours.

Estimated Annual Burden on Respondents: 98 hours.

Frequency: Annually.

Nadine Pembleton,

Director, Office of Management Planning.

[FR Doc. 2021–26608 Filed 12–7–21; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2021–0268]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: IT'S ENOUGH (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 7, 2022.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2021–0268 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2021–0268 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2021–0268, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–459, Washington, DC 20590. Telephone 202–366–5723, Email James.Mead@*dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel IT'S ENOUGH is:

—*Intended Commercial Use of Vessel:* ''Day charters.''

—*Geographic Region Including Base of Operations:* ''Florida'' (Base of Operations: Naples, FL)

—*Vessel Length and Type:* 73′ Motor

The complete application is available for review identified in the DOT docket as MARAD 2021–0268 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2021–0268 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures

described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

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, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

* * * * *

By Order of the Acting Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2021–26550 Filed 12–7–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Office of the Assistant Secretary for International Affairs; Survey of U.S. Ownership of Foreign Securities as of December 31, 2021

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of reporting requirements.

SUMMARY: By this Notice, the Department of the Treasury is informing the public that it is conducting a mandatory survey of ownership of foreign securities by U.S. residents as of December 31, 2021. This Notice constitutes legal notification to all United States persons (defined below) who meet the reporting requirements set forth in this Notice that they must respond to, and comply with, this survey. The reporting form SHC (2021) and instructions may be printed from the internet at: *https://home.treasury.gov/data/treasury-international-capital-tic-system-home-page/tic-forms-instructions/forms-shc.*

Definition: Pursuant to 22 U.S.C. 3102(3) and (4): A person means any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency); and a United States person means any person resident in the United States or subject to the jurisdiction of the United States.

Who Must Report: The following United States (U.S.) persons must report on this survey:

- U.S. persons who manage, as custodians, the safekeeping of foreign securities for themselves and other U.S. persons. These U.S. persons, who include the affiliates in the United States of foreign entities, must report on this survey if the total fair value of the foreign securities whose safekeeping they manage on behalf of U.S. persons—aggregated over all accounts and for all U.S. branches and affiliates of their firm—is $200 million or more as of the close of business on December 31, 2021.
- U.S. persons who own foreign securities for their own portfolios and/or who invest in foreign securities on behalf of others, such as investment managers/fund sponsors. These U.S. persons (referred to as ''end-investors''), who include the affiliates in the United States of foreign entities, must report on this survey if the total fair value of these foreign securities—aggregated over all accounts and for all U.S. branches and affiliates of their firm—is $200 million or more as of the close of business on December 31, 2021.
- U.S. persons who are notified by letter from the Federal Reserve Bank of New York. These U.S. persons must file Schedule 1, even if the recipient of the letter is under the reporting threshold of $200 million and need only report ''exempt'' on Schedule 1. These U.S. persons who meet the reporting threshold must also file Schedule 2 and/or Schedule 3.

What To Report: This report will collect information on holdings by U.S. residents of foreign securities, including equities, long-term debt securities, and short-term debt securities (including selected money market instruments).

How To Report: Copies of the survey forms and instructions, which contain complete information on reporting procedures and definitions, may be obtained at the website address given above in the **SUMMARY**. Completed reports can be submitted electronically or via email at *SHC.help@ny.frb.org.* Inquiries can be made to the survey staff of the Federal Reserve Bank of New York at (212) 720–6300 or email: *SHC.help@ny.frb.org.* Inquiries can also be made to Dwight Wolkow at (202) 622–1276, email: *comments2TIC@do.treas.gov.*

When To Report: Data must be submitted to the Federal Reserve Bank of New York, acting as fiscal agent for the Department of the Treasury, by March 4, 2022.

Paperwork Reduction Act Notice: This data collection has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and assigned control number 1505–0146. 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 control number assigned by OMB. The estimated average annual burden associated with this collection of information is 49 hours per respondent for end-investors and custodians that file Schedule 3 reports covering their foreign securities entrusted to U.S. resident custodians, 146 hours per respondent for large end-investors filing Schedule 2 reports, and 546 hours per respondent for large custodians of securities filing Schedule 2 reports. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Department of the Treasury, Attention: Administrator, International Portfolio Investment Data Reporting Systems, Room 1050, Washington, DC 20220, and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. In light of the current pandemic, please also email comments to Dwight Wolkow at: *comments2TIC@do.treas.gov.*

Dwight Wolkow,

Administrator, International Portfolio Investment Data Reporting Systems.

[FR Doc. 2021–26589 Filed 12–7–21; 8:45 am]

BILLING CODE 4810–AK–P

FEDERAL REGISTER

Vol. 86 Wednesday,
No. 233 December 8, 2021

Part II

Bureau of Consumer Financial Protection

12 CFR Part 1026
Facilitating the LIBOR Transition (Regulation Z); Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2020–0014]

RIN 3170–AB01

Facilitating the LIBOR Transition (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretation.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is amending Regulation Z, which implements the Truth in Lending Act (TILA), generally to address the anticipated sunset of LIBOR, which is expected to be discontinued for most U.S. Dollar (USD) tenors in June 2023. Some creditors currently use USD LIBOR as an index for calculating rates for open-end and closed-end products. The Bureau is amending the open-end and closed-end provisions to provide examples of replacement indices for LIBOR indices that meet certain Regulation Z standards. The Bureau also is amending Regulation Z to permit creditors for home equity lines of credit (HELOCs) and card issuers for credit card accounts to transition existing accounts that use a LIBOR index to a replacement index on or after April 1, 2022, if certain conditions are met. This final rule also addresses change-in-terms notice provisions for HELOCs and credit card accounts and how they apply to accounts transitioning away from using a LIBOR index. Lastly, the Bureau is amending Regulation Z to address how the rate reevaluation provisions applicable to credit card accounts apply to the transition from using a LIBOR index to a replacement index. The Bureau is reserving judgment about whether to include references to a 1-year USD LIBOR index and its replacement index in various comments; the Bureau will consider whether to finalize comments proposed on that issue in a supplemental final rule once it obtains additional information.

DATES:

Effective dates: This final rule is effective on April 1, 2022, except the amendment to appendix H to part 1026 in amendatory instruction 8, which is effective on October 1, 2023.

Compliance dates: The mandatory compliance date for revisions to the change-in-terms notice requirements in § 1026.9(c)(1)(ii) and (c)(2)(v)(A) is October 1, 2022. The mandatory compliance date for all other provisions of the final rule is April 1, 2022.

FOR FURTHER INFORMATION CONTACT: Krista Ayoub, Kristen Phinnessee, or Lanique Eubanks, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

The Bureau is adopting amendments to Regulation Z, which implements TILA, for both open-end and closed-end credit to address the anticipated sunset of LIBOR.[1] The effective date of this final rule is April 1, 2022. For HELOCs and credit card accounts, the updated requirements in this final rule related to disclosing a reduction in a margin in the change-in-terms notices are effective on April 1, 2022, with a mandatory compliance date of October 1, 2022. For the revisions related to the post-consummation disclosure form for certain adjustable rate mortgages (ARMs), specifically sample form H–4(D)(4) in appendix H (that can be used for complying with § 1026.20(d)), this final rule provides creditors, assignees, and servicers with additional time to add the date at the top of the form if they are not already including the date. Specifically, from April 1, 2022, through September 30, 2023, creditors, assignees, and servicers have the option of either using the version of the form in effect prior to April 1, 2022, that does not include the date at the top of the form (denoted as ''Legacy Form'' in appendix H), or using the revised form put into effect on April 1, 2022, (denoted as ''Revised Form'' in appendix H) that includes the date at the top of the form. Creditors, assignees, and servicers are not required to use the revised form that includes the date at the top of the form that will be put into effect on April 1, 2022, until October 1, 2023. Also, this final rule adds a new sample form H–4(D)(2) in appendix H effective April 1, 2022, that references a Secured Overnight Financing Rate (SOFR) index (denoted as ''Revised Form'' in appendix H) that can be used for complying with § 1026.20(c). This final rule also retains through September 30, 2023, the sample form H–4(D)(2) that was in effect prior to April 1, 2022, that references a LIBOR index (denoted as ''Legacy Form'' in appendix H). This is discussed in this section and the effective date discussion in part VI, below.

A. Open-End Credit

The Bureau is adopting several amendments to the open-end credit provisions in Regulation Z to address the anticipated sunset of LIBOR. First, this final rule sets forth a detailed roadmap for HELOC creditors and card issuers to choose a compliant replacement index for the LIBOR index.[2] Regulation Z already permits HELOC creditors and card issuers to change an index and margin they use to set the annual percentage rate (APR) on a variable-rate account under certain conditions, when the original index becomes unavailable or is no longer available. The Bureau determined, however, that consumers, HELOC creditors, and card issuers would benefit substantially if HELOC creditors and card issuers could transition away from a LIBOR index before LIBOR is expected to become unavailable.

Under this final rule, HELOC creditors and card issuers can transition away from using the LIBOR index to a replacement index on or after April 1, 2022, before LIBOR is expected to become unavailable. To accomplish this, this final rule imposes certain requirements on selecting a replacement index. HELOC creditors and card issuers must ensure that the APR calculated using the replacement index is substantially similar to the rate calculated using the LIBOR index, based generally on the values of these indices on October 18, 2021.[3] HELOC creditors

[1] When amending commentary, the Office of the Federal Register requires reprinting of certain subsections being amended in their entirety rather than providing more targeted amendatory instructions. The sections of regulatory text and commentary included in this document show the language of those sections. In addition, the Bureau is releasing an unofficial, informal redline to assist industry and other stakeholders in reviewing the changes made in this final rule to the regulatory text and commentary of Regulation Z. This redline can be found on the Bureau's website, at [placeholder]. If any conflicts exist between the redline and the text of Regulation Z, its commentary, or this final rule, the documents published in the **Federal Register** are the controlling documents.

[2] Reverse mortgages structured as open-end credit are HELOCs subject to the provisions in §§ 1026.40 and 1026.9(c)(1).

[3] If the replacement index is not published on October 18, 2021, the creditor or card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the Alternative Reference Rates Committee (ARRC) for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the creditor or card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is

and card issuers may select a replacement index that is newly established and has no history or an index that is not newly established and has historical fluctuations substantially similar to those of the LIBOR index. This final rule provides details on how to determine whether a replacement index has historical fluctuations that are substantially similar to those of a particular LIBOR index for HELOCs and credit card accounts. Specifically, this final rule provides examples of the type of factors to be considered in whether a replacement index meets the Regulation Z ''historical fluctuations are substantially similar'' standard. The Bureau also has determined that the prime rate published in the Wall Street Journal (Prime) has historical fluctuations substantially similar to those of the 1-month and 3-month USD LIBOR indices. In addition, the Bureau has determined that spread-adjusted [4] indices based on SOFR recommended by the Alternative Reference Rates Committee (ARRC) for consumer products to the replace 1-month, 3-month, or 6-month USD LIBOR index have historical fluctuations that are substantially similar to those of the applicable USD LIBOR index they are intended to replace. These new provisions that detail specifically how HELOC creditors and card issuers may replace a LIBOR index with a replacement index for accounts on or after April 1, 2022, are set forth in § 1026.40(f)(3)(ii)(B) for HELOCs and § 1026.55(b)(7)(ii) for credit card accounts. The ARRC has indicated that the SOFR-based spread-adjusted indices recommended by ARRC for consumer products to the replace 1-month, 3-month, 6-month, or 1-year USD LIBOR index will not be published until Monday, July 3, 2023, which is the first weekday after Friday, June 30, 2023, when LIBOR is currently anticipated to sunset for these USD LIBOR tenors.[5] However, the Bureau wishes to facilitate an earlier transition for those HELOC creditors or card issuers that may want to transition to an index other than the SOFR-based spread-adjusted indices recommended by ARRC for consumer products. Accordingly, the Bureau is making these provisions effective on April 1, 2022.

Second, this final rule makes clarifying changes to existing Regulation Z provisions on the replacement of an index when the index becomes unavailable. These changes are set forth in § 1026.40(f)(3)(ii)(A) for HELOCs and in § 1026.55(b)(7)(i) for credit card accounts.

Third, this final rule revises change-in-terms notice requirements for HELOCs and credit card accounts to notify consumers how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced. This final rule ensures that the change-in-terms notices for these accounts will disclose the index that is replacing the LIBOR index and any adjusted margin that will be used to calculate a consumer's rate, regardless of whether the margin is being reduced or increased. These changes will become effective April 1, 2022. From April 1, 2022, through September 30, 2022, creditors will have the option of complying with these revised change-in-terms notice requirements. On or after October 1, 2022, creditors will be required to comply with these revised change-in-terms notice requirements. These changes are set forth in § 1026.9(c)(1)(ii) for HELOCs and in § 1026.9(c)(2)(v)(A) for credit card accounts.

Fourth, this final rule also provides additional details on how a creditor may disclose information about the periodic rate and APR in a change-in-terms notice for HELOCs and credit card accounts when the creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by ARRC for consumer products to replace 1-month, 3-month, or 6-month USD LIBOR index in certain circumstances. These details are set forth in comment 9(c)(1)–4 for HELOCs and in comment 9(c)(2)(iv)–2.ii for credit card accounts.

Fifth, this final rule adds an exception from the rate reevaluation provisions applicable to credit card accounts. Currently, when a card issuer increases a rate on a credit card account, the card issuer generally must complete an analysis reevaluating the rate increase every six months until the rate is reduced to a certain degree. To facilitate compliance, this final rule adds an exception from these requirements for increases that occur as a result of replacing a LIBOR index using the specific provisions described above for transitioning from a LIBOR index or as a result of the LIBOR index becoming unavailable. This exception is set forth in § 1026.59(h)(3). This exception would not apply to rate increases that are already subject to the rate reevaluation requirements prior to the transition from the LIBOR index. This final rule also would address cases where the card issuer was already required to perform a rate reevaluation review prior to transitioning away from LIBOR and LIBOR was used as the benchmark for comparison for purposes of determining whether the card issuer can terminate the six-month reviews. To facilitate compliance, these changes will address how a card issuer can terminate the obligation to review where the rate applicable immediately prior to the increase was a variable rate calculated using a LIBOR index. These changes are set forth in § 1026.59(f)(3).

Sixth, in relation to the open-end credit provisions, this final rule adopts technical edits to comment 59(d)–2 to replace the LIBOR reference with a reference to a SOFR index and to make related changes and corrections.

B. Closed-End Credit

The Bureau is adopting amendments to the closed-end credit provisions in Regulation Z to address the anticipated sunset of LIBOR. First, this final rule provides details on how to determine whether a replacement index is a comparable index to a particular LIBOR index for purposes of the closed-end refinancing provisions. Currently, under Regulation Z, if the creditor changes the index of a variable-rate closed-end loan to an index that is not a comparable index, the index change may constitute a refinancing for purposes of Regulation Z, triggering certain requirements. Specifically, this final rule provides examples of the type of factors to be considered in whether a replacement index meets the Regulation Z ''comparable'' standard with respect to a particular LIBOR index for closed-end transactions. This change is set forth in comment 20(a)–3.iv. This final rule also adds an illustrative example to identify the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6 month USD LIBOR index as an example of a comparable index for the LIBOR indices that they are intended to replace. This change is set forth in comment 20(a)(3)–ii.B.

substantially similar to the rate based on the LIBOR index.

[4] The spread between two indices is the difference between the levels of those indices, which may vary from day to day. For example, if today, index X is 5 percent and index Y is 4 percent, then the X–Y spread today is 1 percentage point (or, equivalently, 100 basis points). A spread adjustment is a term that is added to one index to make it more similar to another index. For example, if the X–Y spread is typically around 100 basis points, then one reasonable spread adjustment may be to add 100 basis points to Y every day. Then the spread-adjusted value of Y will typically be much closer to the value of X than Y is, although there may still be differences between X and the spread-adjusted Y from day to day.

[5] Alt. Reference Rates Comm, *Summary of the ARRC's Fallback Recommendations,* at 11 (Oct. 6, 2021), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/spread-adjustments-narrative-oct-6-2021* (Summary of Fallback Recommendations).

Second, in relation to the closed-end credit provisions, this final rule adopts technical edits to § 1026.36(a)(4)(iii)(C) and (a)(5)(iii)(B), comment 37(j)(1)–1, and sample forms H–4(D)(2) and H–4(D)(4) in appendix H pursuant to § 1026.20(c) and (d). These technical edits would replace LIBOR references with references to a SOFR index and make related changes and corrections. This final rule also adds a date at the top of the sample form H–4(D)(4) that can be used for complying with § 1026.20(d) concerning ARMs. The effective date of the revised sample forms in H–4(D)(2) and H–4(D)(4) in appendix H is April 1, 2022. With respect to sample form H–4(D)(4) in appendix H, from April 1, 2022, through September 30, 2023, creditors, assignees, or servicers will have the option of using a format substantially similar to form H–4(D)(4) either in effect prior to April 1, 2022 (that does not include the date at the top of the form and is denoted as ''Legacy Form'' in appendix H), or the form that becomes effective on April 1, 2022 (that includes the date at the top of the form and is denoted as ''Revised Form'' in appendix H). Both versions of the forms will be available in appendix H through September 30, 2023. Starting on or after October 1, 2023, only creditors, assignees, or servicers using a format substantially similar to the form that becomes effective on April 1, 2022, that includes a date at the top of the form, will be deemed to be in compliance. Accordingly, the version of form H–4(D)(4) in effect prior to April 1, 2022, will be removed from appendix H and cannot be used to demonstrate compliance with § 1026.20(d). In addition, the revised form of H–4(D)(4) that will become effective on April 1, 2022, also provides an example of the form using a SOFR index. Because most tenors of USD LIBOR are not expected to be discontinued until June 2023, this final rule retains through September 30, 2023, the sample form H–4(D)(4) that was in effect prior to April 1, 2022, that references a LIBOR index. New sample form H–4(D)(2) in appendix H effective April 1, 2022, (denoted as ''Revised Form'' in appendix H) can be used for complying with § 1026.20(c) relating to ARMs and provides an example using a SOFR index. This final rule also retains through September 30, 2023, the sample form H–4(D)(2) that was in effect prior to April 1, 2022, (denoted as ''Legacy Form'' in appendix H) that provides an example using a LIBOR index.

II. Background

A. LIBOR

Introduced in the 1980s, LIBOR (originally an acronym for London Interbank Offered Rate) was intended to measure the average rate at which a bank could obtain unsecured funding in the London interbank market for a given period, in a given currency. LIBOR is calculated based on submissions from a panel of contributing banks and published every London business day for five currencies (USD, British pound sterling (GBP), euro (EUR), Swiss franc (CHF), and Japanese yen (JPY)) and for seven tenors [6] for each currency (overnight, 1-week, 1-month, 2-month, 3-month, 6-month, and 1-year), resulting in 35 individual rates (collectively, LIBOR). As of September 2021, the panel for USD LIBOR is comprised of sixteen banks, and each bank contributes data for all seven tenors.[7]

In 2017, the chief executive of the U.K. Financial Conduct Authority (FCA), which regulates LIBOR, announced that it did not intend to persuade or compel banks to submit information for LIBOR past the end of 2021 (subsequently extended to June 30, 2023, for certain USD LIBOR tenors only) and that the panel banks had agreed to voluntarily sustain LIBOR until then in order to provide sufficient time for the market to transition from using LIBOR indices to alternative indices.[8] In March 2021, the FCA announced cessation dates for all LIBOR indices. The bank panels are scheduled to end immediately after December 31, 2021, for the 1-week and 2-month USD LIBOR indices and immediately after June 30, 2023, for the remaining USD LIBOR indices. After these dates, representative LIBOR indices will no longer be available.[9]

B. Consumer Products Using LIBOR

In the United States, financial institutions have used USD LIBOR as a common benchmark rate for a variety of adjustable-rate consumer financial products, including mortgages, credit cards, HELOCs, and student loans. Typically, the consumer pays an interest rate that is calculated as the sum of a benchmark index and a margin. For example, a consumer may pay an interest rate equal to the 1-year USD LIBOR plus two percentage points.

Financial institutions have been developing plans and procedures to transition from the use of LIBOR indices to replacement indices for products that are being newly issued and existing accounts that were originally benchmarked to a LIBOR index. In some markets, such as for HELOCs and credit cards, the vast majority of newly originated lines of credit are already based on indices other than a LIBOR index.

III. Summary of Rulemaking Process

A. 2020 Proposal

On June 4, 2020, the Bureau issued a notice of proposed rulemaking containing several proposed amendments to Regulation Z, which implements TILA, for both open-end and closed-end credit to address the anticipated sunset of LIBOR.[10] This notice of proposed rulemaking was published in the **Federal Register** on June 18, 2020 (2020 Proposal).[11] The Bureau generally proposed that the final rule would take effect on March 15, 2021, except for the updated change-in-term disclosure requirements for HELOCs and credit card accounts that would apply as of October 1, 2021.

The Bureau proposed several amendments to the open-end credit provisions in Regulation Z to address the anticipated sunset of LIBOR. Specifically, the Bureau proposed to add new provisions that detail specifically how HELOC creditors and card issuers may replace a LIBOR index with a replacement index for accounts on or after March 15, 2021. In the 2020 Proposal, the Bureau set forth certain proposed conditions that HELOC creditors and card issuers would be required to meet in order to use these newly proposed provisions. Under the 2020 Proposal, HELOC creditors and card issuers would have been required

[6] The tenor refers to the to the length of time remaining until a loan matures.

[7] The Intercontinental Exch. LIBOR, *Panel Composition, https://www.theice.com/iba/libor.*

[8] Andrew Bailey, Fin. Conduct Auth., *The Future of LIBOR* (2017), *https://www.fca.org.uk/news/speeches/the-future-of-libor;* Fin. Conduct Auth., *FCA Statement on LIBOR Panels* (2017), *https://www.fca.org.uk/news/statements/fca-statement-libor-panels.*

[9] Fin. Conduct Auth., *Announcements on the End of LIBOR* (2021), *https://www.fca.org.uk/news/press-releases/announcements-end-libor (last updated May 3, 2021);* Fin. Conduct Auth., *About LIBOR Transition* (2021), *https://www.fca.org.uk/markets/libor-transition* (last updated May 7, 2021).

[10] At the same time as issuing the proposal, the Bureau issued separate written guidance in the form of Frequently Asked Questions (FAQs) for creditors and card issuers to use as they transition away from using LIBOR indices. These FAQs addressed regulatory questions where the existing rule was clear on the requirements and already provides necessary alternatives for the LIBOR transition. The FAQs, as well as additional written guidance materials including an executive summary of this final rule, are available here: Bureau of Consumer Fin. Prot., [Title] *https://www.consumerfinance.gov/policy-compliance/guidance/other-applicable-requirements/libor-transition/.*

[11] 85 FR 36938 (June 18, 2020).

to ensure that the APR calculated using the replacement index is substantially similar to the rate calculated using the LIBOR index, based generally on the values of these indices on December 31, 2020. The 2020 Proposal also would have imposed other requirements on a replacement index. Under the 2020 Proposal, HELOC creditors and card issuers could select a replacement index that is newly established and has no history, or an index that is not newly established and has a history. As proposed, HELOC creditors and card issuers would have been permitted to replace a LIBOR index with an index that has a history only if the index has historical fluctuations substantially similar to those of the LIBOR index. The Bureau proposed to determine that Prime has historical fluctuations substantially similar to those of the 1-month and 3-month USD LIBOR indices. The Bureau also proposed to determine that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the LIBOR indices that they are intended to replace.

The Bureau also proposed amendments to the open-end credit provisions to: (1) Make clarifying changes to the existing provisions on the replacement of an index when the index becomes unavailable; (2) revise change-in-terms notice requirements for HELOCs and credit card accounts to ensure that consumers are notified of how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced; (3) add an exception from the rate reevaluation provisions applicable to credit card accounts for increases that occur as a result of replacing a LIBOR index using the specific proposed provisions described above for transitioning from a LIBOR index or as a result of the LIBOR index becoming unavailable; (4) address cases where the card issuer was already required to perform a rate reevaluation review prior to transitioning away from LIBOR and LIBOR was used as the benchmark for comparison for purposes of determining whether the card issuer can terminate the six-month reviews; and (5) make several technical edits to certain commentary to replace LIBOR references with references to a SOFR index.

The Bureau also proposed amendments to the closed-end credit provisions in Regulation Z to address the anticipated sunset of LIBOR, including proposed amendments to: (1) Add an illustrative example to identify the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products as an example of a comparable index for the LIBOR indices that they are intended to replace for purposes of the closed-end refinancing provisions; and (2) make technical edits to certain commentary and sample forms to replace LIBOR references with references to a SOFR index and make related changes and corrections.

The comment period for the 2020 Proposal closed on August 4, 2020. The Bureau received around 30 comment letters. Approximately half of the comment letters were submitted by industry commenters, specifically banks and credit unions and their trade associations. Commenters also included several consumer groups, a financial services education and consulting firm, and several individuals.

Commenters generally supported the proposed provisions that would allow HELOC creditors and card issuers to replace a LIBOR index with a replacement index for accounts on or after March 15, 2021, if certain conditions are met. Nonetheless, several industry commenters encouraged the Bureau to allow HELOC creditors and card issuers to replace a LIBOR index sooner than March 15, 2021. Commenters also generally supported the proposed conditions that must be met for HELOC creditors and card issuers to use the newly proposed provisions described above. Also, several industry commenters and several consumer group commenters supported the Bureau's proposal determining that Prime and certain SOFR-based spread-adjusted indices recommended by ARRC for consumer products have historical fluctuations substantially similar to those of certain LIBOR indices. Nonetheless, a few consumer group commenters indicated that the Bureau should not adopt its proposal that Prime has historical fluctuations that are substantially similar to those of certain LIBOR indices.

Several commenters requested additional guidance on the proposed conditions that must be met by HELOC creditors and card issuers to use the proposed provisions discussed above, including: (1) Many industry commenters and one individual commenter requested that the Bureau identify additional indices that meet the Regulation Z standards that the historical fluctuations of those indices are substantially similar to those of certain tenors of LIBOR; (2) several industry commenters requested that the Bureau provide a principles-based standard for determining when the historical fluctuations of an index are substantially similar to those of a particular LIBOR index; (3) a few consumer group commenters and a financial services education and consulting firm indicated that the Bureau should limit when a newly established index can be used to replace a LIBOR index; and (4) several industry commenters and several consumer group commenters indicated that the Bureau should provide greater detail on the proposed condition that HELOC creditors and card issuers must ensure that the APR calculated using the replacement index is substantially similar to the rate calculated using the LIBOR index.

Several industry commenters and several consumer group commenters also indicated that the Bureau should provide further guidance to HELOC creditors and card issuers to assist them in determining whether LIBOR (or another index) is unavailable for purposes of Regulation Z.

Commenters generally supported the Bureau's proposed revisions to the notice requirements for HELOCs and credit card accounts. Several industry commenters and an individual commenter also requested that the Bureau provide comprehensive sample disclosures for change-in-terms notices for HELOC accounts and for credit card accounts that can be provided to borrowers to help them understand the change in the index. Commenters also generally supported the proposed changes to the rate reevaluation provisions applicable to credit card accounts.

With respect to the proposed amendments related to closed-end credit, commenters generally supported the proposed new illustrative example to identify the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products as an example of a comparable index for the LIBOR indices that they are intended to replace for purposes of the closed-end refinancing provisions. Nonetheless, commenters also requested other changes to the closed-end provisions, including: (1) Many industry commenters generally urged the Bureau to provide additional examples of comparable indices to the LIBOR indices; (2) many industry commenters urged the Bureau to provide additional guidance on how to determine if an index is a comparable index for purposes of Regulation Z; (3) several commenters, including a few consumer groups, a financial services education and consulting firm, and a few individuals, urged the Bureau to require disclosures to consumers with closed-

end loans notifying consumers of the index change; (4) a few industry commenters urged the Bureau to include the same provisions for closed-end loans that it proposed for HELOCs and credit card accounts which would allow HELOC creditors and card issuers to transition from using a LIBOR index on or after March 15, 2021, if certain conditions are met; and (5) several industry commenters urged the Bureau to include the proposed example for the SOFR-based spread-adjusted indices recommended by ARRC for consumer products in the text of the rule, rather than the commentary.

The Bureau responds to the above comments in the section-by-section discussion below.

The Bureau notes that some of the comments the Bureau received raised issues that are beyond the scope of the 2020 Proposal. Specifically, several industry commenters requested that the Bureau provide guidance that the use of certain replacement indices would not raise Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) concerns. The Bureau is not addressing these comments requesting guidance on UDAAP in this final rule because they are outside the scope of the 2020 Proposal.

B. Outreach

Prior to the 2020 Proposal, the Bureau received feedback through both formal and informal channels, regarding ways in which the Bureau could use rulemaking to facilitate the market's orderly transition from using LIBOR indices to alternate indices. The following is a brief summary of some of the Bureau's engagement with industry, consumer groups, regulators, and other stakeholders regarding the transition away from the use of LIBOR indices prior to the 2020 Proposal. The Bureau discusses feedback received through these various channels that is relevant to this final rule throughout the document.

The Bureau is an *ex officio* member of the ARRC, a group of private-market participants convened by the Board of Governors of the Federal Reserve System (Board) and the Federal Reserve Bank of New York (New York Fed) to ensure a successful transition from the use of LIBOR as an index. The group is comprised of a diverse set of private-sector entities that have an important presence in markets affected by USD LIBOR and a wide array of official-sector entities, including banking and financial sector regulators, as ex-officio members. As an *ex officio* member, the Bureau does not have voting rights and may only offer views and analysis to support the ARRC's objectives. Through its interaction with other ARRC members, the Bureau has received questions and requests for clarification regarding certain provisions in the Bureau's rules that could affect the industry's LIBOR transition plans. For example, the Bureau has received informal requests from members of the ARRC for clarification that the SOFR-based spread-adjusted index recommended by ARRC for consumer products is a comparable index to the LIBOR index. The Bureau has also, in coordination with the ARRC, actively sought feedback regarding a potential rulemaking related to the LIBOR transition. For example, the Bureau convened multiple meetings for members of the ARRC to hear consumer groups' views on potential issues consumers may face during the anticipated sunset of LIBOR and solicited suggestions for potential actions the regulators could take to facilitate a smooth transition.

The Bureau has engaged in ongoing market monitoring with individual institutions, trade associations, regulators, and other stakeholders to understand their plans for the LIBOR transition, their concerns, and potential impacts on consumers. Institutions and trade associations have met informally with the Bureau and sent letters outlining their concerns related to the anticipated sunset of LIBOR. The Bureau also has received feedback regarding the LIBOR transition through other formal channels that were related to general Bureau activities. For example, in January 2019, the Bureau solicited information from the public about several aspects of the consumer credit card market.[12] The Bureau received comments submitted from a banking trade group regarding changes to Regulation Z that could support the transition away from using LIBOR indices.

Through these various channels, industry trade associations, consumer groups, and other organizations provided information about provisions in Bureau regulations that could be modified to reduce market confusion, enable institutions and consumers to transition away from using LIBOR indices in a timely manner, and lower risks related to the LIBOR transition. A number of financial institutions raised concerns that LIBOR may continue for some time after December 2021 but become less representative or reliable if, as expected, some panel banks stop submitting information before LIBOR finally is discontinued. Stakeholders noted that FCA could declare LIBOR to be unrepresentative at some point after 2021 and wanted clarity from U.S. Federal regulators about how U.S. firms should interpret such a declaration. Some industry participants asked that the Bureau declare LIBOR to be unavailable for the purposes of Regulation Z. They also requested that the Bureau facilitate a transition timeline that would provide sufficient time for financial institutions to notify consumers of the change and make the necessary changes to their systems.

Credit card issuers and related trade associations stated that Prime should be permitted to replace a LIBOR index, noting that while a SOFR-based index is expected to replace a LIBOR index in many commercial contexts, Prime is the industry standard rate index for credit cards. They also requested that the Bureau permit card issuers to replace the LIBOR index used in setting the variable rates on existing accounts before LIBOR becomes unavailable to facilitate compliance. They also requested guidance on how the rate reevaluation provisions applicable to credit card accounts apply to accounts that are transitioning away from using LIBOR indices.

Consumer groups emphasized the need for transparency as institutions sunset their use of LIBOR indices and indicated a preference for replacement indices that are publicly available. They recommended regulators protect consumers by preventing institutions from changing the index or margin in a manner that would raise the interest rate paid by the consumer. They also shared industry's concerns that LIBOR may continue for some time after December 2021 but become less representative or reliable until LIBOR finally is discontinued. Consumer advocates noted that existing contract language may limit how and when institutions can transition away from LIBOR. They also discussed issues specific to particular consumer products, expressing concern, for example, that the contract language in the private student loan market is ambiguous and gives lenders wide leeway in determining a comparable replacement index for LIBOR indices.

IV. Legal Authority

A. Section 1022 of the Dodd-Frank Act

Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions

[12] 84 FR 647 (Jan. 31, 2019).

thereof.'' Among other statutes, title X of the Dodd-Frank Act and TILA are Federal consumer financial laws.[13] Accordingly, in issuing this final rule, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b) to prescribe rules under TILA and title X that carry out the purposes and objectives and prevent evasion of those laws.

B. The Truth in Lending Act

TILA is a Federal consumer financial law. In adopting TILA, Congress explained that: (1) Economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit; (2) the informed use of credit results from an awareness of the cost thereof by consumers; and (3) it is the purpose of TILA to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to them and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.[14]

TILA and Regulation Z define credit broadly as the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.[15] TILA and Regulation Z set forth disclosure and other requirements that apply to creditors. Different rules apply to creditors depending on whether they are extending ''open-end credit'' or ''closed-end credit.'' Under the statute and Regulation Z, open-end credit exists where there is a plan in which the creditor reasonably contemplates repeated transactions; the creditor may impose a finance charge from time to time on an outstanding unpaid balance; and the amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.[16] Typically, closed-end credit is credit that does not meet the definition of open-end credit.[17]

The term ''creditor'' generally means a person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract or by agreement when there is no note or contract.[18] TILA defines ''finance charge'' generally as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.[19]

The term ''creditor'' also includes a card issuer, which is a person or its agent that issues credit cards, when that person extends credit accessed by the credit card.[20] Regulation Z defines the term ''credit card'' to mean any card, plate, or other single credit device that may be used from time to time to obtain credit.[21] A charge card is a credit card on an account for which no periodic rate is used to compute a finance charge.[22] In addition to being creditors under TILA and Regulation Z, card issuers also generally must comply with the credit card rules set forth in the Fair Credit Billing Act[23] and in the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act)[24] (if the card accesses an open-end credit plan), as implemented in Regulation Z subparts B and G.[25]

TILA section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a)[26] directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that, in the judgment of the Bureau, are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. Pursuant to TILA section 102(a), a purpose of TILA is to assure a meaningful disclosure of credit terms to enable the consumer to avoid the uninformed use of credit and compare more readily the various credit terms available to the consumer. This stated purpose is tied to Congress's finding that economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit.[27] Thus, strengthened competition among financial institutions is a goal of TILA, achieved through the effectuation of TILA's purposes.

Historically, TILA section 105(a) has served as a broad source of authority for rules that promote the informed use of credit through required disclosures and substantive regulation of certain practices. Dodd-Frank Act section 1100A clarified the Bureau's section 105(a) authority by amending that section to provide express authority to prescribe regulations that contain ''additional requirements'' that the Bureau finds are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. This amendment clarified the authority to exercise TILA section 105(a) to prescribe requirements beyond those specifically listed in the statute that meet the standards outlined in section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a) authority to make adjustments and exceptions to the requirements of TILA applies to all transactions subject to TILA, except with respect to the provisions of TILA section 129 that apply to the high-cost mortgages referred to in TILA section 103(bb).[28]

For the reasons discussed in this document, the Bureau is amending certain provisions in Regulation Z that impact the transition from LIBOR indices to other indices to carry out TILA's purposes and is finalizing such additional requirements, adjustments, and exceptions as, in the Bureau's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance. In developing these aspects of this final rule pursuant to its authority under TILA section 105(a), the Bureau has considered the purposes of TILA, including ensuring meaningful disclosures, facilitating consumers' ability to compare credit terms, and helping consumers avoid the

[13] Dodd-Frank Act section 1002(14); codified at 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12); codified at 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include TILA).

[14] TILA section 102(a), codified at 15 U.S.C. 1601(a).

[15] TILA section 103(f), codified at 15 U.S.C. 1602(f); 12 CFR 1026.2(a)(14).

[16] 12 CFR 1026.2(a)(20).

[17] 12 CFR 1026.2(a)(10); comment 2(a)(10)–1.

[18] *See* TILA section 103(g), codified at 15 U.S.C. 1602(g); 12 CFR 1026.2(a)(17)(i).

[19] TILA section 106(a), codified at 15 U.S.C. 1605(a); *see* 12 CFR 1026.4.

[20] *See* TILA section 103(g), codified at 15 U.S.C. 1602(g); 12 CFR 1026.2(a)(17)(iii) and (iv).

[21] *See* 12 CFR 1026.2(a)(15)(i).

[22] *See* 12 CFR 1026.2(a)(15)(iii).

[23] Fair Credit Billing Act, Pubic Law 93–495, 88 Stat. 1511 (1974).

[24] Credit Card Accountability Responsibility and Disclosure Act of 2009, Public Law 111–24, 123 Stat. 1734 (2009).

[25] *See generally* 12 CFR 1026.5(b)(2)(ii), 1026.7(b)(11), 1026.12, 1026.51–.60.

[26] 15 U.S.C. 1604(a).

[27] TILA section 102(a), codified at 15 U.S.C. 1601(a).

[28] 15 U.S.C. 1602(bb).

uninformed use of credit, and the findings of TILA, including strengthening competition among financial institutions and promoting economic stabilization.

TILA section 105(d). As amended by the Dodd-Frank Act, TILA section 105(d)[29] states that any Bureau regulations requiring any disclosure which differs from the disclosures previously required in certain sections shall have an effective date of October 1 which follows by at least six months the date of promulgation. The section also states that the Bureau may in its discretion lengthen or shorten the amount of time for compliance when it makes a specific finding that such action is necessary to comply with the findings of a court or to prevent unfair or deceptive disclosure practices. The section further states that any creditor or lessor may comply with any such newly promulgated disclosures requirements prior to the effective date of the requirements.

V. Section-by-Section Analysis

Section 1026.9 Subsequent Disclosure Requirements

9(c) Change in Terms

9(c)(1) Rules Affecting Home-Equity Plans

Section 1026.9(c)(1)(i) provides that for HELOCs subject to § 1026.40 whenever any term required to be disclosed in the account-opening disclosures under § 1026.6(a) is changed or the required minimum periodic payment is increased, the creditor must mail or deliver written notice of the change to each consumer who may be affected. The notice must be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer; the notice must be given, however, before the effective date of the change. Section 1026.9(c)(1)(ii) provides that for HELOCs subject to § 1026.40, a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(1) when the change involves a reduction of any component of a finance or other charge or when the change results from an agreement involving a court proceeding.

A creditor for a HELOC subject to § 1026.40 is required under current § 1026.9(c)(1) to provide a change-in-terms notice disclosing the index that is replacing the LIBOR index. The index is a term that is required to be disclosed in the account-opening disclosures under § 1026.6(a) and thus, a creditor must provide a change-in-terms notice disclosing the index that is replacing the LIBOR index.[30] The exception in § 1026.9(c)(1)(ii) that provides that a change-in-terms notice is not required when a change involves a reduction in the finance or other charge does not apply to the index change. The change in the index used in making rate adjustments is a change in a term required to be disclosed in a change-in-terms notice under § 1026.9(c)(1) regardless of whether there is also a change in the index value or margin that involves a reduction in a finance or other charge.

Under current § 1026.9(c)(1), a creditor generally is required to provide a change-in-terms notice of a margin change if the margin is increasing. In disclosing the variable rate in the account-opening disclosures under § 1026.6(a), the creditor must disclose the margin as part of an explanation of how the amount of any finance charge will be determined.[31] Thus, a creditor must provide a change-in-terms notice under current § 1026.9(c)(1) disclosing the changed margin, unless § 1026.9(c)(1)(ii) applies. Current § 1026.9(c)(1)(ii) applies to a decrease in the margin because that change would involve a reduction in a component of a finance or other charge. Thus, under current § 1026.9(c)(1), a creditor would only be required to provide a change-in-terms notice of a change in the margin under § 1026.9(c)(1) if the margin is increasing.

A creditor also is required to disclose in the change-in-terms notice any increased periodic rate or APR as calculated using the replacement index at the time the change-in-terms notice is provided. The periodic rate and APR are terms that are required to be disclosed in the account-opening disclosures under § 1026.6(a) and thus, a creditor must provide a change-in-terms notice disclosing the new periodic rate and APR calculated using the replacement index if the periodic rate or APR is increasing from the rate calculated using the LIBOR index at the time the change-in-terms notice is provided.[32] Comment 9(c)(1)–1 provides that no notice of a change in terms need be given if the specific change is set forth initially, such as rate increases under a properly disclosed variable-rate plan. Nonetheless, the Bureau determines that this comment does not apply when a periodic rate or APR is increasing because the index is being replaced (as opposed to the periodic rate or APR is increasing because the value of the original index is increasing).

As discussed more in the section-by-section analysis of § 1026.9(c)(1)(ii), the Bureau proposed to revise § 1026.9(c)(1)(ii) which provides an exception under which a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(1) when the change involves a reduction of any component of a finance or other charge. The Bureau proposed to revise § 1026.9(c)(1)(ii) to provide that the exception does not apply on or after October 1, 2021, to situations where the creditor is reducing the margin when a LIBOR index is replaced as permitted by proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B). The Bureau also proposed comment 9(c)(1)(ii)–3 to provide detail on this proposed revision to § 1026.9(c)(1)(ii). This final rule adopts § 1026.9(c)(1)(ii) and comment 9(c)(1)(ii)–3 as proposed except to provide that the revisions to § 1026.9(c)(1)(ii) are effective April 1, 2022, with a mandatory compliance date of October 1, 2022, consistent with the effective date of this final rule and consistent with TILA section 105(d).

This final rule also provides additional details on how a creditor may disclose information about the periodic rate and APR in a change-in-terms notice for HELOCs when the creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products in certain circumstances. Specifically, this final rule provides additional details for situations where a creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index, the creditor is not changing the margin used to calculate the variable rate as a result of the replacement, and a periodic rate or the corresponding APR based on the replacement index is unknown to the creditor at the time the change-in-terms notice is provided because the SOFR index has not been published at the time the creditor provides the change-in-terms notice but will be published by the time the replacement of the index takes effect on the account. In this case, new comment 9(c)(1)–4 provides that a creditor may comply with any

[29] 15 U.S.C. 1604(d).

[30] *See* 12 CFR 1026.6(a)(1)(ii) and (iv) and comment 6(a)(1)(ii)–5.

[31] *See* 12 CFR 1026.6(a)(1)(iv).

[32] *See* 12 CFR 1026.6(a)(1)(ii). Comment 6(a)(1)(ii)–3 provides that in disclosing the rate(s) in effect for a variable-rate plan at the time of the account-opening disclosures (as is required by § 1026.6(a)(1)(ii)), the creditor may use an insert showing the current rate; may give the rate as of a specified date and then update the disclosure from time to time, for example, each calendar month; or may disclose an estimated rate under § 1026.5(c).

requirement to disclose in the change-in-terms notice the amount of the periodic rate or APR (or changes in these amounts) as calculated using the replacement index based on the best information reasonably available, clearly stating that the disclosure is an estimate. For example, in this situation, comment 9(c)(1)–4 provides that the creditor may state that: (1) Information about the rate is not yet available but that the creditor estimates that, at the time the index is replaced, the rate will be substantially similar to what it would be if the index did not have to be replaced; and (2) the rate will vary with the market based on a SOFR index.

In this unique circumstance, the Bureau interprets § 1026.5(c) to be consistent with new comment 9(c)(1)–4. Section 1026.5(c) provides, in relevant part, that if any information necessary for accurate disclosure is unknown to the creditor, it must make the disclosure based on the best information reasonably available and must state clearly that the disclosure is an estimate. New comment 9(c)(1)–4 also is consistent with this final rule provisions that provide that if a creditor uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the conditions in § 1026.40(f)(3)(ii)(A) and (B) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index.[33]

As described above, under § 1026.9(c)(1)(i), the change-in-terms notice for HELOC accounts subject to § 1026.40 generally must be mailed or delivered at least 15 days prior to the effective date of the change. Also, as discussed above, the ARRC has indicated that the SOFR-based spread-adjusted indices recommended by ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR will not be published until Monday, July 3, 2023, which is the first weekday after Friday, June 30, 2023, when LIBOR is currently anticipated to sunset for these USD LIBOR tenors. This final rule provision is intended to facilitate compliance with the 15-day advance notice requirement for change-in-terms notices by allowing creditors in the situation described above to provide change-in-terms notices prior to the SOFR-based spread-adjusted index being published, so that creditors are not left without an index to use on the account after the SOFR-based spread-adjusted index is published but before it becomes effective on the account. The Bureau has determined that the information described in new comment 9(c)(1)–4 sufficiently notifies consumers of the estimated periodic rate and APR as calculated using the SOFR-based spread-adjusted index, even though the SOFR-based spread-adjusted index is not being published at the time the notice is sent, as long as the SOFR-based spread-adjusted index is published by the time the replacement of the index takes effect on the account.

The Bureau is reserving judgment about whether to include a reference to the 1-year USD LIBOR index in comment 9(c)(1)–4 until it obtains additional information. Once the Bureau knows which SOFR-based spread-adjusted index the ARRC will recommend to replace the 1-year USD LIBOR index for consumer products, the Bureau may determine whether the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index. Assuming the Bureau determines that the index meets that standard, the Bureau will then consider whether to codify that determination in a supplemental final rule, or otherwise announce that determination.

9(c)(1)(ii) Notice Not Required

The Bureau's Proposal

The Bureau proposed to revise § 1026.9(c)(1)(ii) which provides an exception under which a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(1) when the change involves a reduction of any component of a finance or other charge. The Bureau proposed to revise § 1026.9(c)(1)(ii) to provide that the exception does not apply on or after October 1, 2021, to situations where the creditor is reducing the margin when a LIBOR index is replaced as permitted by proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B).[34]

The Bureau also proposed to add comment 9(c)(1)(ii)–3 to provide additional detail. Proposed comment 9(c)(1)(ii)–3 provided that for change-in-terms notices provided under § 1026.9(c)(1) on or after October 1, 2021, covering changes permitted by proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B), a creditor must provide a change-in-terms notice under § 1026.9(c)(1) disclosing the replacement index for a LIBOR index and any adjusted margin that is permitted under proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B), even if the margin is reduced. Proposed comment 9(c)(1)(ii)–3 also provided that prior to October 1, 2021, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B).

As discussed below, this final rule adopts § 1026.9(c)(1)(ii) and comment 9(c)(1)(ii)–3 generally as proposed except to provide that the revisions to § 1026.9(c)(1)(ii) are effective April 1, 2022, with a mandatory compliance date of October 1, 2022, consistent with the effective date of this final rule and consistent with TILA section 105(d).

Comments Received

Revisions to change-in-terms notice requirements. In response to the 2020 Proposal, the Bureau received comments from trade associations, consumer groups, and individual commenters on the proposed change-in-terms notice requirements. Several trade associations provided the same comments for both the proposed changes to the change-in-terms notice requirements in proposed § 1026.9(c)(1)(ii) for HELOCs and § 1026.9(c)(2)(v)(A) for credit card accounts under an open-end (not home-secured) consumer credit plan. These trade associations supported the Bureau's proposed revisions to the notice requirements, stating that the proposed amendments will help consumers understand changes they

[33] *See* comments 40(f)(3)(ii)(A)–3 and 40(f)(3)(ii)(B)–3; *see also* the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau making this determination.

[34] As discussed in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), the Bureau proposed to move the provisions in current § 1026.40(f)(3)(ii) that allow a creditor for HELOC plans subject to § 1026.40 to replace an index and adjust the margin if the index is no longer available in certain circumstances to proposed § 1026.40(f)(3)(ii)(A) and to revise the proposed moved provisions for clarity and consistency. Also, as discussed in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii)(B), to facilitate compliance, the Bureau proposed to add new LIBOR-specific provisions to proposed § 1026.40(f)(3)(ii)(B) that would permit creditors for HELOC plans subject to § 1026.40 that use a LIBOR index for calculating a variable rate to replace the LIBOR index and change the margin for calculating the variable rate on or after March 15, 2021, in certain circumstances.

may see as a result of the move away from LIBOR.

A few industry commenters specifically addressed the proposed amendments in § 1026.9(c)(1)(ii) for HELOCs. A trade association commented that the proposed revisions to § 1026.9(c)(1)(ii) are appropriate to inform consumers of the index that is replacing LIBOR and any adjustment to the margin, regardless of whether the margin is increasing or decreasing, and should reduce confusion for consumers during the transition. Another trade association representing credit unions supported the proposed changes to § 1026.9(c)(1)(ii) because it believed that the proposed amendments would help inform borrowers of the changes that could affect their loans.

Several consumer group commenters supported the proposed amendments to the change-in-terms notice requirements under proposed § 1026.9(c)(1)(ii) for HELOCs but indicated that these proposed amendments should not be limited just to the LIBOR transition, but should apply to any future index transitions as well.

An individual commenter stated that the proposed revisions to the change-in-terms notice requirements under proposed § 1026.9(c)(1)(ii) for HELOCs and § 1026.9(c)(2)(v)(A) for credit card accounts are important in ensuring that the change is properly disclosed to the borrower. A few individual commenters specifically supported the proposed revisions to the change-in-terms notice requirements under proposed § 1026.9(c)(1)(ii) for HELOCs. Another individual commenter requested that the Bureau require creditors to show in dollar terms the current rate changes for the previous five years and what these changes would have been under the new index. The commenter stated that this additional information would enable borrowers to understand exactly how the change in the index would affect them.

Sample or model notices. Several industry commenters requested that the Bureau provide comprehensive sample disclosures for change-in-terms notices required under § 1026.9(c)(1) for HELOC accounts and § 1026.9(c)(2) for credit card accounts that can be provided to borrowers to help them understand the change in the index. An individual commenter indicated that the Bureau should provide model disclosures for the proposed amendments under proposed § 1026.9(c)(1)(ii).

Timing of notice. An individual commenter indicated that the Bureau should require banks to identify and communicate the replacement index well in advance of the transition date.

The Final Rule

For the reasons discussed below, this final rule adopts § 1026.9(c)(1)(ii) and comment 9(c)(1)(ii)–3 as proposed except to provide that the revisions to § 1026.9(c)(1)(ii) are effective April 1, 2022, with a mandatory compliance date of October 1, 2022, consistent with the effective date of this final rule and consistent with TILA section 105(d). To effectuate the purposes of TILA, the Bureau is using its TILA section 105(a) authority to amend § 1026.9(c)(1)(ii) and adopt comment 9(c)(1)(ii)–3. TILA section 105(a) [35] directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that, in the judgment of the Bureau, are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. The Bureau believes that when a creditor for a HELOC plan that is subject to § 1026.40 is replacing the LIBOR index and adjusting the margin as permitted by § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B), it is beneficial for consumers to receive notice not just of the replacement index, but also any adjustments to the margin, even if the margin is decreased. This information will help ensure that consumers are notified of the replacement index and any adjusted margin (even a reduction in the margin) so that consumers will know how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced. Otherwise, a consumer that is only notified that the LIBOR index is being replaced with a replacement index that has a higher index value but is not notified that the margin is decreasing could reasonably but mistakenly believe that the APR on the plan is increasing.

The revisions to § 1026.9(c)(1)(ii) are effective April 1, 2022, with a mandatory compliance date of October 1, 2022. TILA section 105(d) generally requires that changes in disclosures required by TILA or Regulation Z have an effective date of October 1 that is at least six months after the date the final rule is adopted.[36] TILA section 105(d) also provides that a creditor may comply with newly promulgated disclosure requirements prior to the effective date of the requirement.

[35] 15 U.S.C. 1604(a).

[36] 15 U.S.C. 1604(d).

Consistent with TILA section 105(d), comment 9(c)(1)(ii)–3 clarifies that from April 1, 2022, through September 30, 2022, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B). Creditors for HELOC plans subject to § 1026.40 may want to provide the information about the decreased margin in the change-in-terms notice even if they replace the LIBOR index and adjust the margin pursuant to § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) earlier than October 1, 2022, starting on or after April 1, 2022. These creditors may want to provide this information to avoid confusion by consumers and because this reduced margin is beneficial to consumers. Thus, comment 9(c)(1)(ii)–3 permits creditors for HELOC plans subject to § 1026.40 to provide the information about the decreased margin in the change-in-terms notice even if they replace the LIBOR index and adjust the margin pursuant to § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) earlier than October 1, 2022, starting on or after April 1, 2022. The Bureau encourages creditors to include this information in change-in-terms notices provided earlier than October 1, 2022, starting on or after April 1, 2022, even though they are not required to do so, to ensure that consumers are notified of how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced.

This final rule does not provide sample or model forms for the change-in-terms notices required under § 1026.9(c)(1) when a creditor for HELOC plans subject to § 1026.40 transitions away from a LIBOR index under § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B). The Bureau believes that sample or model forms for such a notice are not necessary or warranted. The change-in-terms notice is not a new requirement. The Bureau believes that § 1026.9(c)(1) and the related commentary provide sufficient information for creditors to understand change-in-terms notice requirements without the need for sample or model forms.

This final rule also does not change the timing in which change-in-terms notices under § 1026.9(c)(1) must be provided to the consumer when a creditor replaces a LIBOR index for HELOC plans subject to § 1026.40. Section 1026.9(c)(1) provides that change-in-terms notices generally must be mailed or delivered at least 15 days

prior to the effective date of the change, and the Bureau did not propose changes to the timing of the notices when a creditor replaces a LIBOR index. The Bureau concludes that a 15-day period is appropriate for change-in-terms notices given when a creditor replaces a LIBOR index for HELOC plans subject to § 1026.40; this is the period generally applicable to change-in-terms notices for HELOCs under § 1026.9(c)(1).

9(c)(2) Rules Affecting Open-End (Not Home-Secured) Plans

TILA section 127(i)(1), which was added by the Credit CARD Act, provides that in the case of a credit card account under an open-end consumer credit plan, a creditor generally must provide written notice of an increase in an APR not later than 45 days prior to the effective date of the increase.[37] In addition, TILA section 127(i)(2) provides that in the case of a credit card account under an open-end consumer credit plan, a creditor must provide written notice of any significant change, as determined by a rule of the Bureau, in terms (other than APRs) of the cardholder agreement not later than 45 days prior to the effective date of the change.[38]

Section 1026.9(c)(2)(i)(A) provides that for plans other than HELOCs subject to § 1026.40, a creditor generally must provide written notice of a ''significant change in account terms'' at least 45 days prior to the effective date of the change to each consumer who may be affected. Section 1026.9(c)(2)(ii) defines ''significant change in account terms'' to mean a change in the terms required to be disclosed under § 1026.6(b)(1) and (b)(2), an increase in the required minimum periodic payment, a change to a term required to be disclosed under § 1026.6(b)(4), or the acquisition of a security interest. Among other things, § 1026.9(c)(2)(v)(A) provides that a change-in-terms notice is not required when a change involves a reduction of any component of a finance or other charge. The change-in-terms provisions in § 1026.9(c)(2) generally apply to a credit card account under an open-end (not home-secured) consumer credit plan, and to other open-end plans that are not subject to § 1026.40.

The creditor is required to provide a change-in-terms notice under § 1026.9(c)(2) disclosing the index that is replacing the LIBOR index pursuant to § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). A creditor is required to disclose the index under § 1026.6(b)(2)(i)(A) and (4)(ii)(B) and thus, the index is a term that meets the definition of a ''significant change in account terms,'' as discussed above.[39] As a result, a creditor must provide a change-in-terms notice disclosing the index that is replacing the LIBOR index. The exception in § 1026.9(c)(2)(v)(A) that provides that a change-in-terms notice is not required when a change involves a reduction in the finance or other charge does not apply to the index change. The change in the index used in making rate adjustments is a change in a term required to be disclosed in a change-in-terms notice under § 1026.9(c)(2) regardless of whether there is also a change in the index value or margin that involves a reduction in a finance or other charge.

Under current § 1026.9(c)(2), for plans other than HELOCs subject to § 1026.40, a creditor generally is required to provide a change-in-terms notice of a margin change if the margin is increasing. In disclosing the variable rate in the account-opening disclosures, the creditor must disclose the margin as part of an explanation of how the rate is determined.[40] Thus, a creditor must provide a change-in-terms notice under § 1026.9(c)(2) disclosing the changed margin, unless § 1026.9(c)(2)(v)(A) applies. Current § 1026.9(c)(2)(v)(A) applies to a decrease in the margin because that change would involve a reduction in a component of a finance or other charge. Thus, under current § 1026.9(c)(2), a creditor would only be required to provide a change-in-terms notice of a change in the margin under § 1026.9(c)(2) if the margin is increasing.

When an index is being replaced, a creditor is required to disclose the replacement index as well as information relevant to the change, if that relevant information is required by § 1026.6(b)(1) and (b)(2).[41] Comment 9(c)(2)(iv)–2 explains that, if a creditor is changing the index used to calculate a variable rate, the creditor must disclose the following information in a tabular format in the change-in-terms notice: the amount of the new rate (as calculated using the new index) and indicate that the rate varies and how the rate is determined, as explained in § 1026.6(b)(2)(i)(A). The comment provides an example, which indicates that, if a creditor is changing from using a prime rate to using LIBOR in calculating a variable rate, the creditor would disclose in the table required by § 1026.9(c)(2)(iv)(D)(*1*) the new rate (using the new index) and indicate that the rate varies with the market based on LIBOR.

A creditor also is required to disclose in the change-in-terms notice any increased periodic rate or APR calculated using the replacement index at the time the change-in-terms notice is provided. The periodic rate and APR are terms that are required to be disclosed in the account-opening disclosures under § 1026.6(b) and thus, a creditor must provide a change-in-terms notice disclosing the new periodic rate and APR calculated using the replacement index if the periodic rate or APR is increasing from the rate calculated using the LIBOR index at the time the change-in-terms notice is provided.[42] Section 1026.9(c)(2)(v)(C) provides that a change-in-terms notice is not required when the change is an increase in a variable APR in accordance with a credit card or other account agreement that provides for changes in the rate according to the operation of an index that is not under the control of the creditor and is available to the general public. Nonetheless, the Bureau determines that § 1026.9(c)(2)(v)(C) does not apply when a periodic rate or APR is increasing because the index is being replaced (as opposed to the periodic rate or APR is increasing because the value of the original index is increasing).

The Bureau proposed two changes to the provisions in § 1026.9(c)(2) and its accompanying commentary. First, the Bureau proposed technical edits to comment 9(c)(2)(iv)–2 to replace LIBOR references with references to SOFR. Second, the Bureau proposed changes to § 1026.9(c)(2)(v)(A) which provides an exception under which a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(2) when the change involves a reduction of any component of a finance or other charge. The Bureau proposed to revise § 1026.9(c)(2)(v)(A) to provide that the exception does not apply on or after October 1, 2021, to situations where the creditor is reducing the margin when a LIBOR index is replaced as permitted by proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). For the reasons discussed below, this final rule adopts the amendments to § 1026.9(c)(2)(v)(A) and its accompanying commentary generally as proposed except to provide that the revisions to § 1026.9(c)(2)(v)(A) and accompanying commentary are effective April 1, 2022, with a

[37] 15 U.S.C. 1637(i)(1).

[38] 15 U.S.C. 1637(i)(2).

[39] *See also* 12 CFR 1026.9(c)(2)(iv)(D)(*1*) and comment 9(c)(2)(iv)–2.

[40] 12 CFR 1026.6(b)(4)(ii)(B).

[41] *See* 12 CFR 1026.9(c)(2)(iv)(A)(*1*) and (D)(*1*).

[42] *See* 12 CFR 1026.6(b)(4)(i)(A). Section 1026.6(b)(4)(ii)(G) provides that for purposes of disclosing variable rates in the account-opening disclosures, a rate generally is accurate if it is a rate as of a specified date and this rate was in effect within the last 30 days before the disclosures are provided.

mandatory compliance date of October 1, 2022, consistent with the effective date of this final rule and consistent with TILA section 105(d). This final rule also adds new comment 9(c)(2)(iv)–2.ii to provide additional details on how a creditor may disclose information about the periodic rate and APR in a change-in-terms notice for credit card accounts when the creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by ARRC for consumer products in certain circumstances. This final rule also makes other revisions to current comment 9(c)(2)(iv)–2 to be consistent with the revision described above.

9(c)(2)(iv) Disclosure Requirements

For plans other than HELOCs subject to § 1026.40, comment 9(c)(2)(iv)–2 explains that, if a creditor is changing the index used to calculate a variable rate, the creditor must disclose the following information in a tabular format in the change-in-terms notice: the amount of the new rate (as calculated using the new index) and indicate that the rate varies and how the rate is determined, as explained in § 1026.6(b)(2)(i)(A). The comment provides an example, which indicates that, if a creditor is changing from using a prime rate to using LIBOR in calculating a variable rate, the creditor would disclose in the table required by § 1026.9(c)(2)(iv)(D)(*1*) the new rate (using the new index) and indicate that the rate varies with the market based on LIBOR. In light of the anticipated discontinuation of LIBOR, the Bureau proposed to amend the example in comment 9(c)(2)(iv)–2 to substitute SOFR for the LIBOR index. The Bureau also proposed to make technical changes for clarity by changing ''prime rate'' to ''prime index.'' The Bureau did not receive any comments on the proposed amendments.

This final rule revises comment 9(c)(2)(iv)–2 from the proposal in several ways. First, this final rule moves the proposed language in comment 9(c)(2)(iv)–2 to comment 9(c)(2)(iv)–2.i and makes revisions to the example. New comment 9(c)(2)(iv)–2.i provides that if a creditor is changing the index used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new index) and indicate that the rate varies and how the rate is determined, as explained in § 1026.6(b)(2)(i)(A). For example, if a creditor is changing from using a LIBOR index to using a Prime index in calculating a variable rate, the creditor would disclose in the table the new rate (using the new index) and indicate that the rate varies with the market based on a Prime index.

This final rule also adds new comment 9(c)(2)(iv)–2.ii to provide additional details on how a creditor may disclose information about the periodic rate and APR in a change-in-terms notice for credit card accounts when the creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products in certain circumstances. Specifically, this final rule provides additional details for situations where a creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index, the creditor is not changing the margin used to calculate the variable rate as a result of the replacement, and a periodic rate or the corresponding APR based on the replacement index is unknown to the creditor at the time the change-in-terms notice is provided because the SOFR index has not been published at the time the creditor provides the change-in-terms notice but will be published by the time the replacement of the index takes effect on the account. In this case, new comment 9(c)(2)(iv)–2.ii provides that a creditor may comply with any requirement to disclose in the change-in-terms notice the amount of the periodic rate or APR (or changes in these amounts) as calculated using the replacement index based on the best information reasonably available, clearly stating that the disclosure is an estimate. For example, in this situation, comment 9(c)(2)(iv)–2.ii provides that the creditor may state that: (1) Information about the rate is not yet available but that the creditor estimates that, at the time the index is replaced, the rate will be substantially similar to what it would be if the index did not have to be replaced; and (2) the rate will vary with the market based on a SOFR index.

In this unique circumstance, the Bureau interprets § 1026.5(c) to be consistent with new comment 9(c)(2)(iv)–2.ii. Section 1026.5(c) provides in relevant part, that if any information necessary for accurate disclosure is unknown to the creditor, it must make the disclosure based on the best information reasonably available and must state clearly that the disclosure is an estimate. New comment 9(c)(2)(iv)–2.ii also is consistent with this final rule provisions that provide that if a creditor uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the conditions in § 1026.55(b)(7)(i) and (ii) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index.[43]

As described above, under § 1026.9(c)(2), the change-in-terms notice for open-end credit that is not subject to § 1026.40 (including credit card accounts) generally must be mailed or delivered at least 45 days prior to the effective date of the change. Also, as discussed above, the ARRC has indicated that the SOFR-based spread-adjusted indices recommended by ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index will not be published until Monday, July 3, 2023, which is the first weekday after Friday, June 30, 2023, when LIBOR is currently anticipated to sunset for these USD LIBOR tenors. This final rule provision is intended to facilitate compliance with the 45-day advance notice requirement for change-in-terms notices by allowing creditors in the situation described above to provide change-in-terms notices prior to the SOFR-based spread-adjusted index being published, so that creditors are not left without an index to use on the account after the SOFR-based spread-adjusted index is published but before it becomes effective on the account. The Bureau has determined that the information described in new comment 9(c)(2)(iv)–2.ii sufficiently notifies consumers of the estimated rate calculated using the SOFR-based spread-adjusted index, even though the SOFR-based spread-adjusted index is not being published at the time the notice is sent, as long as the SOFR-based spread-adjusted index is published by the time the replacement of the index takes effect on the account.

The Bureau is reserving judgment about whether to include a reference to the 1-year USD LIBOR index in comment 9(c)(2)(iv)–2.ii until it obtains additional information. Once the Bureau knows which SOFR-based spread-adjusted index the ARRC will recommend to replace the 1-year USD LIBOR index for consumer products, the Bureau may determine whether the

[43] *See* comments 55(b)(7)(i)–2 and 55(b)(7)(ii)–3; *see also* the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau making this determination.

replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index. Assuming the Bureau determines that the index meets that standard, the Bureau will then consider whether to codify that determination in a supplemental final rule, or otherwise announce that determination.

9(c)(2)(v) Notice Not Required

The Bureau's Proposal

The Bureau proposed to revise § 1026.9(c)(2)(v)(A) to provide that for plans other than HELOCs subject to § 1026.40, the exception in § 1026.9(c)(2)(v)(A) to change-in-terms notice requirements under § 1026.9(c)(2) does not apply on or after October 1, 2021, to margin reductions when a LIBOR index is replaced as permitted by proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii).[44]

The Bureau also proposed to add comment 9(c)(2)(v)–14 to provide additional detail. Proposed comment 9(c)(2)(v)–14 provided that for change-in-terms notices provided under § 1026.9(c)(2) on or after October 1, 2021, covering changes permitted by proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii), a creditor must provide a change-in-terms notice under § 1026.9(c)(2) disclosing the replacement index for a LIBOR index and any adjusted margin that is permitted under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii), even if the margin is reduced. Proposed comment 9(c)(2)(v)–14 also provided that prior to October 1, 2021, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii).

Comments Received

As discussed in the section-by-section analysis of § 1026.9(c)(1)(ii), in response to the 2020 Proposal, several industry commenters and several individual commenters provided the same comments for both the proposed changes to the change-in-terms notice requirements in proposed § 1026.9(c)(1)(ii) for HELOCs and § 1026.9(c)(2)(v)(A) for credit card accounts under an open-end (not home-secured) consumer credit plan. With respect to these comments, (1) several trade associations and an individual commenter supported the Bureau's proposed revisions to the notice requirements; (2) another individual commenter requested that the Bureau require lenders to show in dollar terms the current rate changes for the previous five years and what these changes would have been under the new index; (3) several industry commenters requested that the Bureau provide comprehensive sample disclosures for change-in-terms notices that can be provided to borrowers to help them understand the change in the index; and (4) an individual commenter indicated that the Bureau should require banks to identify and communicate the replacement index well in advance of the transition date.

The Final Rule

For the reasons discussed below, this final rule adopts § 1026.9(c)(2)(v)(A) and comment 9(c)(2)(v)–14 generally as proposed except to provide that the revisions to § 1026.9(c)(2)(v)(A) and comment 9(c)(2)(v)–14 are effective April 1, 2022, with a mandatory compliance date of October 1, 2022, consistent with the effective date of this final rule and consistent with TILA section 105(d). For the same reasons that the Bureau is adopting the revisions to § 1026.9(c)(1)(ii) for HELOC accounts, the Bureau believes that when a creditor for plans other than HELOCs subject to § 1026.40 is replacing the LIBOR index and adjusting the margin as permitted by § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii), it is beneficial for consumers to receive notice not just of the replacement index but also any adjustments to the margin, even if the margin is decreased. Informing consumers of the replacement index and any adjusted margin (even a reduction in the margin) tells consumers how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced. Otherwise, a consumer that is only notified that the LIBOR index is being replaced with a replacement index that has a higher index value but is not notified that the margin is decreasing could reasonably but mistakenly believe that the APR on the plan is increasing.

The revisions to § 1026.9(c)(2)(v)(A) are effective April 1, 2022, with a mandatory compliance date of October 1, 2022. TILA section 105(d) generally requires that changes in disclosures required by TILA or Regulation Z have an effective date of the October 1 that is at least six months after the date the final rule is adopted.[45] TILA section 105(d) also provides that a creditor may comply with newly promulgated disclosure requirements prior to the effective date of the requirement. Consistent with TILA section 105(d), comment 9(c)(2)(v)–14 clarifies that from April 1, 2022, through September 30, 2022, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). Creditors for plans other than HELOCs subject to § 1026.40 may want to provide the information about the decreased margin in the change-in-terms notice, even if they replace the LIBOR index and adjust the margin pursuant to § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) earlier than October 1, 2022, starting on or after April 1, 2022. These creditors may want to provide this information to avoid confusion by consumers and because this reduced margin is beneficial to consumers. Thus, comment 9(c)(2)(v)–14 permits creditors for plans other than HELOCs subject to § 1026.40 to provide the information about the decreased margin in the change-in-terms notice even if they replace the LIBOR index and adjust the margin pursuant to § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) earlier than October 1, 2022, starting on or after April 1, 2022. The Bureau encourages creditors to include this information in change-in-terms notices provided earlier than October 1, 2022, starting on or after April 1, 2022, even though they are not required to do so, to ensure that consumers are notified of how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced.

For the similar reasons discussed in the section-by-section analysis of § 1026.9(c)(1)(ii) for HELOC accounts, this final rule does not provide sample or model forms for the change-in-terms notices required under § 1026.9(c)(2) when a creditor transitions away from a LIBOR index under § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) for plans that are not subject to § 1026.40. The Bureau believes that sample or model forms for such a notice are not necessary or warranted. The change-in-terms notice is not a new requirement. The Bureau believes that § 1026.9(c)(2) and the related commentary provide sufficient

[44] As discussed in more detail in the section-by-section analysis of § 1026.55(b)(7)(i), the Bureau proposed to move the provisions in current comment 55(b)(2)–6 that allow a card issuer to replace an index and adjust the margin if the index becomes unavailable in certain circumstances to proposed § 1026.55(b)(7)(i) and to revise the proposed moved provisions for clarity and consistency. Also, as discussed in more detail in the section-by-section analysis of § 1026.55(b)(7)(ii), to facilitate compliance, the Bureau proposed to add new LIBOR-specific provisions to proposed § 1026.55(b)(7)(ii) that would permit card issuers for a credit card account under an open-end (not home-secured) consumer credit plan that use a LIBOR index under the plan to replace the LIBOR index and change the margin on such plans on or after March 15, 2021, in certain circumstances.

[45] 15 U.S.C. 1604(d).

information for creditors to understand change-in-terms notice requirements without the need for a model form.

For similar reasons discussed in the section-by-section analysis of § 1026.9(c)(1)(ii) for HELOC accounts, this final rule also does not change the timing in which change-in-terms notices under § 1026.9(c)(2) must be provided to the consumer when a creditor replaces a LIBOR index for plans that are not subject to § 1026.40. Section 1026.9(c)(2) provides that change-in-terms notices generally must be mailed or delivered at least 45 days prior to the effective date of the change, and the Bureau did not propose changes to the timing of the notices when a creditor replaces a LIBOR index. The Bureau concludes that a 45-day period is appropriate for change-in-terms notices given when a creditor replaces a LIBOR index for plans other than HELOCs subject to § 1026.40; this is the period generally applicable to change-in-terms notices for open-end (not home-secured) plans under § 1026.9(c)(2).

Section 1026.20 Disclosure Requirements Regarding Post-Consummation Events

20(a) Refinancings

The Bureau's Proposal

Section 1026.20 includes disclosure requirements regarding post-consummation events for closed-end credit. Section 1026.20(a) and its commentary define when a refinancing occurs for closed-end credit and provide that a refinancing is a new transaction requiring new disclosures to the consumer. Comment 20(a)–3.ii.B explains that a new transaction subject to new disclosures results if the creditor adds a variable-rate feature to the obligation, even if it is not accomplished by the cancellation of the old obligation and substitution of a new one. The comment also states that a creditor does not add a variable-rate feature by changing the index of a variable-rate transaction to a comparable index, whether the change replaces the existing index or substitutes an index for one that no longer exists. To clarify comment 20(a)–3.ii.B, the Bureau proposed to add to the comment an illustrative example, which would indicate that a creditor does not add a variable-rate feature by changing the index of a variable-rate transaction from the 1-month, 3-month, 6-month, or 1-year USD LIBOR index to the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index respectively because the replacement index is a comparable index to the corresponding USD LIBOR index.[46] The Bureau requested comment on whether it was appropriate to add the proposed example to comment 20(a)–3.ii.B and whether the Bureau should make any other amendments to § 1026.20(a) or its commentary in connection with the LIBOR transition. The Bureau also requested comment on whether there were any other replacement indices that it should identify as an example of a comparable index in comment 20(a)–3.ii.B, and if so, which indices and on what bases. For the reasons discussed below, the Bureau is finalizing the amendments to comment 20(a)–3.ii.B generally as proposed with a revision to cross-reference new comment 20(a)(3)–iv and with a revision not to include 1-year USD LIBOR in the comment at this time pending the Bureau's receipt of additional information and further consideration by the Bureau. This final rule also adds new comment 20(a)(3)–iv to provide examples of the type of factors to be considered in whether a replacement index meets the Regulation Z ''comparable'' standard with respect to a particular LIBOR index for closed-end transactions.

Comments Received

SOFR spread-adjusted index. Several industry commenters, several consumer group commenters, and a financial services education and consulting firm expressed support for the proposed new illustrative example in comment 20(a)–3.ii.B, which indicated that a creditor does not add a variable-rate feature by changing the index of a variable-rate transaction from the 1-month, 3-month, 6-month, or 1-year USD LIBOR index to the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index respectively because the replacement index is a comparable index to the corresponding USD LIBOR index. A few industry commenters and an individual commenter expressed concern about SOFR's lack of history.

Additional examples of indices that are comparable to the LIBOR. Many industry commenters generally urged the Bureau to provide additional examples of comparable indices to the LIBOR indices. Some commenters mentioned specific indices that the Bureau should clarify are comparable to LIBOR, such as Prime, AMERIBOR® rates,[47] the effective Federal funds rate (EFFR),[48] and the Constant Maturity Treasury (CMT) rates.[49] An industry commenter urged the Bureau to designate other replacement indices as compliant if recommended by the Board.

In addition, several industry commenters expressed support for the Bureau's statement that the example provided in comment 20(a)–3.ii.B is not the only index that is comparable to LIBOR. In addition, an industry commenter urged the Bureau to avoid mandating the use of any particular replacement index.

Additional guidance on what constitutes a comparable index. Many industry commenters urged the Bureau to provide additional guidance on how to determine if an index is a comparable index for purposes of Regulation Z. Some of these commenters shared views on what types of index the Bureau should consider as comparable for purposes of Regulation Z. Several industry commenters urged that any guidance that the Bureau provides on how to determine if an index is comparable should provide alternatives to reliance on historical fluctuations because such historical evidence would not be available for new indices. Several consumer group commenters and a financial services education and consulting firm commenter cautioned

[46] By ''corresponding USD LIBOR index,'' the Bureau means the specific USD LIBOR index for which the ARRC is recommending the replacement index as a replacement for consumer products. Thus, because the ARRC has recommended, for consumer products, a specific spread-adjusted 6-month term rate SOFR index for consumer products as a replacement for the 6-month USD LIBOR index, the 6-month USD LIBOR index would be the ''corresponding USD LIBOR index'' for that specific spread-adjusted 6-month term rate SOFR index for consumer products.

[47] According to its website, ''AMERIBOR® is a new interest rate benchmark created by the American Financial Exchange [that] reflects the actual borrowing costs of thousands of small, medium and regional banks across America [and] is also useful for larger banks and financial institutions that do business with these banks.'' Am. Fin. Exch., *AMERIBOR® Brochure, https://ameribor.net/background.*

[48] The EFFR is a rate produced by the New York Fed which is calculated as a volume-weighted median of overnight Federal funds transactions reported in the FR 2420 Report of Selected Money Market Rates. Fed. Rsrv. Bank of N.Y., *Effective Federal Funds Rate, https://www.newyorkfed.org/markets/reference-rates/effr.*

[49] The CMT rates are Treasury Yield Curve Rates where the ''[y]ields are interpolated by the Treasury from the daily yield curve. This curve, which relates the yield on a security to its time to maturity is based on the closing market bid yields on actively traded Treasury securities in the over-the-counter market. These market yields are calculated from composites of indicative, bid-side market quotations (not actual transactions) obtained by the Federal Reserve Bank of New York at or near 3:30 p.m. each trading day.'' U.S. Dep't of the Treasury, *Daily Treasury Yield Curve Rates, https://www.treasury.gov/resource-center/data-chart-center/interest-rates/pages/textview.aspx?data=yield* (last updated Sept. 24, 2021).

the Bureau against recognizing newly established indices as suitable replacement indices for LIBOR indices, unless they satisfy the criteria reviewed by the ARRC in selecting SOFR. Several commenters asserted that any guidance on what constitutes a comparable index should clarify that the index change should be ''value neutral,'' meaning that the change should not raise or lower the interest rate on the loan. A few industry commenters urged the Bureau to clarify that a creditor may use any ''reasonable method'' to determine if a replacement index is comparable. Several industry commenters urged the Bureau to clarify that an index is comparable if the index and the margin achieve a substantially similar interest rate.

Disclosures concerning index changes. Several commenters, including several consumer groups, a financial services education and consulting firm, and a few individuals, urged the Bureau to require disclosures to consumers with closed-end loans informing consumers of the index change. Several industry commenters stated that if the Bureau requires a disclosure for closed-end products, the Bureau should require it to be provided 45 days before the index change. Another industry commenter urged the Bureau to provide guidance on how to complete a Loan Estimate or Closing Disclosure for a SOFR product.

Timing of transition. A few industry commenters urged the Bureau to include the same provisions for closed-end loans that it proposed for HELOCs and credit card accounts which would allow creditors for HELOCs and card issuers to transition from using a LIBOR index on or after March 15, 2021, if certain conditions are met.

Placement of example in Regulation Z. Several industry commenters urged the Bureau to include the proposed example in the text of the rule, rather than the commentary, and explained their perception that including the example in the commentary would not provide sufficient legal protection.

The Final Rule

The Bureau is finalizing the amendments to comment 20(a)–3.ii.B generally as proposed with a revision to cross-reference comment 20(a)–3.iv and with a revision not to include 1-year USD LIBOR in the comment at this time pending the Bureau's receipt of additional information and further consideration by the Bureau. This final rule also adds new comment 20(a)–3.iv to provide examples of the type of factors to be considered in whether a replacement index meets the Regulation Z ''comparable'' standard with respect to a particular LIBOR index for closed-end transactions.

SOFR spread-adjusted index. The Bureau agrees with the commenters that expressed support for the new illustrative example in comment 20(a)–3.ii.B.

The Bureau has reviewed the SOFR indices upon which the ARRC has indicated it will base its recommended replacement indices and the spread adjustment methodology that the ARRC is recommending using to develop the replacement indices. Based on this review, the Bureau has determined that the spread-adjusted replacement indices that the ARRC is recommending for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index will provide a good example of a comparable index to the tenors of LIBOR that they are designated to replace.

On June 22, 2017, the ARRC identified SOFR as its recommended alternative to LIBOR after considering various potential alternatives, including other term unsecured rates, overnight unsecured rates, other secured repurchase agreements (repo) rates, U.S. Treasury bill and bond rates, and overnight index swap rates linked to the EFFR.[50] The ARRC made its final recommendation of SOFR after evaluating and incorporating feedback from a 2016 consultation and end-users on its advisory group.[51]

As the ARRC has explained, SOFR is a broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities.[52] SOFR is determined based on transaction data composed of: (i) Tri-party repo, (ii) General Collateral Finance repo, and (iii) bilateral Treasury repo transactions cleared through Fixed Income Clearing Corporation. SOFR is representative of general funding conditions in the overnight Treasury repo market. As such, it reflects an economic cost of lending and borrowing relevant to the wide array of market participants active in financial markets. In terms of the transaction volume underpinning it, SOFR has the widest coverage of any Treasury repo rate available. Averaging over $1 trillion of daily trading, transaction volumes underlying SOFR are far larger than the transactions in any other U.S. money market.[53]

On April 21, 2021, CME Group Benchmark Administration Ltd (CME Group) started producing term rates for 1-month SOFR, 3-month SOFR, and 6-month SOFR, which now go back as far as January 3, 2019.[54] Prior to that, the Board produced data on 1-month, 3-month, and 6-month ''indicative'' term SOFR rates that likely provide a good indication of how term SOFR rates would have performed starting from June 11, 2018.[55] On July 29, 2021, the ARRC formally recommended the 1-month, 3-month, and 6-month term SOFR rates produced by the CME Group as the underlying SOFR rates for use in replacing the 1-month, 3-month, and 6-month USD LIBOR tenors respectively for existing accounts.[56] On October 6, 2021, the ARRC published a summary of the decisions that the ARRC has made to that date concerning its recommended SOFR-based spread-adjusted indices for contracts referencing USD LIBOR.[57] In that summary, for consumer products, the ARRC indicated that for 1-year USD LIBOR, the ARRC's recommended replacement index will be to a spread-adjusted index based on a 1-year term SOFR rate or to a spread-adjusted index based on the 6-month term SOFR rate. The replacement index will use the spread adjustment for 1-year USD LIBOR mentioned in Table 1 below for arriving at the recommended replacement index for replacing 1-year USD LIBOR in consumer products.[58] The ARRC indicated that it will make a recommendation on the SOFR-based

[50] The Fed. Rsrv. Bank of N.Y., *ARRC Consultation on Spread Adjustment Methodologies for Fallbacks in Cash Products Referencing USD LIBOR* at 3 (Jan. 21, 2020), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Spread_Adjustment_Consultation.pdf* (ARRC Consultation on Spread Adjustment Methodologies).

[51] *Id.*

[52] *Id.*

[53] Fed. Rsrv. Bank of N.Y., *Additional Information About SOFR and Other Treasury Repo Reference Rates, https://www.newyorkfed.org/markets/treasury-repo-reference-rates-information* (last updated Apr. 16, 2021).

[54] Press Release, The Chi. Mercantile Exch., *CME Group Announces Launch of CME Term SOFR Reference Rates* (Apr. 21, 2021), *https://www.cmegroup.com/media-room/press-releases/2021/4/21/cme_group_announceslaunchofcmetermsofrreferencerates.html#;* The Chi. Mercantile Exch, *CME Term SOFR Reference Rates Benchmarks* (Sept. 21, 2021), *https://www.cmegroup.com/market-data/files/cme-term-sofr-reference-rates-benchmarks.pdf.*

[55] June 11, 2018, is the first date for which indicative term SOFR rate data are available. Erik Heitfield & Yang-Ho- Park, *Indicative Forward-Looking SOFR Term Rates* (Apr. 19, 2019), The Fed. Rsrv. Bank, *FEDS Notes, https://www.federalreserve.gov/econres/notes/feds-notes/indicative-forward-looking-sofr-term-rates-20190419.htm* (last updated May 26, 2021).

[56] Press Release, Alt. Reference Rates Comm., *ARRC Formally Recommends Term SOFR* (July 29, 2021), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Press_Release_Term_SOFR.pdf.*

[57] Summary of Fallback Recommendations, *supra* note 5, at 1.

[58] *Id.* at 10.

spread-adjusted index to replace 1-year USD LIBOR and all other remaining details of its recommended replacement indices for consumer products no later than one year before the date when 1-year USD LIBOR is expected to cease (*i.e.,* by June 30, 2022).[59] In March 2021, the ARRC announced that it has selected Refinitiv, a London Stock Exchange Group (LSEG) business, to publish the ARRC's recommended spread adjustments and SOFR-based spread-adjusted indices for cash products.[60] Refinitiv will publicly make available, for free, the SOFR-based spread-adjusted indices for consumer products so that consumers can see the actual indices that are used by industry in the pricing of their adjustable-rate consumer loan contracts that will be transitioning to the SOFR-based spread-adjusted indices for consumer products.[61]

The Bureau is reserving judgment about whether to include a reference to the 1-year USD LIBOR index in comment 20(a)–3.ii.B until it obtains additional information. Once the Bureau knows which SOFR-based spread-adjusted index the ARRC will recommend to replace the 1-year USD LIBOR index for consumer products, the Bureau may determine whether that index meets the ''comparable'' standard based on information available at that time. Assuming the Bureau determines that the index meets that standard, the Bureau will then consider whether to codify that determination by finalizing the proposed comment related to the 1-year USD LIBOR index in a supplemental final rule, or otherwise announce that determination.

The Bureau has reviewed the historical data on the 1-month, 3-month, and 6-month term SOFR rates produced by CME Group and the indicative term SOFR rates produced by the Board and on 1-month, 3-month, and 6-month USD LIBOR from June 11, 2018, to October 18, 2021. The Bureau calculated the spread-adjusted term SOFR rates by adding the long-term values of the spread-adjustments set forth in Table 1 described below to the historical data on the 1-month, 3-month, and 6-month term SOFR rates described above.

As discussed in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), the Bureau has determined that: (1) The historical fluctuations of 6-month USD LIBOR are substantially similar to those of the 6-month spread-adjusted term SOFR rates; (2) the historical fluctuations of 3-month USD LIBOR are substantially similar to those of 3-month spread-adjusted term SOFR rates; and (3) the historical fluctuations of 1-month USD LIBOR are substantially similar to those of the 1-month spread-adjusted term SOFR rate.

The ARRC and the Bureau also have compared the rate history that is available for SOFR (to calculate compounded averages) with the rate history for the applicable LIBOR indices.[62] The New York Fed publishes three compounded averages of SOFR on a daily basis, including a 30-day compounded average of SOFR (30-day SOFR), and a daily index that allows for the calculation of compounded average rates over custom time periods.[63] Prior to the start of the official publication of SOFR in 2018, the New York Fed released data from August 2014 to March 2018 representing modeled, pre-production estimates of SOFR that are based on the same basic underlying transaction data and methodology that now underlie the official publication.[64] The Bureau analyzed the spread-adjusted indices based on the 30-day SOFR. The Bureau calculated the spread-adjusted 30-day SOFR rates by adding the long-term values of the spread-adjustments set forth in Table 1 described below to the historical data on 30-day SOFR. For the reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), the Bureau finds that the historical fluctuations in the spread-adjusted index based on 30-day SOFR are substantially similar to those of 1-month, 3-month, and 6-month USD LIBOR.

Term SOFR rates will have fewer differences with LIBOR term rates than 30-day SOFR does.[65] Since they are also term rates, they also include term premia, and these should usually be similar to the term premia embedded in LIBOR. Since term SOFR rates will also be forward-looking, they should adjust quickly to changing expectations about future funding conditions as LIBOR term rates do, rather than following them with a lag as 30-day SOFR does. However, term SOFR rates will still have differences from the LIBOR indices. SOFR is a secured rate while the LIBOR indices are unsecured and therefore include an element of bank credit risk. The LIBOR indices also may reflect supply and demand conditions in wholesale unsecured funding markets that also could lead to differences with SOFR.

Forward-looking term SOFR rates will without adjustments differ in levels from the LIBOR indices. The ARRC intends to account for these differences from the historical levels of LIBOR term rates through spread adjustments in the replacement indices that it recommends. On January 21, 2020, the ARRC released a consultation on spread adjustment methodologies that provided historical analyses of a number of potential spread adjustment methodologies and that showed that the proposed methodology performed well relative to other options, including potential dynamic spread adjustments.[66] On April 8, 2020, the ARRC announced that it had agreed on a recommended spread adjustment methodology for cash products referencing USD LIBOR.[67] In response to the January 2020 consultation, the ARRC received over 70 responses from consumer advocacy groups, asset managers, corporations, banks, industry associations, GSEs, and others.[68] In May 2020, the ARRC released a follow-up consultation on the spread adjustment methodologies with respect to two

[59] *Id.*

[60] Fed. Rsrv. Bank of N.Y., *ARRC Announces Refinitiv as Publisher of its Spread Adjustment Rates for Cash Products* (Mar. 17, 2021), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/20210317-press-release-Spread-Adjustment-Vendor-Refinitiv.pdf.*

[61] *Id.*

[62] *See, e.g.,* ARRC Consultation on Spread Adjustment Methodologies, *supra* note 50, at 4 (comparing 3-month compounded SOFR relative to the 3-month USD LIBOR since 2014). The ARRC and the Bureau have also considered the history of other indices that could be viewed as historical proxies for SOFR. *See, e.g.,* David Bowman, *Historical Proxies for the Secured Overnight Financing Rate* (July 15, 2019), *https://www.federalreserve.gov/econres/notes/feds-notes/historical-proxies-for-the-secured-overnight-financing-rate-20190715.htm* (Historical SOFR).

[63] Fed. Rsrv. Bank of N.Y., *SOFR Averages and Index Data, https://apps.newyorkfed.org/markets/autorates/sofr-avg-ind.*

[64] *See* Historical SOFR, *supra* note 62.

[65] 30-day SOFR is a historical, backward-looking 30-day average of overnight rates, while the LIBOR indices are forward-looking term rates published with several different tenors (overnight, 1-week, 1-month, 2-month, 3-month, 6-month, and 1-year). The LIBOR indices, therefore, reflect funding conditions for a different length of time than 30-day SOFR does, and they reflect those funding conditions in advance rather than with a lag as 30-day SOFR does. The LIBOR indices may also include term premia missing from 30-day SOFR. (The ''term premium'' is the excess yield that investors require to buy a long-term bond instead of a series of shorter-term bonds.)

[66] ARRC Consultation on Spread Adjustment Methodologies, *supra* note 50.

[67] Press Release, Alt. Reference Rates Comm., *ARRC Announces Recommendation of a Spread Adjustment Methodology* (Apr. 8, 2020), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Spread_Adjustment_Methodology.pdf* (ARRC Announces Recommendation of a Spread Adjustment Methodology).

[68] Alt. Reference Rates Comm., *Summary of Feedback Received in the ARRC Spread-Adjustment Consultation and Follow-Up Consultation on Technical Details* 2 (May 6, 2020), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Spread_Adjustment_Consultation_Follow_Up.pdf* (ARRC Supplemental Spread-Adjustment Consultation).

technical issues.[69] In June 2020, the ARRC announced recommendations on these two technical issues.[70] Following its consideration of feedback received on its public consultations, the ARRC is recommending a long-term spread adjustment equal to the historical median of the five-year spread between USD LIBOR and SOFR. On March 8, 2021, the ARRC issued an announcement [71] recognizing a set of values as the long-term spread adjustment for the SOFR-based spread-adjusted indices,[72] as shown in Table 1 below, based on the March 5, 2021, announcements by the ICE Benchmarks Administration and the FCA.

TABLE 1—VALUES OF THE LONG-TERM SPREAD-ADJUSTMENT FOR THE SOFR-BASED SPREAD-ADJUSTED INDICES

USD LIBOR tenor being replaced	Spread applied to SOFR based rate (bps)
1-month LIBOR	11.448
3-month LIBOR	26.161
6-month LIBOR	42.826
1-year LIBOR	71.513

For consumer products, the ARRC is additionally recommending a 1-year transition period to this five-year median spread adjustment methodology.[73] Thus, the transition will be gradual. Specifically, the ARRC has recommended, for a period of one year, a short-term spread adjustment for SOFR-based spread-adjusted indices in order to ensure that consumers do not encounter a sudden change in their monthly payments when the LIBOR index is replaced. The short-term spread adjustment initially will be the 2-week average of the LIBOR–SOFR spread up to July 3, 2023, for the SOFR-based spread-adjusted indices for consumer products to replace 1-month, 3-month, 6-month, or 1-year USD LIBOR.[74] For these indices, over the first ''transition'' year following July 3, 2023, the daily published short-term spread adjustment will move linearly toward the longer-term fixed spread adjustment.[75] After the initial transition year, the spread adjustment will be permanently set at the longer-term fixed rate spread.[76] The ARRC also stated that it was not aware of any consumer products using 1-week and 2-month LIBOR, which will cease publication immediately after December 31, 2021.[77] The inclusion of a transition period for consumer products was endorsed by many respondents, including consumer advocacy groups.[78]

The ARRC intends for the spread adjustment to reflect and adjust for the historical differences between LIBOR and SOFR in order to make the spread-adjusted rate comparable to LIBOR in a fair and reasonable way, thereby minimizing the impact to borrowers and lenders.[79]

The Bureau finds that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products as a replacement for the 1-month, 3-month, or 6-month USD LIBOR index are comparable indices to the 1-month, 3-month, or 6-month USD LIBOR index respectively. The SOFR-based spread-adjusted indices that the ARRC recommends for consumer products will be published and made publicly available on Refinitiv's website. The Bureau has concluded that using them as a replacement for the corresponding tenors of LIBOR does not seem likely to significantly change the economic position of the parties to the contract, given that SOFR and the LIBOR indices have generally moved together and the replacement index will be spread adjusted based on a methodology derived through public consultation.

For the reasons discussed above, the Bureau is finalizing the amendment to comment 20(a)–3.ii.B to add an illustrative example, which indicates that a creditor does not add a variable-rate feature by changing the index of a variable-rate transaction from the 1-month, 3-month, or 6-month USD LIBOR index to the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index respectively because the replacement index is a comparable index to the corresponding USD LIBOR index.

Additional examples of indices that are comparable to the LIBOR. As discussed in more detail above, the Bureau received comments from industry requesting additional safe harbors, meaning additional examples of indices that are comparable to the LIBOR indices for closed-end transactions such as Prime, AMERIBOR® rates, EFFR, and CMT rates.

This final rule does not set forth safe harbors indicating that Prime, AMERIBOR® rates, EFFR, or the CMT rates satisfy the Regulation Z ''comparable'' standard for appropriate replacement indices for a particular LIBOR index in a closed-end transaction. First, for Prime, AMERIBOR® rates, EFFR, or CMT rates, with respect to the Regulation Z ''comparable'' standard for closed-end credit, all of these rates may need to be ''spread-adjusted'' to account for the differences in rate levels from the LIBOR rates in order to potentially comply with the standard. This step is important for comparability because unlike for HELOC and credit card contracts, some closed-end contracts, especially mortgages, typically do not allow for margin adjustments to account for any spread adjustment needed when changing the index. The Bureau is not aware of market participants having developed a methodology to spread adjust the rates. Without spread adjustments to the indices, the indices do not appear to be able to meet the ''comparable'' standard. Second, as discussed in more detail below, the Bureau notes that the determinations of whether an index is comparable to a LIBOR index are fact-specific, and they depend on the replacement index being considered and the LIBOR tenor being replaced. The commenters did not specify which AMERIBOR® rates, EFFR, or CMT rates should be used as the replacement tenor and which LIBOR tenor the rate would replace.

In addition, the Bureau understands that the vast majority of the impacted industry participants will use the indices for which this final rule provides a safe harbor (*i.e.,* certain SOFR-based spread-adjusted indices recommended by the ARRC for consumer products) as replacement indices for closed-end transactions. The Bureau notes that this final rule does not disallow the use of other replacement indices if they comply with Regulation Z.

An industry commenter urged the Bureau to designate other replacement indices as compliant if recommended by

[69] *Id.*

[70] Press Release, Alt. Reference Rates Comm., *ARRC Announces Further Details Regarding Its Recommendation of Spread Adjustments for Cash Products* (June 30, 2020), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Recommendation_Spread_Adjustments_Cash_Products_Press_Release.pdf.*

[71] Press Release, Alt. Reference Rates Comm., *ARRC Confirms a ''Benchmark Transition Event'' has occurred under ARRC Fallback Language* (Mar. 8, 2021), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Benchmark_Transition_Event_Statement.pdf.*

[72] Press Release, Bloomberg, *Bloomberg Notice on IBOR Fallbacks* (Mar. 5, 2021), *https://www.bloomberg.com/company/press/bloomberg-notice-on-ibor-fallbacks/;* Summary of Fallback Recommendations, *supra* note 5, at 4.

[73] ARRC Announces Recommendation of a Spread Adjustment Methodology, *supra* note 67; Summary of Fallback Recommendations, *supra* note 5, at 11.

[74] Summary of Fallback Recommendations, *supra* note 5, at 11.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] ARRC Supplemental Spread-Adjustment Consultation, *supra* note 68, at 1.

[79] *Id.* at 2, 3.

the Board. The Bureau notes in response that the Board has not recommended other replacement indices.

The Bureau appreciates commenters' suggestion to reiterate that the example included in comment 20(a)–3.ii.B is not intended to provide an exhaustive list of indices that are comparable to LIBOR. The example included in comment 20(a)–3.ii.B is illustrative only, and the Bureau does not intend to suggest that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index are the only indices that would be comparable to the LIBOR indices. The Bureau recognizes that there may be other comparable indices that creditors may use as replacements for the various tenors of LIBOR.

Additional guidance on what constitutes a comparable index. As discussed in more detail above, numerous industry commenters asked the Bureau to provide additional guidance on how to determine if an index is comparable for purposes of Regulation Z.

To facilitate compliance with Regulation Z, this final rule adds new comment 20(a)–3.iv to provide a non-exhaustive list of factors to be considered in whether a replacement index meets the Regulation Z ''comparable'' standard with respect to a particular LIBOR index for closed-end transactions. Specifically, new comment 20(a)–3.iv provides that the relevant factors to be considered in determining whether a replacement index is comparable to a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. New comment 20(a)–3.iv also provides that the types of relevant factors to establish if a replacement index could meet the ''comparable'' standard with respect to a particular LIBOR index using historical data or future expectations, include but are not limited to, whether: (1) The movements over time are comparable; (2) the consumers' payments using the replacement index compared to payments using the LIBOR index are comparable if there is sufficient data for this analysis; (3) the index levels are comparable; (4) the replacement index is publicly available; and (5) the replacement index is outside the control of the creditor. The first three factors are important to help minimize the financial impact on consumers, including the payments they must make, when LIBOR is replaced with another index. The last two factors would promote transparency for consumers and help reduce potential manipulation of the replacement rate by the creditor in the future. As discussed above, the Bureau has considered these factors in determining that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR indices have historical fluctuations that are comparable to those of the 1-month, 3-month, or 6-month USD LIBOR indices respectively. There is sufficient historical data to analyze, which shows that the consumers' payments using the SOFR index are comparable to payments using the LIBOR index and the index levels are comparable. Further, the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products will be publicly available and are outside of the creditor's control.

The Bureau notes that this final rule does not set forth a principles-based standard for determining whether a replacement index is comparable to a particular LIBOR tenor for closed-end credit. These determinations are fact-specific and depend on the replacement index being considered and the LIBOR tenor being replaced, as well as prevailing market conditions. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as (1) the length of time the data has been available and how much of the available data to consider in the analysis of whether the Regulation Z standards have been satisfied; (2) the quality of the historical data, including the methodology of how the rate is determined and whether it sufficiently represents a market rate; and (3) whether the replacement index is a backward-looking rate (*e.g.,* historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. These considerations will vary depending on the replacement index being considered and the LIBOR tenor that is being replaced. Therefore, this final rule does not provide a principles-based standard for determining whether a replacement index for closed-end credit is comparable to those of a particular LIBOR index.

Disclosures concerning index changes. This final rule does not adopt commenters' suggestion to require a new disclosure informing consumers about a change in an index. The Bureau did not propose to require a new disclosure and lacks sufficient information about the potential benefits and costs of such a new disclosure.

The Bureau anticipates, however, that industry practices and existing legal requirements will provide consumers with information about changes to their interest rate that affect their loan payments. The Bureau understands that industry is developing best practices and model communications that creditors can use to inform consumers about the LIBOR transition.[80] In addition, other provisions in Regulation Z require disclosures to consumers with adjustable-rate mortgages if the interest rate or payment amount will change. For example, initial interest rate adjustment notices required by § 1026.20(d) alert consumers to the initial reset of an adjustable-rate mortgage, and subsequent interest rate adjustment notices required by § 1026.20(c) alert consumers to interest rate adjustments and provide the consumer with information about the new interest rate and new periodic payment prior to each adjustment that results in a payment change. In addition, required periodic statements for closed-end consumer credit transactions secured by a dwelling provide consumers with mortgage loan account information, including alerting the consumer to upcoming interest rate changes for each billing cycle.[81]

The Bureau appreciates commenters' suggestion to provide guidance on completing a Loan Estimate or Closing Disclosure for a SOFR product and will consider providing that guidance in the future through implementation materials.

Timing of transition. The Bureau declines to adopt the commenter's suggestion to include the same provisions for closed-end loans that it proposed for HELOCs and credit card accounts which would allow creditors for HELOCs and card issuers to transition from using a LIBOR index on or after March 15, 2021, if certain conditions are met. It is not necessary or warranted for Regulation Z to address the timing of the transition from using the LIBOR indices for closed-end loans

[80] *See, e.g.,* The Fed. Nat'l Mortg. Ass'n, *LIBOR Transition Playbook, https://capitalmarkets.fanniemae.com/media/5206/display;* The Fed. Home Loan Mortg. Corp., *LIBOR Transition Playbook* (Apr. 2021), *http://www.freddiemac.com/about/pdf/LIBOR_transition_playbook.pdf;* Mortg. Bankers Ass'n, *Adjustable-Rate Mortgage Disclosure: Possible Discontinuation of LIBOR* (Apr. 2021), *https://www.mba.org/Documents/Policy/Issue%20Briefs/20305_MBA_LIBOR_Consumer_Disclosure.pdf;* Alt. Reference Rates Comm., *LIBOR ARM Transition Resource Guide* (Aug. 18, 2020), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/LIBOR_ARM_Transition_Resource_Guide.pdf.*

[81] 12 CFR 1026.41.

because Regulation Z does not address when a creditor may transition a closed-end loan to a new index. Instead, Regulation Z provides guidance on the circumstances when an index change requires creditors to treat the transaction as a refinancing and, accordingly, to provide the disclosures required at origination.

Placement of example in Regulation Z. The Bureau declines to adopt commenters' suggestion to include the proposed example in the text of the rule rather than the commentary because it is not necessary or warranted to protect creditors from liability. Good faith compliance with the commentary affords protection from liability under TILA section 130(f), which protects entities from civil liability for any act done or omitted in good faith in conformity with any interpretation issued by the Bureau.[82]

Section 1026.36 Prohibited Acts or Practices and Certain Requirements for Credit Secured by a Dwelling

36(a) Definitions

36(a)(4) Seller Financiers; Three Properties

36(a)(4)(iii)

36(a)(4)(iii)(C)

Section 1026.36(a)(1) defines the term ''loan originator'' for purposes of the prohibited acts or practices and requirements for credit secured by a dwelling in § 1026.36. Section 1026.36(a)(4) addresses the three-property exclusion for seller financers and provides that a person (as defined in § 1026.2(a)(22)) that meets all of the criteria specified in § 1026.36(a)(4)(i) to (iii) is not a loan originator under § 1026.36(a)(1). Pursuant to § 1026.36(a)(4)(iii)(C), one such criterion requires that, if the financing agreement has an adjustable rate, the index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or LIBOR. In light of the anticipated discontinuation of LIBOR, the Bureau proposed to amend the examples of indices provided in § 1026.36(a)(4)(iii)(C) to substitute SOFR for LIBOR. The Bureau received no comments on the proposed amendments to § 1026.36(a)(4)(iii)(C) and is finalizing the amendments as proposed.

36(a)(5) Seller Financiers; One Property

36(a)(5)(iii)

36(a)(5)(iii)(B)

Section 1026.36(a)(1) defines the term ''loan originator'' for purposes of the prohibited acts or practices and requirements for credit secured by a dwelling in § 1026.36. Section 1026.36(a)(5) addresses the one-property exclusion for seller financers and provides that a natural person, estate, or trust that meets all of the criteria specified in § 1026.36(a)(5)(i) to (iii) is not a loan originator under § 1026.36(a)(1). Pursuant to § 1026.36(a)(5)(iii)(B), one such criterion currently requires that, if the financing agreement has an adjustable rate, the index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or LIBOR. In light of the anticipated discontinuation of LIBOR, the Bureau proposed to amend the examples of indices provided in § 1026.36(a)(5)(iii)(B) to substitute SOFR for LIBOR. The Bureau received no comments on the proposed amendments to § 1026.36(a)(5)(iii)(B) and is finalizing the amendments as proposed.

Section 1026.37 Content of Disclosures for Certain Mortgage Transactions (Loan Estimate)

37(j) Adjustable Interest Rate Table

37(j)(1) Index and Margin

Section 1026.37 governs the content of the Loan Estimate disclosure for certain mortgage transactions. If the interest rate may adjust and increase after consummation and the product type is not a step rate, § 1026.37(j)(1) requires disclosure in the Loan Estimate of, *inter alia,* the index upon which the adjustments to the interest rate are based. Comment 37(j)(1)–1 explains that the index disclosed pursuant to § 1026.37(j)(1) must be stated such that a consumer reasonably can identify it. The comment further explains that a common abbreviation or acronym of the name of the index may be disclosed in place of the proper name of the index, if it is a commonly used public method of identifying the index. The comment provides, as an example, that ''LIBOR'' may be disclosed instead of London Interbank Offered Rate. In light of the anticipated discontinuation of LIBOR, the Bureau proposed to amend this example in comment 37(j)(1)–1 to provide that ''SOFR'' may be disclosed instead of Secured Overnight Financing Rate. The Bureau did not receive any comments on the proposed amendments to comment 37(j)(1)–1 and is finalizing the amendments as proposed.

Section 1026.40 Requirements for Home Equity Plans

40(f) Limitations on Home Equity Plans

40(f)(3)

40(f)(3)(ii)

TILA section 137(c)(1) provides that no open-end consumer credit plan under which extensions of credit are secured by a consumer's principal dwelling may contain a provision that permits a creditor to change unilaterally any term except in enumerated circumstances set forth in TILA section 137(c).[83] TILA section 137(c)(2)(A) provides that a creditor may change the index and margin applicable to extensions of credit under such a plan if the index used by the creditor is no longer available and the substitute index and margin will result in a substantially similar interest rate.[84] In implementing TILA section 137(c), § 1026.40(f)(3) prohibits a creditor from changing the terms of a HELOC subject to § 1026.40 except in enumerated circumstances set forth in § 1026.40(f)(3). Section 1026.40(f)(3)(ii) provides that a creditor may change the index and margin used under the HELOC plan if the original index is no longer available, the new index has a historical movement substantially similar to that of the original index, and the new index and margin would have resulted in an APR substantially similar to the rate in effect at the time the original index became unavailable.

Current comment 40(f)(3)(ii)–1 provides that a creditor may change the index and margin used under the HELOC plan if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. Current comment 40(f)(3)(ii)–1 also provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable. As discussed in the section-by-section analysis of § 1026.55(b)(7), card issuers for a credit card account under an open-end (not home-secured) consumer credit plan are subject to current comment 55(b)(2)–6, which provides a similar provision on the unavailability of an index as current comment 40(f)(3)(ii)–1.

[82] 15 U.S.C. 1640; comment 1 to 12 CFR part 1026.

[83] 15 U.S.C. 1647(c).

[84] 15 U.S.C. 1647(c)(2)(A).

The Bureau's Proposal

As discussed in part III, the industry has requested that the Bureau permit card issuers to replace the LIBOR index used in setting the variable rates on existing accounts before LIBOR becomes unavailable to facilitate compliance. Among other things, the industry is concerned that if card issuers must wait until LIBOR become unavailable to replace the LIBOR indices used on existing accounts, these card issuers would not have sufficient time to inform consumers of the replacement index and update their systems to implement the change. To reduce uncertainty with respect to selecting a replacement index, the industry has also requested that the Bureau determine that Prime has historical fluctuations that are substantially similar to those of the LIBOR indices. The Bureau believes that similar issues may arise with respect to the transition of existing HELOC accounts away from using a LIBOR index.

To address these concerns, as discussed in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii)(B), the Bureau proposed to add new LIBOR-specific provisions to proposed § 1026.40(f)(3)(ii)(B). These proposed provisions would have permitted creditors for HELOC plans subject to § 1026.40 that use a LIBOR index under the plan to replace the LIBOR index and change the margins for calculating the variable rates on or after March 15, 2021, in certain circumstances without needing to wait for LIBOR to become unavailable.

Specifically, proposed § 1026.40(f)(3)(ii)(B) provided that if a variable rate on a HELOC subject to § 1026.40 is calculated using a LIBOR index, a creditor may replace the LIBOR index and change the margin for calculating the variable rate on or after March 15, 2021, as long as: (1) The historical fluctuations in the LIBOR index and replacement index were substantially similar; and (2) the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed § 1026.40(f)(3)(ii)(B) also provided that if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

Also, as discussed in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii)(B), to reduce uncertainty with respect to selecting a replacement index that meets the standards in proposed § 1026.40(f)(3)(ii)(B), the Bureau proposed to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices. The Bureau also proposed to determine that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR have historical fluctuations that are substantially similar to those of the LIBOR indices that they are intended to replace. The Bureau also proposed additional detail in comments 40(f)(3)(ii)(B)–1 through –3 with respect to proposed § 1026.40(f)(3)(ii)(B).

In addition, as discussed in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), the Bureau proposed to move the unavailability provisions in current § 1026.40(f)(3)(ii) and current comment 40(f)(3)(ii)–1 to proposed § 1026.40(f)(3)(ii)(A) and proposed comment 40(f)(3)(ii)(A)–1 respectively and to revise the proposed moved provisions for clarity and consistency. The Bureau also proposed additional detail in comments 40(f)(3)(ii)(A)–2 and –3 with respect to proposed § 1026.40(f)(3)(ii)(A). For example, to reduce uncertainty with respect to selecting a replacement index that meets the standards for selecting a replacement index under proposed § 1026.40(f)(3)(ii)(A), the Bureau proposed the same determinations described above related to Prime and the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products in relation to proposed § 1026.40(f)(3)(ii)(A). The Bureau proposed to make these revisions and provide additional detail because the Bureau understands that some HELOC creditors may use the unavailability provision in proposed § 1026.40(f)(3)(ii)(A) to replace a LIBOR index used under a HELOC plan, depending on the contractual provisions applicable to their HELOC plans, as discussed in more detail below.

Proposed comment 40(f)(3)(ii)–1 would have addressed the interaction among the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A), the LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B), and the contractual provisions that apply to the HELOC plan. Proposed comment 40(f)(3)(ii)–1 provided that a creditor may use either the provision in proposed § 1026.40(f)(3)(ii)(A) or proposed § 1026.40(f)(3)(ii)(B) to replace a LIBOR index used under a HELOC plan subject to § 1026.40 so long as the applicable conditions are met for the provision used. This proposed comment made clear, however, that neither provision excuses the creditor from noncompliance with contractual provisions.

To facilitate compliance, proposed comment 40(f)(3)(ii)–1 also provided examples on the interaction among the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A), the LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B), and three types of contractual provisions for HELOCs because the Bureau understands that HELOC contracts may be written in a variety of ways. For example, the Bureau recognizes that some existing contracts for HELOCs that use LIBOR as an index for a variable rate may provide that: (1) A creditor can replace the LIBOR index and the margin for calculating the variable rate unilaterally only if the LIBOR index is no longer available or becomes unavailable; and (2) the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the LIBOR index becomes unavailable. Other HELOC contracts may provide that a creditor can replace the LIBOR index and the margin for calculating the variable rate unilaterally only if the LIBOR index is no longer available or becomes unavailable but does not require that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the LIBOR index becomes unavailable. In addition, other HELOC contracts may allow a creditor to change the terms of the contract (including the LIBOR index used under the plan) as permitted by law.

As discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), this final rule adopts § 1026.40(f)(3)(ii)(A) as proposed. As discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(B), this final rule adopts § 1026.40(f)(3)(ii)(B) generally as proposed with revisions to: (1) Set April 1, 2022, as the date on or after which HELOC creditors are permitted to replace the LIBOR index used under the plan pursuant to § 1026.40(f)(3)(ii)(B) prior to LIBOR becoming unavailable;

(2) set October 18, 2021, as the date creditors generally must use under § 1026.40(f)(3)(ii)(B) for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar; and (3) provide that if the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[85]

Comments Received

The Bureau received a significant number of comments on proposed § 1026.40(f)(3)(ii)(A) and (B) from industry, including banks, credit unions, and their trade associations. The Bureau also received several comment letters from consumer groups and individual consumers. In response to the 2020 Proposal, most commenters generally provided the same comments for both proposed § 1026.40(f)(ii)(A) and (B) for HELOC accounts and § 1026.55(b)(7)(i) and (ii) for credit card accounts under an open-end (not home-secured) consumer credit plan.

Allow transition from a LIBOR index prior to LIBOR becoming unavailable. The Bureau received comments from industry, consumer groups, and individuals on proposed § 1026.40(f)(3)(ii)(B) and proposed § 1026.55(b)(7)(ii) that would permit creditors for HELOC plans subject to § 1026.40 and card issuers that use a LIBOR index under the plan to replace the LIBOR index and change the margins for calculating the variable rates on or after March 15, 2021, in certain circumstances without needing to wait for LIBOR to become unavailable. Several industry commenters encouraged the Bureau to adopt these proposed provisions. A trade association indicated that these proposed provisions, if adopted, would allow HELOC creditors and card issuers to undertake the transition on a timeline that is more manageable and less likely to cause disruption for both HELOC creditors and consumers. A few other trade associations indicated that these proposed provisions allowing transition to a replacement index prior to LIBOR becoming unavailable, if adopted, would address concerns that LIBOR may continue to be available but may become less representative or reliable.

Several consumer group commenters and an individual commenter generally supported proposed § 1026.40(f)(3)(ii)(B) for HELOC accounts and § 1026.55(b)(7)(ii) for credit card accounts, indicating that the Bureau should allow HELOC creditors and card issuers to replace a LIBOR index used under a plan before LIBOR becomes unavailable. The individual commenter indicated that these provisions would allow HELOC creditors and card issuers enough lead time to communicate with borrowers regarding the changes to the index.

A few credit union trade association commenters supported the Bureau's proposal to allow creditors for HELOCs and card issuers to make the transition away from a LIBOR index as soon as March 15, 2021, but requested that the Bureau consider moving this date up even earlier. Several trade association commenters requested that HELOC creditors and card issuers be allowed to transition away from a LIBOR index as early as December 31, 2020.

A trade association commenter representing reverse mortgage creditors requested that the Bureau coordinate with both the U.S. Department of Housing and Urban Development (HUD) and the Government National Mortgage Association (Ginnie Mae) with respect to the March 15, 2021, date in proposed § 1026.40(f)(3)(ii)(B). This commenter was concerned that if HUD decides to switch the HECM index to a SOFR index as of January 1, 2021, creditors would need to comply with that in order to make HECM loans insured by the Federal Housing Administration (FHA). This commenter indicated that it was not clear how such a required change by HUD would interact with proposed § 1026.40(f)(3)(ii)(B), if adopted.

Determination that Prime and certain SOFR-based spread-adjusted indices recommended by the ARRC for consumer products have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau received comments from several trade associations and consumer groups on the Bureau's proposed determination that Prime and certain SOFR-based spread-adjusted indices recommended by the ARRC have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. Several trade association commenters, including trade association commenters that represent credit unions, supported the Bureau's proposal determining that Prime has historical fluctuations substantially similar to those of certain LIBOR indices for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). A few of these trade association commenters that represent credit unions indicated that many credit unions already use Prime for new open-end plans in lieu of LIBOR or plan to transition away from LIBOR to Prime for existing open-end plans. Several trade association commenters supported the Bureau's proposal determining that certain SOFR-based spread-adjusted indices recommended by the ARRC have historical fluctuations substantially similar to those of certain LIBOR indices for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii).

A few consumer group commenters indicated that the Bureau should not adopt its proposal that Prime has historical fluctuations that are substantially similar to those of certain LIBOR indices for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). These consumer group commenters instead indicated that the Bureau should signal its expectation that industry participants will select the SOFR-based spread-adjusted indices recommended by ARRC for consumer products as the replacement index and that failure to do so will invite increased scrutiny of compliance with Regulation Z. Several other consumer group commenters indicated that they support the Bureau's proposal that both Prime and the SOFR-based spread-adjusted indices recommended by the ARRC have historical fluctuations that are substantially similar to certain LIBOR indices. These consumer group commenters believed the SOFR-based spread-adjusted indices recommended by the ARRC are the best replacement for consumers and the only appropriate replacement in contracts where the margin cannot be adjusted. However, these consumer group commenters supported the Bureau's proposal under proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii) that: (1) Prime has substantially similar historic fluctuations to those of certain LIBOR indices; and (2) a creditor or card issuer using Prime must comply with the condition that the replacement index

[85] See the section-by-section analysis of § 1026.40(f)(3)(ii)(B) for the rationale for why the Bureau selected the October 18, 2021, date. The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

and replacement margin result in an APR substantially similar to the rate at the time the LIBOR became unavailable.

Additional examples of indices that have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. Many industry commenters and one individual commenter requested that the Bureau identify additional indices which meet the Regulation Z standards in proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii) that the historical fluctuations of those indices are substantially similar to those of certain tenors of LIBOR. A few trade associations and several banks requested that the Bureau consider providing a safe harbor for AMERIBOR® rates that the historical fluctuations of those indices would be considered substantially similar to those of certain LIBOR indices for purposes of Regulation Z's standards. A few trade associations representing credit unions requested that the Bureau consider providing a safe harbor for EFFR that the historical fluctuations of that rate would be considered substantially similar to those of certain LIBOR indices for purposes of Regulation Z's standards. A few trade associations requested that the Bureau consider providing a safe harbor for CMT rates that the historical fluctuations of those rates would be considered substantially similar to those of certain LIBOR indices for purposes of Regulation Z's standards. A trade association commenter representing reverse mortgage creditors requested that the Bureau expressly provide a safe harbor for the index prescribed by the HUD Secretary for replacement of the LIBOR index for HECMs, if that index is different from the SOFR-spread adjusted indices recommended by ARRC for consumer products, that the historical fluctuations of that index would be considered substantially similar to those of certain LIBOR indices for purposes of Regulation Z's standards. This trade group encouraged the Bureau, HUD, and Ginnie Mae to conduct statistical analyses to determine what the effect of such a replacement index will be on, for example, existing pools of securitized HECMs to ensure that such replacement index is truly substantially similar.

An individual commenter indicated that the difference among LIBOR and SOFR rates would trigger issues around the pricing of loans linked to SOFR and that the Bureau needs to study this issue. This commenter noted that various lenders have already started looking at other indices like AMERIBOR®.

Additional guidance on determining whether historical fluctuations are substantially similar to those of certain USD LIBOR indices. Several industry commenters requested that the Bureau provide guidance by defining when the historical fluctuations of an index are substantially similar to those of a particular LIBOR index for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). A few trade associations requested that the Bureau provide guidance on the meaning of ''substantially similar'' and also adopt a flexible principles-based standard in order to avoid effectively ''mandating'' any specific index as the replacement for LIBOR. A credit union trade association commenter indicated that although the proposal allows the use of an established index with historical fluctuations substantially similar to those of a LIBOR index, the proposal does not define what it means for a rate to be substantially similar. This commenter indicated that credit unions would benefit from the Bureau clarifying when historical fluctuations are considered substantially similar to those of a LIBOR index.

Newly established index as replacement for a LIBOR index. The Bureau received comments from industry, consumer groups, and a financial services education and consulting firm in relation to the use of a newly established index for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). An industry trade association indicated that in order to enhance compliance certainty, the Bureau should provide greater detail to HELOC creditors and card issuers regarding the factors or considerations that should be taken into account to determine that an index is newly established for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). This commenter suggested that such factors could include the length of time in which an index has been published or made available, as well as the period of time since the index has gained broad acceptance or use in financial markets. A financial services education and consulting firm indicated that the Bureau should only recognize newly established indices as being appropriate replacements for LIBOR if they are developed with the same high standards as SOFR. This commenter indicated its belief that all efforts should be made to minimize any value transfer in relation to replacing a LIBOR index.

A few consumer group commenters indicated that the Bureau should limit its recognition of a newly established index as an appropriate replacement for LIBOR for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). These consumer group commenters indicated their belief that without any historical track record, the appropriateness of a newly established index cannot be determined based only on the fact of it reflecting LIBOR on a single day.

Several consumer group commenters indicated that the Bureau should restrict the use of new indices that lack historical data. These consumer group commenters indicated that if the Bureau allows newly established indices, the Bureau should require HELOC creditors or card issuers to demonstrate in advance, with a verifiable methodology, that the newly established index would have had substantially similar historical fluctuations as the original index. These consumer group commenters indicated that the Bureau should base this requirement on the steps the New York Fed used to evaluate the SOFR and prove that it was sufficiently similar to the LIBOR index.

Substantially similar rates. The Bureau received several comments from industry, consumer groups, and individuals in relation to whether an APR calculated using a replacement index is substantially similar to the APR using the LIBOR index for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii).

A trade association commenter indicated that the Bureau should provide greater detail as to the process HELOC creditors and card issuers must use to determine whether an APR calculated using a replacement index is substantially similar to the APR using the LIBOR index for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). Several consumer group commenters indicated that the Bureau should interpret ''substantially similar'' to require HELOC creditors or card issuers to minimize any value transfer when selecting a replacement index and setting a new margin for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii).

An individual commenter indicated that consumers should be allowed to refinance their existing debt at no cost into existing market rate products at their discretion and banks should be forced to not artificially inflate rates ahead of the anticipated sunset date of LIBOR.

In determining whether the APRs are substantially similar, the Bureau received comments from industry and consumer groups on the Bureau's proposal to use a single date for the index values for purposes of proposed

§§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii), rather than using a historical median or average of the index values. A trade association commenter indicated that: (1) The Bureau should give HELOC creditors and card issuers the option to either use a single date for purposes of the index values or use the median value of the difference between the two indices over a slightly longer period of time; and (2) such an approach would preserve flexibility and recognize that different indices will present different challenges with respect to evaluation on a single date.

A trade association commenter representing reverse mortgage creditors indicated that the Bureau should require the use of the historical spread rather than the spread on a specific day in comparing rates to help ensure such rates are substantially similar to each other. This commenter: (1) Indicated that a historical median or average of the spread between the replacement index and LIBOR over the time period the historical data is available, or 5 years, whichever is shorter, should be used for purposes of determining whether a rate using the replacement index is substantially similar to the rate using the LIBOR index; and (2) raised concerns that the use of a single day to compare the rates of LIBOR and its replacement could be problematic if such dates happen to occur during a period of extreme volatility.

Several consumer group commenters indicated that the Bureau should require HELOC creditors and card issuers to use a historical median value rather than the value from a single day when comparing the APR using a replacement index to the APR using the LIBOR index to determine if the two rates are substantially similar for purposes of proposed § 1026.40(f)(3)(ii)(A) and (B) and § 1026.55(b)(7)(i) and (ii). These commenters noted that the ARRC and the International Swaps and Derivatives Association (ISDA) have endorsed using a historical median to calculate the spread-adjustment between the LIBOR and SOFR (the historical median over a five-year lookback period). These commenters indicated that the Bureau should require HELOC creditors and card issuers to make a similar calculation for other replacement indices rather than comparing the original and replacement indices on a single day.

With respect to the SOFR-based spread-adjusted indices recommended by the ARRC, a trade association commenter indicated that the Bureau should clarify that the APR calculated using a spread-adjusted SOFR index is substantially similar to the APR calculated using a corresponding LIBOR index, provided the HELOC creditor or card issuer uses the same margin in effect immediately prior to the transition.

Determination that LIBOR index is no longer available. The Bureau received comments from industry and consumer groups in relation to determining when a LIBOR index is no longer available. Several trade associations commenters indicated that the Bureau should provide further guidance to HELOC creditors and card issuers to assist them in making the determination of whether LIBOR (or another index) is unavailable for purposes of Regulation Z. These commenters indicated that the Bureau should, for example, provide the triggers used in the ARRC's recommended contractual fallback language for new closed-end, residential ARMs as examples of when an index is unavailable, such as when an index administrator permanently or indefinitely stops providing the index to the general public, or when an index administrator or its regulator issues an official public statement that the index is no longer reliable or representative.[86] These commenters stated their belief that such guidance would be beneficial to financial institutions and consumers and would help provide further certainty, not only for the upcoming LIBOR transition but for any transitions in the future as well.

Another trade association commenter that represents reverse mortgage creditors indicated that the Bureau should include language in the final rule clarifying when LIBOR is deemed to be no longer available. This commenter indicated that the Bureau should permit lenders to make the determination that a LIBOR index is no longer available when LIBOR is no longer widely used or supported in the industry at large (or is becoming less available as time goes on) as opposed to LIBOR being unavailable (since it is likely that it will take some time before LIBOR disappears completely), and that if creditors make this assessment in good faith and switch the index accordingly, the Bureau will not subject them to sanctions or other punitive measures.

Another trade association commenter indicated that the Bureau should clarify the extent to which LIBOR would become unavailable in the event that it continued to be reported but became unreliable or that there was uncertainty about its ongoing status. Another trade association commenter indicated that the Bureau should make a determination that after year-end 2021, LIBOR is unavailable.

Several trade associations commenters indicated that the Bureau should provide, applicable to all variable rate loan products, that a creditor may replace the LIBOR index before the publication of LIBOR is discontinued, even when the contract only provides for replacement upon the unavailability of LIBOR. In addition, these trade associations indicated that the Bureau should make clear that a creditor can replace both the index and the margin even in cases where the consumer credit agreement does not explicitly contemplate the replacement of the pre-existing LIBOR index and margin.

Several consumer group commenters indicated that the Bureau should either define ''unavailable'' or ban the use of LIBOR indices after December 2021 in any consumer credit product, including credit cards, student loans, and mortgages. These consumer group commenters stated their belief that defining ''unavailable'' would help avoid future ambiguity for index transitions. Nonetheless, these consumer group commenters indicated that their preferred approach is for the Bureau to ban the use of LIBOR indices after December 2021.

The Final Rule

As discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), this final rule adopts § 1026.40(f)(3)(ii)(A) as proposed. As discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(B), this final rule adopts § 1026.40(f)(3)(ii)(B) generally as proposed with revisions to: (1) Set April 1, 2022, as the date on or after which HELOC creditors are permitted to replace the LIBOR index used under the plan pursuant to § 1026.40(f)(3)(ii)(B) prior to LIBOR becoming unavailable; (2) set October 18, 2021, as the date creditors generally must use under § 1026.40(f)(3)(ii)(B) for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar;[87] and (3) provide that if the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for

[86] Alt. Reference Rates Comm., *ARRC Recommendations Regarding More Robust LIBOR Fallback Contract Language for New Closed-End, Residential Adjustable Rate Mortgages* (Nov. 15, 2019), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARM_Fallback_Language.pdf* (LIBOR Fallback).

[87] See the section-by-section analysis of § 1026.40(f)(3)(ii)(B) for the rationale for why the Bureau selected the October 18, 2021, date.

which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[88] Revisions to comment 40(f)(3)(ii)–1 as proposed are discussed in more detail below.[89]

This final rule adopts new LIBOR-specific provisions rather than interpreting when the LIBOR indices are unavailable. The Bureau declines to adopt the industry commenters' suggestions to provide further guidance to creditors to assist them in making the determination of whether LIBOR (or another index) is unavailable for purposes of Regulation Z. The Bureau also declines the consumer group commenters' suggestion to either define ''unavailable'' or ban the use of LIBOR indices after December 2021 in any consumer credit product, including credit cards, student loans, and mortgages. For several reasons discussed below, the Bureau determines that it is appropriate for this final rule to adopt new LIBOR-specific provisions under § 1026.40(f)(3)(ii)(B), rather than interpreting the LIBOR indices to be unavailable as of a certain date prior to LIBOR being discontinued under current § 1026.40(f)(3)(ii) (as moved to § 1026.40(f)(3)(ii)(A)).

The Bureau recognizes that the ARRC's recommended contractual fallback language for new closed-end, residential ARMs provides triggers for when an index is unavailable under the contract, including when an index administrator or its regulator issues an official public statement that the index is no longer reliable or representative.[90] In March 2021, the FCA (the regulator of LIBOR) issued an official public statement that all USD LIBOR tenors (other than 1-week and 2-month USD LIBOR) will either cease to be provided by any administrator or no longer be representative after June 30, 2023.[91] The FCA also indicated that the FCA does not expect that USD LIBOR tenors (other than 1-week and 2-month USD LIBOR) will become unrepresentative before June 30, 2023.[92] The June 30, 2023 date generally will be applicable to most USD LIBOR tenors used in existing HELOC contracts because the Bureau understands that HELOCs contracts generally do not use the 1-week or 2-month USD LIBOR tenors. Given the June 30, 2023 date for when the FCA will consider most USD LIBOR tenors to be unrepresentative, the Bureau has concluded that it is not advisable to make a determination in this final rule that the LIBOR indices are unavailable or unrepresentative as of the effective date of this final rule (*i.e.,* April 1, 2022) for Regulation Z purposes under current § 1026.40(f)(3)(ii) (as moved to § 1026.40(f)(3)(ii)(A)). For similar reasons, the Bureau is not banning in this final rule use of a LIBOR index after December 2021 under Regulation Z.

The Bureau also is concerned that a determination in this final rule that the LIBOR indices are unavailable as of the effective date of this final rule (*i.e.,* April 1, 2022) for purposes of current § 1026.40(f)(3)(ii) (as moved to § 1026.40(f)(3)(ii)(A)) could have unintended consequences on other products or markets. For example, such a determination could unintentionally cause confusion for creditors for other products (*e.g.,* ARMs) about whether the LIBOR indices are unavailable at this time for those products too and could possibly put pressure on those creditors to replace the LIBOR index used for those products before those creditors are ready for the change.

Moreover, even if the Bureau interpreted unavailability under current § 1026.40(f)(3)(ii) (as moved to § 1026.40(f)(3)(ii)(A)) in this final rule to indicate that the LIBOR indices are unavailable as of the effective date of this final rule (*i.e.,* April 1, 2022) or as of June 30, 2023, (the date after which the FCA will consider most USD LIBOR tenors to be unrepresentative even if the rates are still being published), this interpretation would not completely solve the contractual issues for creditors whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index. As discussed below, this final rule does not override contractual provisions that require creditors to wait until LIBOR indices become unavailable for replacing the LIBOR index. Creditors still would need to decide for their specific contracts whether the LIBOR indices are unavailable. Thus, even if the Bureau decided that the LIBOR indices are unavailable under Regulation Z as described above, creditors whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index essentially would remain in the same position of interpreting their contracts as they would have been under the current rule.

Thus, this final rule does not interpret when the LIBOR indices are unavailable for purposes of current § 1026.40(f)(3)(ii) (as moved to § 1026.40(f)(3)(ii)(A)).

Interaction among § 1026.40(f)(3)(ii)(A) and (B) and contractual provisions. Comment 40(f)(3)(ii)–1 provides detail on the interaction among the unavailability provisions in § 1026.40(f)(3)(ii)(A), the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B), and the contractual provisions that apply to a HELOC plan. This final rule adopts comment 40(f)(3)(ii)–1 generally as proposed, with several revisions consistent with the changes this final rule makes to proposed § 1026.40(f)(3)(ii)(B). Specifically, this final rule revises comment 40(f)(3)(ii)–1 from the proposal to reflect that: (1) April 1, 2022, is the date on or after which a creditor may replace a LIBOR index under § 1026.40(f)(3)(ii)(B) if certain conditions are met; (2) October 18, 2021, is the date that creditors generally must use for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar under § 1026.40(f)(3)(ii)(B);[93] and (3) if the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[94]

[88] As set forth in § 1026.40(f)(3)(ii)(B), one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

[89] Revisions to comments 40(f)(3)(ii)(A)–1 through –3 as proposed are discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A). Revisions to comments 40(f)(3)(ii)(B)–1 through –3 as proposed are discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(B).

[90] *See* LIBOR Fallback, *supra* note 86.

[91] The FCA stated that the 1-week and 2-month USD LIBOR will either cease to be provided by any administrator or no longer be representative after December 31, 2021. Press Release, Fin. Conduct Auth., *FCA announcement on future cessation and loss of representativeness of the LIBOR benchmarks* (Mar. 05, 2021), *https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf.*

[92] Press Release, Fin. Conduct Auth., *Announcements on the end of LIBOR* (May 03, 2021), *https://www.fca.org.uk/news/press-releases/announcements-end-libor.*

[93] See the section-by-section analysis of § 1026.40(f)(3)(ii)(B) for the rationale for why the Bureau selected the October 18, 2021, date.

[94] The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year

Specifically, comment 40(f)(3)(ii)–1 provides that a creditor may use either the provision in § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) to replace a LIBOR index used under a HELOC plan subject to § 1026.40 so long as the applicable conditions are met for the provision used. This comment makes clear, however, that neither provision excuses the creditor from noncompliance with contractual provisions. The Bureau does not find it appropriate for the provisions in the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B) to override the consumer's contract with the creditor. TILA section 111(d) provides that, subject to certain exceptions, TILA and Regulation Z do not affect the validity or enforceability of any contract or obligation under State or Federal law.[95] Further, § 1026.28(a) generally provides that provisions of State law that are inconsistent with certain TILA provisions and the implementing Regulation Z provisions are preempted to the extent of the inconsistency.[96] A State law is inconsistent if it requires a creditor to make disclosures or take actions that contradict the requirements of the Federal law. The Bureau believes that contractual provisions that require a creditor to wait to replace a LIBOR index used under the plan until LIBOR is unavailable are not inconsistent with § 1026.40(f)(3)(ii)(B) and do not require a creditor to take action that contradicts Regulation Z. Section 1026.40(f)(3)(ii)(B) permits a creditor to replace a LIBOR index used under a HELOC plan and adjust the margin on or after April 1, 2022, if certain conditions are met but does not require the creditor to do so. If a creditor's contract with the consumer requires the creditor to wait until the LIBOR index is unavailable before replacing the index, the creditor can still comply with the contract without violating Regulation Z. Thus, the Bureau believes that these contractual provisions are not inconsistent with, and should not be preempted by, § 1026.40(f)(3)(ii)(B).

To facilitate compliance, comment 40(f)(3)(ii)–1 also provides examples of the interaction among the unavailability provisions in § 1026.40(f)(3)(ii)(A), the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B), and three types of contractual provisions for HELOCs. Each of these examples assumes that the LIBOR index used under the plan becomes unavailable after June 30, 2023. Specifically, comment 40(f)(3)(ii)–1.i provides an example where a HELOC contract provides that a creditor may not replace an index unilaterally under a plan unless the original index becomes unavailable and provides that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, comment 40(f)(3)(ii)–1.i explains that the creditor may use the unavailability provisions in § 1026.40(f)(3)(ii)(A) to replace the LIBOR index used under the plan so long as the conditions of that provision are met. Comment 40(f)(3)(ii)–1.i also explains that the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B) generally provide that a creditor may replace the LIBOR index if the replacement index value in effect on October 18, 2021, and the replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. Comment 40(f)(3)(ii)–1.i notes, however, that the creditor in this example would be contractually prohibited from replacing the LIBOR index used under the plan unless the replacement index and replacement margin also will produce an APR substantially similar to a rate that is in effect when the LIBOR index becomes unavailable.

Comment 40(f)(3)(ii)–1.ii provides an example of a HELOC contract under which a creditor may not replace an index unilaterally under a plan unless the original index becomes unavailable but does not require that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the creditor would be contractually prohibited from unilaterally replacing a LIBOR index used under the plan until it becomes unavailable. At that time, the creditor has the option of using § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) to replace the LIBOR index if the conditions of the applicable provision are met.

This final rule allows the creditor in this case to use either the unavailability provisions in § 1026.40(f)(3)(ii)(A) or the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B). If the creditor uses the unavailability provisions in § 1026.40(f)(3)(ii)(A), the creditor must use a replacement index and replacement margin that will produce an APR substantially similar to the rate in effect when the LIBOR index became unavailable. If the creditor uses the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B), the creditor generally must use the replacement index value in effect on October 18, 2021, and the replacement margin that will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[97]

Provided that the replacement index is published on October 18, 2021, this

USD LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

[95] 15 U.S.C. 1610(d).

[96] Section 1026.28 generally provides that State law requirements that are inconsistent with the requirements contained in chapter 1 (General Provisions), chapter 2 (Credit Transactions), or chapter 3 (Credit Advertising) of TILA and the implementing Regulation Z provisions are preempted to the extent of the inconsistency.

[97] The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

final rule allows a creditor in this case to use the index values of the LIBOR index and replacement index on October 18, 2021, under § 1026.40(f)(3)(ii)(B) to meet the ''substantially similar'' standard with respect to the comparison of the rates even if the creditor is contractually prohibited from unilaterally replacing the LIBOR index used under the plan until it becomes unavailable. The Bureau recognizes that LIBOR may not be discontinued until June 30, 2023, which is more than a year and a half later than the October 18, 2021, date.[98] Nonetheless, this final rule allows creditors that are restricted by their contracts to replace the LIBOR index used under the HELOC plans until the LIBOR index becomes unavailable to use generally the LIBOR index values and the replacement index values in effect on October 18, 2021, (provided the replacement index is published on that day), under § 1026.40(f)(3)(ii)(B), rather than the index values on the day that LIBOR becomes unavailable under § 1026.40(f)(3)(ii)(A). This final rule allows those creditors to use consistent index values to those creditors that are not restricted by their contracts in replacing the LIBOR index prior to LIBOR becoming unavailable. This final rule promotes consistency for consumers in that these HELOC creditors would be permitted to use the same LIBOR values in comparing the rates.

Thus, this final rule provides creditors in the situation described in comment 40(f)(3)(ii)–1.ii with the flexibility to choose to compare the rates using the index values for the LIBOR index and the replacement index on October 18, 2021, (provided the replacement index is published on that day), by using the proposed LIBOR-specific provisions under § 1026.40(f)(3)(ii)(B), rather than using the unavailability provisions in § 1026.40(f)(3)(ii)(A).

Comment 40(f)(3)(ii)–1.iii provides an example of a HELOC contract under which a creditor may change the terms of the contract (including the index) as permitted by law. Comment 40(f)(3)(ii)–1.iii explains in this case, if the creditor replaces a LIBOR index under a plan on or after April 1, 2022, but does not wait until the LIBOR index becomes unavailable to do so, the creditor may only use § 1026.40(f)(3)(ii)(B) to replace the LIBOR index if the conditions of that provision are met. In this case, the creditor may not use § 1026.40(f)(3)(ii)(A). Comment 40(f)(3)(ii)–1.iii also explains that if the creditor waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index, the creditor has the option of using § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) to replace the LIBOR index if the conditions of the applicable provision are met.

This final rule allows the creditor in this case to use either the unavailability provisions in § 1026.40(f)(3)(ii)(A) or the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B) if the creditor waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index. For the reasons explained above in the discussion of the example in comment 40(f)(3)(ii)–1.ii, this final rule in the situation described in comment 40(f)(3)(ii)–1.iii provides creditors with the flexibility to choose to use the index values of the LIBOR index and the replacement index on October 18, 2021 (provided the replacement index is published on that day), by using the LIBOR-specific provisions under § 1026.40(f)(3)(ii)(B), rather than using the unavailability provisions in § 1026.40(f)(3)(ii)(A).

40(f)(3)(ii)(A)

Current § 1026.40(f)(3)(ii) provides that a creditor may change the index and margin used under a HELOC plan subject to § 1026.40 if the original index is no longer available, the new index has a historical movement substantially similar to that of the original index, and the new index and margin would have resulted in an APR substantially similar to the rate in effect at the time the original index became unavailable. Current comment 40(f)(3)(ii)–1 provides that a creditor may change the index and margin used under the plan if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. Current comment 40(f)(3)(ii)–1 also provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

The Bureau's Proposal

The Bureau proposed to move the unavailability provisions in current § 1026.40(f)(3)(ii) and current comment 40(f)(3)(ii)–1 to proposed § 1026.40(f)(3)(ii)(A) and proposed comment 40(f)(3)(ii)(A)–1 respectively and revise the moved provisions for clarity and consistency. In addition, the Bureau proposed to add detail in proposed comments 40(f)(3)(ii)(A)–2 and –3 on the conditions set forth in proposed § 1026.40(f)(3)(ii)(A).

Specifically, proposed § 1026.40(f)(3)(ii)(A) provided that a creditor for a HELOC plan subject to § 1026.40 may change the index and margin used under the plan if the original index is no longer available, the replacement index has historical fluctuations substantially similar to that of the original index, and the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the original index became unavailable. Proposed § 1020.40(f)(3)(ii)(A) also provided that if the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable.

Proposed § 1026.40(f)(3)(ii)(A) differed from current § 1026.40(f)(3)(ii) in three ways. First, proposed § 1026.40(f)(3)(ii)(A) differed from current § 1040(f)(3)(ii) by using the term ''historical fluctuations'' rather than the term ''historical movement'' to refer to the original index and the replacement index. For clarity and consistency, the Bureau proposed to use ''historical fluctuations'' in both proposed § 1026.40(f)(3)(ii)(A) and proposed comment 40(f)(3)(ii)(A)–1, so that the proposed regulatory text and related commentary use the same term.

Second, proposed § 1026.40(f)(3)(ii)(A) differed from current § 1026.40(f)(3)(ii) by including a provision regarding newly established indices that is not contained in current § 1026.40(f)(3)(ii). This proposed provision would have been similar to the sentence in current comment 40(f)(3)(ii)–1 on newly established indices except that the proposed provision in proposed § 1026.40(f)(3)(ii)(A) made clear that a creditor that is using a newly established index also may adjust the margin so that the newly established index and replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable. The newly established index may not have the same index value as the original index, and the creditor may need to adjust the margin to meet the condition that the newly established index and replacement margin will produce an

[98] See the section-by-section analysis of § 1026.40(f)(3)(ii)(B) for the rationale for why the Bureau selected the October 18, 2021, date.

APR substantially similar to the rate in effect when the original index became unavailable.

Third, proposed § 1026.40(f)(3)(ii)(A) differed from current § 1026.40(f)(3)(ii) by using the terms ''replacement index'' and ''replacement index and replacement margin'' instead of using ''new index'' and ''new index and margin,'' respectively as contained in current § 1026.40(f)(3)(ii). These proposed changes were designed to avoid any confusion as to when the provision in proposed § 1026.40(f)(3)(ii)(A) is referring to a replacement index and replacement margin as opposed to a newly established index.

The Bureau proposed to move current comment 40(f)(3)(ii)–1 to proposed comment 40(f)(3)(ii)(A)–1. The Bureau also proposed to revise this proposed moved comment in three ways for clarity and consistency with proposed § 1026.40(f)(3)(ii)(A). First, proposed comment 40(f)(3)(ii)(A)–1 differed from current comment 40(f)(3)(ii)–1 by providing that if an index that is not newly established is used to replace the original index, the replacement index and replacement margin will produce a rate ''substantially similar'' to the rate that was in effect at the time the original index became unavailable. Current comment 40(f)(3)(ii)–1 uses the term ''similar'' instead of ''substantially similar'' for the comparison of these rates. Nonetheless, this use of the term ''similar'' in current comment 40(f)(3)(ii)–1 is inconsistent with the use of ''substantially similar'' in current § 1026.40(f)(3)(ii) for the comparison of these rates. To correct this inconsistency between the regulation text and the commentary provision that interprets it, the Bureau proposed to use ''substantially similar'' consistently in proposed § 1026.40(f)(3)(ii)(A) and proposed comment 40(f)(3)(ii)(A)–1 for the comparison of these rates.

Second, consistent with the proposed new sentence in proposed § 1026.40(f)(3)(ii)(A) related to newly established indices, proposed comment 40(f)(3)(ii)(A)–1 differed from current comment 40(f)(3)(ii)–1 by clarifying that a creditor that is using a newly established index may also adjust the margin so that the newly established index and replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable.

Third, proposed comment 40(f)(3)(ii)(A)–1 differed from current comment 40(f)(3)(ii)–1 by using the term ''the replacement index and replacement margin'' instead of ''the replacement index and margin'' to make clear when the proposed comment is referring to a replacement margin and not the original margin.

Proposed comment 40(f)(3)(ii)(A)–2 provided detail on determining whether a replacement index that is not newly established has historical fluctuations that are substantially similar to those of the LIBOR index used under the plan for purposes of proposed § 1026.40(f)(3)(ii)(A). Specifically, proposed comment 40(f)(3)(ii)(A)–2 provided that for purposes of replacing a LIBOR index used under a plan pursuant to proposed § 1026.40(f)(3)(ii)(A), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier. To reduce uncertainty with respect to selecting a replacement index that meets the standards under proposed § 1026.40(f)(3)(ii)(A), the Bureau proposed in proposed comment 40(f)(3)(ii)(A)–2.i to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices. Proposed comment 40(f)(3)(ii)(A)–2.i also provided that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(A) that Prime and the replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. The Bureau also proposed in proposed comment 40(f)(3)(ii)(A)–2.ii to determine that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the LIBOR indices that they are intended to replace. Proposed comment 40(f)(3)(ii)(A)–2.ii also provided that in order to use a SOFR-based spread-adjusted index for consumer products described above as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(A) that the SOFR-based spread-adjusted index recommended by the ARRC for consumer products and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable.

As discussed above, proposed § 1026.40(f)(3)(ii)(A) provided that the replacement index and replacement margin must produce an APR substantially similar to the rate that was in effect based on the LIBOR index used under the plan when the LIBOR index became unavailable. Proposed comment 40(f)(3)(ii)(A)–3 also provided that for the comparison of the rates, a creditor must use the value of the replacement index and the LIBOR index on the day that the LIBOR index becomes unavailable. Proposed comment 40(f)(3)(ii)(A)–3 also provided that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Proposed comment 40(f)(3)(ii)(A)–3.i provided an example to illustrate this comment.

Comments Received

In response to the proposal, the industry commenters generally provided the same comments for both proposed § 1026.40(f)(3)(ii) for HELOCs and § 1026.55(b)(7) for credit card accounts under an open-end (not home-secured) consumer credit plan. Similarly, the consumer group commenters also provided the same comments for both proposed § 1026.40(f)(3)(ii) for HELOCs and § 1026.55(b)(7) for credit card accounts under an open-end (not home-secured) consumer credit plan. These comments from industry and consumer groups are described in the section-by-section analysis of § 1026.40(f)(3)(ii).

The Final Rule

This final rule adopts § 1026.40(f)(3)(ii)(A) and comment 40(f)(3)(ii)(A)–1 as proposed. This final rule adopts comments 40(f)(3)(ii)(A)–2 and –3 generally as proposed with several revisions to provide additional detail on the § 1026.40(f)(3)(ii)(A) provision, including providing (1) examples of the type of factors to be considered in whether a replacement index meets the Regulation Z ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index for HELOCs; and (2) if a creditor uses the SOFR-based spread-adjusted index recommended by ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index

and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the condition in § 1026.40(f)(3)(ii)(A) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. This final rule provides additional detail with respect to the unavailability provisions in § 1026.40(f)(3)(ii)(A) because the Bureau understands that some HELOC creditors may use these unavailability provisions to replace a LIBOR index used under a HELOC plan, depending on the contractual provisions applicable to their HELOC plans, as discussed above in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii).

Historical fluctuations substantially similar for the LIBOR index and replacement index. This final rule adopts comment 40(f)(3)(ii)(A)–2 generally as proposed with several revisions as described below. Comment 40(f)(3)(ii)(A)–2 provides detail on determining whether a replacement index that is not newly established has historical fluctuations that are substantially similar to those of the LIBOR index used under the plan for purposes of § 1026.40(f)(3)(ii)(A).

Comment 40(f)(3)(ii)(A)–2 provides that for purposes of replacing a LIBOR index used under a plan pursuant to § 1026.40(f)(3)(ii)(A), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

Prime has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. To facilitate compliance, this final rule adopts comment 40(f)(3)(ii)(A)–2.i generally as proposed with one revision described below. Comment 40(f)(3)(ii)(A)–2.i provides a determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices. This final rule revises comment 40(f)(3)(ii)(A)–2.i from the proposal to provide that this determination is effective as of April 1, 2022, which is when this final rule becomes effective as discussed in more detail in part VI.

The Bureau made this determination after reviewing historical data from January 1986 through October 18, 2021, on 1-month USD LIBOR, 3-month USD LIBOR, and Prime. The spread between 1-month USD LIBOR and Prime increased from roughly 142 basis points in 1986 to 281 basis points in 1993. The spread between 3-month USD LIBOR increased from roughly 151 basis points in 1986 to 270 basis points in 1993. Both spreads were fairly steady after 1993. Given that for the last 28 years of history the spreads have remained relatively stable, the data, analysis, and conclusion discussed below are restricted to the period beginning in 1993.

While Prime has not always moved in tandem with 1-month USD LIBOR and 3-month USD LIBOR after 1993, the Bureau has determined that since 1993 the historical fluctuations in 1-month USD LIBOR and Prime have been substantially similar and that the historical fluctuations in 3-month USD LIBOR and Prime have been substantially similar.[99]

The historical correlation between 1-month USD LIBOR and Prime is .9957. The historical correlation between 3-month USD LIBOR and Prime is .9918. While the correlation between these rates is quite high, correlation is not the only statistical measure of similarity that may be relevant for comparing the historical fluctuations of these rates.[100] The Bureau has reviewed other statistical characteristics of these rates, such as the variance, skewness, and kurtosis,[101] and these characteristics imply that on average both the 1-month USD LIBOR and 3-month USD LIBOR tend to move closely with Prime and that the 1-month USD LIBOR and 3-month USD LIBOR tend to present consumers and creditors with payment changes that are similar to that presented by Prime.[102]

Theoretically, these statistical measures could mask important long-term differences in movements. However, as mentioned above, the spread between 1-month USD LIBOR and Prime and the spread between 3-month USD LIBOR and Prime have remained fairly steady from January 1993 to October 18, 2021. For example, the average spread between 1-month USD LIBOR and Prime was 281 basis points in 1993, and 303 basis points in 2020. The average spread between 3-month USD LIBOR and Prime was 270 basis points in 1993, and 289 basis points in 2020.

[99] There was a temporary but large difference in the movements of LIBOR rates and Prime for roughly a month after Lehman Brothers filed for bankruptcy on September 15, 2008, reflecting the effects this event had on the perception of risk in the interbank lending market. For example, 1-month USD LIBOR increased over 200 basis points in the month after September 15, 2008, even as Prime and many other interest rates fell. The numbers presented in this analysis include this time period.

[100] For example, consider two wagers on a series of coin flips. The first wins one cent for every heads and loses one cent for every tails. The second wins a million dollars for every heads and loses a million dollars for every tails. These wagers are perfectly correlated (*i.e.,* they have a correlation of 1) but have very different statistical properties.

[101] Roughly, variance is a statistical measure of how much a random number tends to deviate from its average value. Skewness is a statistical measure of whether particularly large deviations in a random number from its average value tend to be below or above that average value. Kurtosis is a statistical measure of whether deviations of a random number from its average value tend to be small and frequent or rare and large.

[102] The variance, skewness, and kurtosis of Prime are 4.592, .4037, and 1.587 respectively. The variance, skewness, and kurtosis of 1-month USD LIBOR are 4.9567, .3622, and 1.5617 respectively. The variance, skewness, and kurtosis of 3-month USD LIBOR are 4.8725, .3487, and 1.5674, respectively.

Finally, in performing its analysis, the Bureau also considered the impact different indices would have on consumer payments. To that end, the Bureau considered a specific example of a debt with a variable rate that resets monthly, and a balance that accumulates over time with interest but without further charges, payments, or fees. The Bureau used this example for HELOCs and credit card accounts because the Bureau understands that the rates for many of those accounts reset monthly. The example considers debt that accumulates interest over a period of ten years. The Bureau considered the consumer payments incurred by such debt over 17 distinct time periods; each time period begins in January of each year from 1994 to 2009 and then lasts for ten years, so the 17 time periods end between 2004 and 2020. For this example, the Bureau found that since 1994 historical fluctuations in 1-month USD LIBOR and Prime, and 3-month USD LIBOR and Prime, produced substantially similar payment outcomes for consumers with debt similar to that considered.[103] For example, if the initial balance in this example is $10,000, after ten years the debt outstanding under Prime is on average only about $102 greater than the debt outstanding under adjusted 1-month USD LIBOR. The Bureau also found similar results for Prime versus the adjusted 3-month USD LIBOR.

This final rule adopts comment 40(f)(3)(ii)(A)–2.i as proposed to clarify that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(A) that Prime and the replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. This condition for comparing the rates under § 1026.40(f)(3)(ii)(A) is discussed in more detail below.

Certain SOFR-based spread-adjusted indices recommended by the ARRC for consumer products have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. To facilitate compliance, this final rule adopts comment 40(f)(3)(ii)(A)–2.ii generally as proposed with two revisions as discussed below. Comment 40(f)(3)(ii)(A)–2.ii provides a determination that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month USD LIBOR indices respectively. This final rule revises comment 40(f)(3)(ii)(A)–2.ii from the proposal to provide that this determination is effective as of April 1, 2022, when this final rule becomes effective as discussed in more detail in part VI. As discussed in more detail below, this final rule also revises comment 40(f)(3)(ii)(A)–2.ii from the proposal to not include 1-year USD LIBOR in the comment at this time pending the Bureau's receipt of additional information and further consideration by the Bureau.

As discussed in the section-by-section analysis of § 1026.20(a), on July 29, 2021, the ARRC formally recommended the 1-month, 3-month, and 6-month term spread-adjusted SOFR rates produced by the CME Group as the underlying SOFR rates for use in replacing the 1-month, 3-month, and 6-month USD LIBOR tenors respectively for existing accounts. On October 6, 2021, with regards to consumer products, the ARRC indicated that for 1-year USD LIBOR, the ARRC's recommended replacement index will be to a spread-adjusted index based on the 1-year term SOFR rate or to a spread-adjusted index based on the 6-month term SOFR rate using the same spread adjustment it would have for arriving at the replacement index based on the 1-year term SOFR rate.[104] The ARRC indicated that it will make a recommendation on the spread-adjusted index to replace 1-year USD LIBOR and all other remaining details of its recommended replacement indices for consumer products no later than one year before the date when 1-year USD LIBOR is expected to cease (*i.e.,* by June 30, 2022).[105] The Bureau is reserving judgment about whether to include a reference to the 1-year USD LIBOR index in comment 40(f)(3)(ii)(A)–2.ii. until it obtains additional information. Once the Bureau knows which SOFR-based spread-adjusted index the ARRC will recommend for consumer products to replace the 1-year USD LIBOR index, the Bureau may determine whether that index meets the ''historical fluctuations are substantially similar'' standard based on information available at that time. Assuming the Bureau determines that the index meets that standard, the Bureau will then consider whether to codify that determination by finalizing the proposed comment related to the 1-year USD LIBOR index in a supplemental final rule, or otherwise announce that determination.

With respect to this final rule, while the spread-adjusted term SOFR rates have not always moved in tandem with LIBOR, the Bureau has determined that: (1) The historical fluctuations of 6-month USD LIBOR are substantially similar to those of the 6-month spread-adjusted term SOFR rates; (2) the historical fluctuations of 3-month USD LIBOR are substantially similar to those of 3-month spread-adjusted term SOFR rates; and (3) the historical fluctuations of 1-month USD LIBOR are substantially similar to those of the 1-month spread-adjusted term SOFR rates.[106]

Statistics that have led the Bureau to make these determinations are in Tables 2 and 3.

[103] In this example, for each starting year, three versions of debt are considered: (1) One with an interest rate equal to Prime; (2) one with an interest rate equal to the 1-month USD LIBOR plus the average spread between 1-month USD LIBOR and Prime for the 12 months preceding the start date; and (3) one with an interest rate equal to 3-month USD LIBOR plus the average spread between 3-month USD LIBOR and Prime for the 12 months preceding the start date. For the 17 initial starting years considered, the average difference between the debt outstanding under Prime and the debt outstanding under the adjusted 1-month USD LIBOR after ten years is only around 1.02 percent of the initial balance. The average absolute value of the difference in debt outstanding is around 1.6 percent of the initial balance. For the adjusted 3-month USD LIBOR, the average of the difference is around .99 percent of the initial balance, and the average of the absolute value of the difference is around 2.7 percent of the initial balance.

The average difference can be small if the difference is often far from zero, as long as it is sometimes well above zero and it is sometimes well below zero. The absolute value of the difference will be small only if the difference is usually close to zero. For example, suppose the difference is $1 million one year and −$1 million the next year. The average difference these two years is zero, indicating that the difference is close to zero on average. But the average of the absolute value of the difference is $1 million, indicating that the difference is typically far from zero. Consumers and creditors should care more about the average difference, and less about the average of the absolute value of the difference, if they have more liquidity and risk tolerance.

[104] Summary of Fallback Recommendations, *supra* note 5, at 10.

[105] *Id.*

[106] Because the spread adjustments are static (except for the one-year transition period), they do not affect the historical fluctuations in the spread-adjusted term SOFR rates, nor do they affect any of the statistics studied in Tables 2 or 3.

TABLE 2—CORRELATIONS BETWEEN LIBOR AND SPREAD-ADJUSTED TERM SOFR RATES [107]

USD LIBOR tenor	1-month SOFR	3-month SOFR	6-month SOFR
1-month	.9917	N/A	N/A
3-month	N/A	.9826	N/A
6-month	N/A	N/A	.9861

The historical correlations presented in Table 2 are high, suggesting that the given spread-adjusted term SOFR rates tend to move closely with the given LIBOR tenors.

TABLE 3—STATISTICS ON USD LIBOR AND SPREAD-ADJUSTED TERM SOFR RATES [108]

Rate	Variance	Skewness	Kurtosis
1-month LIBOR	1.0349	−0.0023	1.1702
3-month LIBOR	1.11	−0.0146	1.2074
6-month LIBOR	1.147	0.0403	1.2548
1-month SOFR	1.0788	0.0605	1.1596
3-month SOFR	1.0696	0.0706	1.1645
6-month SOFR	1.0723	0.1042	1.1939

The Bureau has reviewed other statistical characteristics of the LIBOR rates and the spread-adjusted term SOFR rates, such as the variance, skewness, and kurtosis, as shown in Table 3 and these imply that the spread-adjusted term SOFR rates tend to present consumers and creditors with payment changes that are similar to that presented by the LIBOR rates.

As discussed in the section-by-section analysis of § 1026.20(a), the ARRC and the Bureau also have compared the rate history that is available for SOFR (to calculate compounded averages) with the rate history for the applicable LIBOR indices.[109] In particular, the Bureau analyzed the spread-adjusted indices based on the 30-day SOFR. In determining whether the SOFR-based spread-adjusted indices have historical fluctuations substantially similar to those of the applicable LIBOR indices, the Bureau has reviewed the historical data on SOFR and historical data on 1-month, 3-month, and 6-month USD LIBOR from August 22, 2014, to October 18, 2021.[110] The Bureau calculated the spread-adjusted 30-day SOFR rates by adding the long-term values of the spread-adjustments set forth in Table 1 contained in the section-by-section analysis of § 1026.20(a) to the historical data on 30-day SOFR.

As discussed in more detail below, the Bureau also has determined that the historical fluctuations in the spread-adjusted 30-day SOFR are substantially similar to those of 1-month, 3-month, and 6-month USD LIBOR. The Bureau has reviewed the correlation and other statistical characteristics of these rates, such as the variance, skewness, and kurtosis (all reported in Table 4), and these imply that spread-adjusted 30-day SOFR tends to present consumers and creditors with payment changes that are similar to 1-month, 3-month, and 6-month USD LIBOR.[111]

Finally, in performing this analysis, the Bureau also considered the impact different indices would have on consumer payments. To that end, the Bureau considered a specific example of a debt with a variable rate that resets monthly, and a balance that accumulates over time with interest but without further charges, payments, or fees. The Bureau used this example for HELOCs and credit card accounts because the Bureau understands that the rates for many of those accounts reset monthly. The example considers debt that accumulates interest over the period of five years, beginning in January of 2016 and ending in January 2021. In this analysis, the Bureau used 30-day SOFR instead of the spread-adjusted 30-day SOFR.[112] For this example, the Bureau found historical fluctuations in 30-day SOFR and 1-month, 3-month, and 6-month USD LIBOR produced substantially similar payment outcomes for consumers with debt similar to that considered. For example, if the initial balance in this example is $10,000, the debt outstanding after five years under 30-

[107] These correlations are for the period beginning June 11, 2018, the first date for which indicative term SOFR rate data are available. These correlations are not directly comparable to those in Table 4, which uses data beginning August 22, 2014, the first date for which data for 30-day SOFR are available.

[108] Table 3 does not report a balance difference as Table 4 does because data on the term SOFR rates are not available for a sufficiently long period.

[109] *See* Historical SOFR, *supra* note 62.

[110] Prior to the start of official publication of SOFR in 2018, the New York Fed released data from August 2014 to March 2018 representing modeled, pre-production estimates of SOFR that are based on the same basic underlying transaction data and methodology that now underlie the official publication. The New York Fed has published indicative SOFR averages going back only to May 2, 2018. *See* Fed. Rsrv. Bank of N.Y., *SOFR Averages and Index Data, https://apps.newyorkfed.org/markets/autorates/sofr-avg-ind.* Therefore, the Bureau has used the estimated SOFR data going back to 2014 to estimate its own 30-day compound average of SOFR since 2014. The methodology to calculate compound averages of SOFR from daily data is described in Fed. Rsrv. Bank of N.Y., *Statement Regarding Publication of SOFR Averages and a SOFR Index,* (Feb. 12, 2020) *https://www.newyorkfed.org/markets/opolicy/operating_policy_200212.*

[111] Although generally spread-adjusted 30-day SOFR tends to move quite closely with 1-month, 3-month, and 6-month LIBOR, it does so with a lag because 30-day SOFR is backwards looking whereas the LIBOR rates are forward-looking. *See supra* note 65.

[112] The goal of this exercise is to try to determine if spread-adjusted 30-day SOFR and 1-month, 3-month, and 6-month USD LIBOR are likely to produce similar payments for consumers in the future. The spread adjustment for SOFR will not precisely align spread-adjusted SOFR and 1-month, 3-month, and 6-month USD LIBOR in the future, but it was calculated by the ARRC specifically to align spread-adjusted SOFR and 1-month, 3-month, and 6-month USD LIBOR in the past which is clearly when our data is from. Thus, using the spread adjustment calculated by the ARRC in this exercise could artificially minimize differences between 30-day SOFR and 1-month, 3-month, and 6-month USD LIBOR. Therefore, we calculate our own spread adjustment for this exercise as the average spread between 30-day SOFR and each of the LIBOR tenors for the 12 months preceding January 2016.

day SOFR is $48 less than the debt outstanding under 6-month USD LIBOR.

TABLE 4—COMPARISON OF HISTORICAL FLUCTUATIONS IN DIFFERENT TENORS OF USD LIBOR AND 30-DAY SOFR [113]

Rate	Correlation with 30-day SOFR	Variance	Skewness	Kurtosis	5-Year balance difference
30-day SOFR	N/A	0.7154	0.7218	2.0014	N/A
1-month LIBOR	.9868	0.7112	0.5843	1.7971	$26
3-month LIBOR	.9709	0.7638	0.5152	1.7902	62
6-month LIBOR	.9412	0.7566	0.386	1.8155	48

The Bureau notes that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products are not yet being published and will not be published by April 1, 2022, the effective date of this final rule. Nonetheless, the Bureau believes that it is appropriate to consider the underlying SOFR data that is available in the determinations that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month USD LIBOR indices respectively.

Comment 40(f)(3)(ii)(A)–2.ii clarifies that in order to use a SOFR-based spread-adjusted index recommended by the ARRC for consumer products described above as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(A) that the SOFR-based spread-adjusted index recommended by the ARRC for consumer products and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. Nonetheless, for the reasons discussed below, this final rule revises comment 40(f)(3)(ii)(A)–3 from the proposal to provide that for purposes of § 1026.40(f)(3)(ii)(A), if a creditor uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the condition in § 1026.40(f)(3)(ii)(A) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. Thus, a creditor that uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index still must comply with the condition in § 1026.40(f)(3)(ii)(A) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable, but the creditor will be deemed to be in compliance with this condition if the creditor uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This condition under § 1026.40(f)(3)(ii)(A) and the related comment 40(f)(3)(ii)(A)–3 are discussed in more detail below.

Additional examples of indices that have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. As discussed in the section-by-section analysis of § 1026.40(f)(3)(ii), many industry commenters generally urged the Bureau to provide additional examples of indices that have historical fluctuations that are substantially similar to those of particular LIBOR indices. Specifically, the Bureau received comments from industry requesting that the Bureau provide safe harbors for the following indices specifying that these indices have historical fluctuations that are substantially similar to those of certain LIBOR indices: (1) AMERIBOR® rates; (2) the EFFR; and (3) the CMT rates.

This final rule does not set forth safe harbors indicating that the AMERIBOR® rates, the EFFR, or the CMT rates meet the Regulation Z ''historical fluctuations are substantially similar'' standard for appropriate replacement indices for a particular LIBOR index. As discussed in more detail below, the Bureau notes that the determinations of whether replacement indices have historical fluctuations that are substantially similar to those of a particular LIBOR index are fact-specific, and they depend on the replacement index being considered and the LIBOR tenor being replaced. Industry commenters did not identify which tenor of LIBOR they use or which version of AMERIBOR®, EFFR, and CMT rates they would use to replace the tenor of LIBOR they use.

Second, the Bureau understands that the vast majority of the impacted industry participants will use the indices for which this final rule already provides a safe harbor (*i.e.,* Prime and certain SOFR-based spread-adjusted indices recommended by the ARRC for consumer products) as replacement indices for HELOCs. The Bureau notes that this final rule does not disallow the use of other replacement indices if they comply with Regulation Z.

Additional guidance on determining whether a replacement index has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. As discussed in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii), several industry commenters asked the Bureau to provide additional guidance on how to determine whether a replacement index has historical fluctuations that are substantially similar to those of a particular LIBOR index, including providing a principles-based standard for determining when a replacement index has historical fluctuations that are substantially similar to those of LIBOR.

To facilitate compliance with Regulation Z, this final rule adds new comment 40(f)(3)(ii)(A)–2.iii to provide a non-exhaustive list of factors to be considered in whether a replacement index meets the Regulation Z ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index. Specifically, new comment 40(f)(3)(ii)(A)–2.iii provides that the relevant factors to be considered

[113] The data in Table 4 generally are calculated using the spread-adjusted 30-day SOFR, except that the 5-year balance differences are calculated using 30-day SOFR rather than the spread-adjusted 30-day SOFR. *See id.*

in determining whether a replacement index has historical fluctuations substantially similar to those of a particular LIBOR index depends on the replacement index being considered and the LIBOR index being replaced. New comment 40(f)(3)(ii)(A)–2.iii also provides that the types of relevant factors to establish if a replacement index would meet the ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index using historical data, include but are not limited to, whether: (1) The movements over time are substantially similar; and (2) the consumers' payments using the replacement index compared to payments using the LIBOR index are substantially similar if there is sufficient historical data for this analysis. These factors are important to help minimize the financial impact on consumers, including the payments they must make, when a LIBOR index is replaced with another index. As discussed above, the Bureau has considered these factors in determining that (1) Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR; and (2) the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month USD LIBOR indices respectively.

The Bureau notes that this final rule does not set forth a principles-based standard for determining whether a replacement index has historical fluctuations that are substantially similar to those of a particular LIBOR tenor. The Bureau notes that these determinations are fact-specific, and they depend on the replacement index being considered and the LIBOR tenor being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as (1) the length of time the data has been available and how much of the available data to consider in the analysis of whether the Regulation Z standards have been satisfied; (2) the quality of the historical data, including the methodology of how the rate is determined and whether it sufficiently represents a market rate; and (3) whether the replacement index is a backward-looking rate (*e.g.,* historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. These considerations will vary depending on the replacement index being considered and the LIBOR tenor that is being replaced. Thus, this final rule does not provide a principles-based standard for determining whether a replacement index has historical fluctuations that are substantially similar to those of a particular LIBOR index.

Newly established index as replacement for a LIBOR index. Section 1026.40(f)(3)(ii)(A) provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable.

This final rule adopts § 1026.40(f)(3)(ii)(A) as proposed to provide the flexibility for creditors to use newly established indices if certain conditions are met. This flexibility is consistent with existing comment 40(f)(3)(ii)–1.

The Bureau declines to adopt industry commenters' suggestions that the Bureau should provide greater detail to creditors regarding the factors or considerations that should be taken into account to determine that an index is newly established. Current comment 40(f)(3)(ii)–1 uses the term newly established without additional details on the factors or considerations that should be taken into account to determine that an index is newly established. The Bureau finds that whether a replacement index is newly established and does not have any rate history is fact-specific and depends on the replacement index being considered. For example, although the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index have not yet been published, these indices will be based on an underlying SOFR rate and the Bureau believes that it is appropriate not to consider the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index as newly established because of the SOFR rate history. Also, commenters did not provide any specific indices that they believed are newly established with respect to the replacement of LIBOR and thus, the Bureau does not believe that additional details in this final rule are needed with respect to whether a particular index is newly established in relation to the LIBOR replacement.

The Bureau also declines to adopt consumer groups' suggestion that the Bureau should restrict the use of new indices that lack historical data. The Bureau finds that it is appropriate to maintain in § 1026.40(f)(3)(ii)(A) the flexibility for creditors generally to use newly established indices as a replacement index if certain conditions are met, given that it is not known what indices will be available in the future when an index needs to be replaced.

Substantially similar rate when LIBOR becomes unavailable. Under § 1026.40(f)(3)(ii)(A), the replacement index and replacement margin must produce an APR substantially similar to the rate that was in effect based on the LIBOR index used under the plan when the LIBOR index became unavailable. Comment 40(f)(3)(ii)(A)–3 generally provides detail on this condition. This final rule adopts comment 40(f)(3)(ii)(A)–3 generally as proposed with several revisions as described below to provide more clarity on this condition. Comment 40(f)(3)(ii)(A)–3 provides that a creditor generally must use the value of the replacement index and the LIBOR index on the day that the LIBOR index becomes unavailable. To facilitate compliance, this final rule revises comment 40(f)(3)(ii)(A)–3 from the proposal to address the situation where the replacement index is not published on the day that LIBOR becomes unavailable. Specifically, comment 40(f)(3)(ii)(A)–3 provides that if the replacement index is not published on the day that the LIBOR index becomes unavailable, the creditor generally must use the previous calendar day that both indices are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

This final rule adopts § 1026.40(f)(3)(ii)(A) as proposed to use a single day to compare the rates. The Bureau declines to adopt industry commenters' suggestions that the Bureau should (1) give creditors the

option to either use a single date for purposes of the index values or use the median value of the difference between the two indices over a slightly longer period of time; or (2) require the use of the historical spread rather than the spread on a specific day in comparing rates to help ensure such rates are substantially similar to each other. The Bureau also declines to adopt consumer group commenters' suggestion that the Bureau should require creditors to use a historical median value rather than the value from a single day when comparing a potential replacement to the original index rate.

This final rule is consistent with the condition in the unavailability provision in current § 1026.40(f)(3)(ii), in the sense that it provides that the new index and margin must result in an APR that is substantially similar to the rate in effect on a single day. Nonetheless, the Bureau recognizes that there is a possibility that the spread between the replacement index and the original index could differ significantly on a particular day from the historical spread in certain unusual circumstances. To mitigate this concern, this final rule generally provides creditors with the flexibility to choose to compare the rates using the index values for the LIBOR index and the replacement index on October 18, 2021, (provided the replacement index is published on that day), by using the proposed LIBOR-specific provisions under § 1026.40(f)(3)(ii)(B), rather than using the unavailability provisions in § 1026.40(f)(3)(ii)(A).[114]

Nonetheless, the Bureau recognizes that it is possible that in some instances the contract may require that the creditor use the index values of LIBOR and the replacement index on the day that the LIBOR index becomes unavailable. As discussed above in relation to comment 40(f)(3)(ii)–1, in this case, the Bureau does not intend to override that contractual provision. Thus, in those cases, the creditor would be required to use the index values of the replacement index and the LIBOR index on the day that the LIBOR index becomes unavailable. The Bureau recognizes that in those cases, the spread between the LIBOR rates and potential replacement rates may differ significantly from the historical spreads on the day that LIBOR becomes unavailable. Nonetheless, the Bureau does not believe it is appropriate to add complexity to this final rule to address this possibility. Thus, the Bureau determines that the approach set forth in this final rule properly minimizes the concerns that the replacement index and the original index could differ significantly on a particular day from the historical spread in certain circumstances discussed above without adding additional complexity to the rule.

Comment 40(f)(3)(ii)(A)–3 clarifies that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Comment 40(f)(3)(ii)(A)–3.i provides an example to illustrate this comment. This final rule adopts these details in comment 40(f)(3)(ii)(A)–3 generally as proposed with revisions to clarify the references to the prime rate and the LIBOR index used in the example and to revise the dates used in the example to be consistent with the June 30, 2023, date that most USD LIBOR tenors are expected to be discontinued. The Bureau believes that it would raise compliance issues if the rate calculated using the replacement index and replacement margin at the time the replacement index and replacement margin became effective had to be substantially similar to the rate in effect calculated using the LIBOR index on the date that the LIBOR index became unavailable. Specifically, under § 1026.9(c)(1), the creditor must provide a change-in-terms notice of the replacement index and replacement margin (including disclosing any reduced margin in change-in-terms notices provided on or after October 1, 2022, as would be required by § 1026.9(c)(1)(ii)) at least 15 days prior to the effective date of the changes. The Bureau believes that this advance notice is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced. Because advance notice of the changes must be given prior to the changes becoming effective, a creditor would not be able to ensure that the rate based on the replacement index and margin at the time the change-in-terms notice becomes effective will be substantially similar to the rate in effect calculated using the LIBOR index at the time the LIBOR index becomes unavailable. The value of the replacement index may change after the LIBOR index becomes unavailable and before the change-in-terms notice becomes effective.

This final rule does not provide additional details on the ''substantially similar'' standard in comparing the rates for purposes of § 1026.40(f)(3)(ii)(A). The Bureau declines to adopt industry commenters' suggestions that the Bureau should provide greater detail as to the process creditors must use to determine whether an APR calculated using a replacement index is substantially similar to the APR using the LIBOR index for purposes of §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). The Bureau also declines to adopt consumer group commenters' suggestion that the Bureau should interpret substantially similar to require creditors to minimize any value transfer when selecting a replacement index and setting a new margin for purposes of §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii).

The Bureau finds that it is not appropriate to provide a definitive list of factors that a creditor must meet for the two APRs to be considered substantially similar. The Bureau finds that whether an APR calculated using the replacement index is substantially similar to the APR calculated using the LIBOR index when LIBOR becomes unavailable is fact-specific and will depend on the two indices used for the calculations and the two rates being compared. The Bureau determines that it is appropriate to provide flexibility with respect to the factors that may be considered in determining whether the two APRs are substantially similar.

As discussed above, comment 40(f)(3)(ii)(A)–2.ii clarifies that in order to use the SOFR-based spread-adjusted index recommended by the ARRC for consumer products as the replacement index for the applicable LIBOR index, the creditor must comply with the condition in § 1026.40(f)(3)(ii)(A) that the SOFR-based spread-adjusted index for consumer products and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. A trade association commenter indicated that the Bureau should clarify that the APR calculated using a SOFR-based spread-adjusted index recommended by ARRC for consumer products is substantially similar to the APR calculated using a corresponding LIBOR index, provided the creditor uses the same margin in effect immediately prior to the transition.

This final rule revises comment 40(f)(3)(ii)(A)–3 from the proposal to provide that for purposes of § 1026.40(f)(3)(ii)(A), if a creditor uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable

[114] See below for a more detailed rationale for why the Bureau selected the October 18, 2021, date.

rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the condition in § 1026.40(f)(3)(ii)(A) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. Thus, a creditor that uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index still must comply with the condition in § 1026.40(f)(3)(ii)(A) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable, but the creditor will be deemed to be in compliance with this condition if the creditor uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

The Bureau has reviewed the methodology to compute the spread adjustments that the ARRC will use, and based on this review, the Bureau has determined that the SOFR-based spread adjusted indices that have been recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index will produce rates that are substantially similar to those of the LIBOR indices they are designed to replace. Thus, to facilitate compliance, the Bureau finds that it is appropriate to provide for purposes of § 1026.40(f)(3)(ii)(A) that a creditor complies with the ''substantially similar'' standard for comparing the rates when the creditor replaces the LIBOR index used under the plan with the applicable SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

The Bureau is reserving judgment about whether to include a reference to the 1-year USD LIBOR index in comment 40(f)(3)(ii)(A)–3 until it obtains additional information. Once the Bureau knows which SOFR-based spread-adjusted index the ARRC will recommend to replace the 1-year USD LIBOR index for consumer products, the Bureau may determine whether the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index. Assuming the Bureau determines that the index meets that standard, the Bureau will then consider whether to codify that determination in a supplemental final rule, or otherwise announce that determination.

40(f)(3)(ii)(B)

The Bureau's Proposal

For the reasons discussed below and in the section-by-section analysis of § 1026.40(f)(3)(ii), the Bureau proposed to add new LIBOR-specific provisions to § 1026.40(f)(3)(ii)(B) that would permit creditors for HELOC plans subject to § 1026.40 that use a LIBOR index for calculating variable rates to replace the LIBOR index and change the margins for calculating the variable rates on or after March 15, 2021, in certain circumstances. The Bureau also proposed to add detail in proposed comments 40(f)(3)(ii)(B)–1 through –3 on the conditions set forth in proposed § 1026.40(f)(3)(ii)(B).

Specifically, proposed § 1026.40(f)(3)(ii)(B) provided that if a variable rate on a HELOC subject to § 1026.40 is calculated using a LIBOR index, a creditor may replace the LIBOR index and change the margin for calculating the variable rate on or after March 15, 2021, as long as: (1) The historical fluctuations in the LIBOR index and replacement index were substantially similar; and (2) the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed § 1026.40(f)(3)(ii)(B) also provided that if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

In addition, proposed § 1026.40(f)(3)(ii)(B) provided that if either the LIBOR index or the replacement index is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the APR based on the replacement index must be substantially similar to the rate based on the LIBOR index.

Proposed comment 40(f)(3)(ii)(B)–1 provided detail on determining whether a replacement index that is not newly established has historical fluctuations that are substantially similar to those of the LIBOR index used under the plan for purposes of proposed § 1026.40(f)(3)(ii)(B). Specifically, proposed comment 40(f)(3)(ii)(B)–1 provided that for purposes of replacing a LIBOR index used under a plan pursuant to proposed § 1026.40(f)(3)(ii)(B), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through December 31, 2020, or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier. The Bureau proposed the December 31, 2020, date to be consistent with the date that creditors generally would have been required to use for selecting the index values in comparing the rates under proposed § 1026.40(f)(3)(ii)(B). In addition, to reduce uncertainty with respect to selecting a replacement index that meets the standards in proposed § 1026.40(f)(3)(ii)(B), the Bureau proposed in proposed comment 40(f)(3)(ii)(B)–1.i to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices. Proposed comment 40(f)(3)(ii)(B)–1.i also provided that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the creditor also must comply with the condition in proposed § 1026.40(f)(3)(ii)(B) that the Prime index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed comment 40(f)(3)(ii)(B)–1 provided that if either the LIBOR index or the Prime index is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the APR based on the Prime index must be substantially

similar to the rate based on the LIBOR index.

The Bureau also proposed in proposed comment 40(f)(3)(ii)(B)–1.ii to determine that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the LIBOR indices that they are intended to replace. Proposed comment 40(f)(3)(ii)(B)–1.ii also provided that in order to use this SOFR-based spread-adjusted index recommended by the ARRC for consumer products as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(B) that the SOFR-based spread-adjusted index recommended by the ARRC for consumer products' value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed comment 40(f)(3)(ii)(B)–1.ii provided that if either the LIBOR index or the SOFR-based spread-adjusted index recommended by the ARRC for consumer products is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the APR based on the SOFR-based spread-adjusted index must be substantially similar to the rate based on the LIBOR index.

As discussed above, proposed § 1026.40(f)(3)(ii)(B) provided that if both the replacement index and LIBOR index used under the plan are published on December 31, 2020, the replacement index value in effect on December 31, 2020, and the replacement margin must produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed comment 40(f)(3)(ii)(B)–2 provided that the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the creditor provides the change-in-terms notice disclosing the replacement index for the variable rate. Proposed comment 40(f)(3)(ii)(B)–2.i provided an example to illustrate this comment, when the margin used to calculate the variable rate is increased pursuant to a written agreement under § 1026.40(f)(3)(iii), and this change in the margin occurs after December 31, 2020, but prior to the date that the creditor provides a change-in-term notice under § 1026.9(c)(1) disclosing the replacement index for the variable rate.

Proposed comment 40(f)(3)(ii)(B)–3 provided that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Proposed comment 40(f)(3)(ii)(B)–3.i provided an example to illustrate this comment.

Comments Received

In response to the proposal, industry commenters generally provided the same comments for both proposed § 1026.40(f)(3)(ii) for HELOCs and § 1026.55(b)(7) for credit card accounts under an open-end (not home-secured) consumer credit plan. Similarly, consumer group commenters also provided the same comments for both proposed § 1026.40(f)(3)(ii) for HELOCs and § 1026.55(b)(7) for credit card accounts under an open-end (not home-secured) consumer credit plan. These comments from industry and consumer groups are described in the section-by-section analysis of § 1026.40(f)(3)(ii).

The Final Rule

This final rule adopts § 1026.40(f)(3)(ii)(B) generally as proposed with the following three revisions: (1) Sets April 1, 2022, as the date on or after which HELOC creditors are permitted to replace the LIBOR index used under the plan pursuant to § 1026.40(f)(3)(ii)(B) prior to LIBOR becoming unavailable; (2) sets October 18, 2021, as the date creditors generally must use for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar; and (3) provides that if the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[115] This final rule adopts comments 40(f)(3)(ii)(B)–1 through –3 generally as proposed with several revisions to provide additional detail on the § 1026.40(f)(3)(ii)(B) provision, including providing (1) examples of the type of factors to be considered in whether a replacement index meets the Regulation Z ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index for HELOCs; and (2) if a creditor uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the condition in § 1026.40(f)(3)(ii)(B) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index.

To effectuate the purposes of TILA and to facilitate compliance, the Bureau is using its TILA section 105(a) authority to provide the new LIBOR-specific provisions under § 1026.40(f)(3)(ii)(B). TILA section 105(a)[116] directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that, in the judgment of the Bureau, are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. In this final rule, the Bureau is adopting these LIBOR-specific provisions to facilitate compliance with TILA and effectuate its purposes. Specifically, the Bureau interprets ''facilitate compliance'' to include enabling or fostering continued operation of variable-rate accounts in conformity with the law.

As a practical matter, § 1026.40(f)(3)(ii)(B) will allow creditors for HELOCs to provide the 15-day change-in-terms notices required under § 1026.9(c)(1) prior to the LIBOR indices becoming unavailable, and thus will allow those creditors to avoid being left

[115] As set forth in § 1026.40(f)(3)(ii)(B), one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

[116] 15 U.S.C. 1604(a).

without a LIBOR index to use in calculating the variable rate before the replacement index and margin become effective. Also, § 1026.40(f)(3)(ii)(B) will allow HELOC creditors to provide the change-in-terms notices, and replace the LIBOR index used under the plans, on accounts on a rolling basis, rather than having to provide the change-in-terms notices, and replace the LIBOR index, for all its accounts at the same time as the LIBOR index used under the plan becomes unavailable.

The ARRC has indicated that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index will not be published until Monday, July 3, 2023, which is the first weekday after Friday, June 30, 2023, when LIBOR is currently anticipated to sunset for these USD LIBOR tenors. However, the Bureau wishes to facilitate an earlier transition for those creditors who may want to transition to an index other than the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products. Accordingly, the Bureau is making this rule effective on April 1, 2022.

Without the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B), as a practical matter, HELOC creditors would need to wait until the LIBOR index becomes unavailable to provide the 15-day change-in-terms notice under § 1026.9(c)(1), disclosing the replacement index, the replacement margin if the margin is changing (including disclosing any reduced margin in change-in-terms notices provided on or after October 1, 2022, as required by revised § 1026.9(c)(1)(ii)), and any increase in the periodic rate or APR as calculated using the replacement index.[117] The Bureau believes that this advance notice of the replacement index and any change in the margin is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced.

HELOC creditors generally would not be able to send out change-in-terms notices disclosing the replacement index, and any change in the replacement margin prior to LIBOR becoming unavailable.[118] HELOC creditors generally would need to know the index values of the LIBOR index and the replacement index prior to sending out the change-in-terms notice so that they could disclose the replacement margin in the change-in-terms notice. HELOC creditors will not know these index values until the day that LIBOR becomes unavailable. Thus, HELOC creditors generally would need to wait until LIBOR becomes unavailable before the creditors could send the 15-day change-in-terms notices under § 1026.9(c)(1) to replace the LIBOR index with a replacement index. Some creditors could be left without a LIBOR index value to use during the 15-day period before the replacement index and replacement margin become effective, depending on their existing contractual terms. The Bureau believes this could cause compliance and systems issues.

A trade association commenter representing reverse mortgage creditors requested that the Bureau coordinate with both HUD and Ginnie Mae with respect to the March 15, 2021, date in proposed § 1026.40(f)(3)(ii)(B). This commenter was concerned that if HUD decides to switch the HECM index to a SOFR index as of January 1, 2021, creditors would need to comply with that in order to make FHA-insured HECM loans. On October 5, 2021, HUD published in the **Federal Register** an Advance Notice of Proposed Rulemaking (ANPR) on a rule it is considering that would address a HUD-approved replacement index for existing FHA-insured loans that use LIBOR as an index and provide for a transition date consistent with the cessation of the LIBOR index.[119] HUD is also considering replacing the LIBOR index with the SOFR interest rate index, with a compatible spread adjustment to minimize the impact of the replacement index for legacy ARMs. Based on this ANPR and outreach with HUD, the Bureau understands that there is not likely to be a conflict between the April 1, 2022, date set forth in § 1026.40(f)(3)(ii)(B) on or after which creditors are permitted to transition away from a LIBOR index in certain conditions, and any HUD actions with respect to the replacement of a LIBOR index in relation to HECMs. Further, the ARRC has indicated that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index will not be published until Monday, July 3, 2023.

Consistent conditions with § 1026.40(f)(3)(ii)(A). This final rule adopts conditions in the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B) for how a creditor must select a replacement index and compare rates that are consistent with the conditions set forth in the unavailability provisions set forth in § 1026.40(f)(3)(ii)(A). For example, the availability provisions in § 1026.40(f)(3)(ii)(A) and the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B) contain a consistent requirement that the APR calculated using the replacement index must be substantially similar to the rate calculated using the LIBOR index.[120] In addition, both § 1026.40(f)(3)(ii)(A) and (B) contain consistent conditions for how a creditor must select a replacement index.

For several reasons, this final rule adopts consistent conditions for these two provisions. First, as discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii), some HELOC creditors may need to wait until LIBOR becomes unavailable to transition to a replacement index because of contractual reasons. The Bureau believes that keeping the conditions consistent in the unavailability provisions in § 1026.40(f)(3)(ii)(A) and the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B) will help ensure that creditors must meet consistent conditions in selecting a replacement index and setting the rates, regardless of whether they are using the unavailability provisions in § 1026.40(f)(3)(ii)(A), or the LIBOR-specific provisions in § 1026.40(f)(3)(ii)(B).

Second, some creditors may have the ability to choose between the unavailability provisions and LIBOR-specific provisions to switch away from using a LIBOR index, and if the conditions between those two provisions are inconsistent, these differences could undercut the purpose of the LIBOR-specific provisions to allow creditors to switch out earlier. For example, if the conditions for selecting a replacement index or setting the rates were stricter in the LIBOR-specific provisions than in the unavailability provisions, this may cause a creditor to

[117] See new comment 9(c)(1)–4 for additional details on how a creditor may disclose information about the periodic rate and APR in a change-in-terms notice for HELOCs when the creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products in certain circumstances.

[118] One exception is when a creditor is replacing the LIBOR index with the SOFR-based spread-adjusted index recommended by ARRC for consumer products as described in new comment 9(c)(1)–4. See the section-by-section analysis of § 1026.9(c)(1) for a discussion of this comment.

[119] 86 FR 54876 (Oct. 5, 2021).

[120] The conditions in § 1026.40(f)(3)(ii)(A) and (B) are consistent, but they are not the same. For example, although both provisions use the ''substantially similar'' standard to compare the rates, they use different dates for selecting the index values in calculating the rates. The provisions in § 1026.40(f)(3)(ii)(A) and (B) differ in the timing of when creditors are permitted to transition away from LIBOR, which creates some differences in how the conditions apply.

wait until LIBOR becomes unavailable to switch to a replacement index, which would undercut the purpose of the LIBOR-specific provisions to allow creditors to switch out earlier and prevent these creditors from having the time to transition from using a LIBOR index.

Historical fluctuations substantially similar for the LIBOR index and replacement index. This final rule adopts comment 40(f)(3)(ii)(B)–1 generally as proposed with several revisions as described below. Comment 40(f)(3)(ii)(B)–1 provides detail on determining whether a replacement index that is not newly established has historical fluctuations that are substantially similar to those of the LIBOR index used under the plan for purposes of § 1026.40(f)(3)(ii)(B).

Proposed comment 40(f)(3)(ii)(B)–1 provided that for purposes of replacing a LIBOR index used under a plan pursuant to proposed § 1026.40(f)(3)(ii)(B), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through December 31, 2020, or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

Comment 40(f)(3)(ii)(B)–1 is revised from the proposal to provide that for purposes of replacing a LIBOR index used under a plan pursuant to § 1026.40(f)(3)(ii)(B), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through the relevant date. If the Bureau has made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the date indicated in that determination by the Bureau. If the Bureau has not made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the later of April 1, 2022, or the date no more than 30 days before the creditor makes a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar.

For the determinations discussed below related to Prime and certain SOFR-based spread-adjusted indices recommended by the ARRC for consumer products, the Bureau has considered data through October 18, 2021, and indicates that October 18, 2021, is the relevant date for those determinations. Nonetheless, for any future determinations that the Bureau might make with respect to replacement indices other than Prime or certain SOFR-based spread-adjusted indices recommended by the ARRC for consumer products, this revised comment would ensure that the Bureau could consider data after October 18, 2021, for those determinations.

Likewise, this revised comment also would ensure that a creditor must consider data after October 18, 2021, for any determination it makes for a replacement index that the replacement index has historical fluctuations that are substantially similar to those of a LIBOR index (if the Bureau has not made such a determination). Specifically, revised comment 40(f)(3)(ii)(B)–1 requires a creditor to consider the data for the two indices up through April 1, 2022, (the effective date of this final rule) or 30 days prior to when the determination is made, whichever is later. To facilitate compliance, this revised comment does not require that creditors consider data for the replacement index and the LIBOR index up to when the determination is made because the Bureau recognizes that rates may be changing up to the date of the determination and there may be some time needed after the data analysis is completed for the creditor to make the determination. The Bureau arrived at a 30-day period for selecting the end date for which creditors must consider rate data related to the determination in part because a 30-day period is used in a somewhat analogous circumstance addressed in § 1026.6(b)(4)(ii)(G) for when variable rates will be considered accurate in account-opening disclosures for open-end (not home-secured) credit. Specifically, variable rates in account-opening disclosures for open-end (not home-secured) credit generally will be considered accurate if the rate disclosed was in effect within the last 30 days before the disclosures are provided. The Bureau concludes that the 30-day period for selecting the end date for which creditors must consider rate data related to the determination that the historical fluctuations are substantially similar to those of the LIBOR index will ensure that creditors are considering recent data as part of the determination, while providing a reasonable cut-off time period for the data that creditors must consider to facilitate compliance for creditors.

Prime has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. To facilitate compliance, comment 40(f)(3)(ii)(B)–1.i includes a determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices. This final rule revises comment 40(f)(3)(ii)(B)–1.i from the proposal to provide that this determination is effective as of April 1, 2022, the date on which this final rule becomes effective.[121] Comment 40(f)(3)(ii)(B)–1.i also clarifies that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(B) that the Prime index value in effect on October 18, 2021, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This final rule revises comment 40(f)(3)(ii)(B)–1.i from the proposal to delete the reference to the exception in § 1026.40(f)(3)(ii)(B) from using the index values on October 18, 2021. This exception is inapplicable because Prime and the LIBOR indices were both published on October 18, 2021. This condition for comparing the rates under § 1026.40(f)(3)(ii)(B) is discussed in more detail below.

Certain SOFR-based spread-adjusted indices recommended by the ARRC for consumer products have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. To facilitate compliance, comment 40(f)(3)(ii)(B)–1.ii provides a determination that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month USD LIBOR indices respectively. The Bureau is making the determination now to facilitate compliance with the rule. The determination provides greater certainty to creditors to enable them to plan sooner about which replacement index to use and how and when to transition to the replacement index.

This final rule revises comment 40(f)(3)(ii)(B)–1.ii from the proposal to provide that this determination is

[121] See the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau making this determination.

effective as of April 1, 2022, when this final rule becomes effective as discussed in more detail in part VI.[122] For the same reasons as discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) with respect to comment 40(f)(3)(ii)(A)–2.ii, this final rule also revises comment 40(f)(3)(ii)(B)–1.ii from the proposal to not include 1-year USD LIBOR in the comment at this time pending the Bureau's receipt of additional information and further consideration by the Bureau.

Comment 40(f)(3)(ii)(B)–1.ii also clarifies that in order to use the SOFR-based spread-adjusted index recommended by the ARRC for consumer products discussed above as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(B) that the SOFR-based spread-adjusted index for consumer products and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This final rule revises comment 40(f)(3)(ii)(B)–1.ii from the proposal to clarify that, because of the exception in § 1026.40(f)(3)(ii)(B), the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

Nonetheless, for the reasons discussed below, this final rule revises comment 40(f)(3)(ii)(B)–3 from the proposal to provide that for purposes of § 1026.40(f)(3)(ii)(B), if a creditor uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the margin it applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the condition in § 1026.40(f)(3)(ii)(B) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index. Thus, a creditor that uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index still must comply with the condition in § 1026.40(f)(3)(ii)(B) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index, but the creditor will be deemed to be in compliance with this condition if the creditor uses as the replacement margin, the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This condition under § 1026.40(f)(3)(ii)(B) and the related comment 40(f)(3)(ii)(B)–3 are discussed in more detail below.

Additional examples of indices that have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. As discussed in the section-by-section analysis of § 1026.40(f)(3)(ii), many industry commenters generally urged the Bureau to provide additional examples of indices that have historical fluctuations that are substantially similar to those of particular LIBOR indices. Specifically, the Bureau received comments from industry requesting that the Bureau provide safe harbors for the following indices specifying that these indices have historical fluctuations that are substantially similar to those of certain LIBOR indices: (1) AMERIBOR® rates; (2) the EFFR; and (3) the CMT rates. For the reasons discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), this final rule does not provide safe harbors indicating that the AMERIBOR® rates, the EFFR, or the CMT rates meet the Regulation Z ''historical fluctuations are substantially similar'' standard for appropriate replacement indices for a particular LIBOR index.

Additional guidance on determining whether a replacement index has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. As discussed in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii), several industry commenters asked the Bureau to provide additional guidance on how to determine whether a replacement index has historical fluctuations that are substantially similar to those of a particular LIBOR index, including providing a principles-based standard for determining when a replacement index has historical fluctuations that are substantially similar to those of LIBOR. For the same reasons discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for adopting new comment 40(f)(3)(ii)(A)–2.iii, this final rule adopts new comment 40(f)(3)(ii)(B)–1.iii to provide a non-exhaustive list of factors to be considered in whether a replacement index meets the Regulation Z ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index. For the same reasons discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), this final rule does not set forth a principles-based standard for determining whether a replacement index has historical fluctuations that are substantially similar to those of the LIBOR index that is being replaced.

Newly established index as replacement for the LIBOR index. Section 1026.40(f)(3)(ii)(B) provides if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on October 18, 2021, and the replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[123]

This final rule adopts § 1026.40(f)(3)(ii)(B) as proposed to provide the flexibility for creditors to use newly established indices if certain conditions are met. The Bureau declines to adopt industry commenters' suggestions that the Bureau should provide greater detail to creditors regarding the factors or considerations that should be taken into account to determine that an index is newly established. The Bureau also declines to adopt consumer groups' suggestion that the Bureau should restrict the use of new indices that lack historical data.

[122] *Id.*

[123] The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

For the reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), the Bureau: (1) Determines it is appropriate to provide flexibility in § 1026.40(f)(3)(ii)(B) for creditors to use a newly established index to replace a LIBOR index if certain conditions are met, and (2) is not providing additional details in this final rule on the factors or considerations that must be taken into account to determine that an index is newly established.

Substantially similar rate using index values in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Section 1026.40(f)(3)(ii)(B) provides that, if the replacement index under the plan is published on October 18, 2021, the replacement index value in effect on October 18, 2021, and the replacement margin must produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[124]

Comment 40(f)(3)(ii)(B)–2 provides details on this condition. This final rule adopts comment 40(f)(3)(ii)(B)–2 as proposed with several revisions consistent with the revisions to § 1026.40(f)(3)(ii)(B) to: (1) Set April 1, 2022, as the date on or after which HELOC creditors are permitted to replace the LIBOR index used under the plan pursuant to § 1026.40(f)(3)(ii)(B) prior to LIBOR becoming unavailable; (2) set October 18, 2021, as the date creditors generally must use for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar; and (3) provide that if the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[125]

In calculating the comparison rates using the replacement index and the LIBOR index used under the HELOC plan, § 1026.40(f)(3)(ii)(B) generally requires creditors to use the index values for the replacement index and the LIBOR index in effect on October 18, 2021. To replace a LIBOR index under § 1026.40(f)(3)(ii)(B), a creditor is to use these index values to promote consistency for creditors and consumers in which index values are used to compare the two rates. Under § 1026.40(f)(3)(ii)(B), HELOC creditors are permitted to replace the LIBOR index used under the plan and adjust the margin used in calculating the variable rate used under the plan on or after April 1, 2022, but creditors may vary in the timing of when they provide change-in-terms notices to replace the LIBOR index used on their HELOC accounts and when these replacements become effective.

For example, one HELOC creditor may replace the LIBOR index used under its HELOC plans in April 2022, while another HELOC creditor may replace the LIBOR index used under its HELOC plans in October 2022. In addition, a HELOC creditor may not replace the LIBOR index used under all of its HELOC plans at the same time. For example, a HELOC creditor may replace the LIBOR index used under some of its HELOC plans in April 2022 but replace the LIBOR index used under other of its HELOC plans in May 2022.

Nonetheless, regardless of when a particular creditor replaces the LIBOR index used under its HELOC plans, § 1026.40(f)(3)(ii)(B) generally requires that all creditors for HELOCs use October 18, 2021, (provided the replacement index is published on that day), as the day for determining the index values for the replacement index and the LIBOR index, to promote consistency for creditors and consumers with respect to which index values are used to compare the two rates.

Section 1026.40(f)(3)(ii)(B) provides exceptions to the general requirement to use the index values for the replacement index and the LIBOR index used under the plan in effect on October 18, 2021. Section 1026.40(f)(3)(ii)(B) provides that if the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day that both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. However, if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

This final rule adopts § 1026.40(f)(3)(ii)(B) as proposed to use a single day to compare the rates. The Bureau declines to adopt industry commenters' suggestions that the Bureau should (1) give creditors the option to either use a single date for purposes of the index values or use the median value of the difference between the two indices over a slightly longer period of time; or (2) require the use of the historical spread rather than the spread on a specific day in comparing rates to help ensure such rates are substantially similar to each other. The Bureau also declines to adopt consumer group commenters' suggestion that the Bureau should require creditors to use a historical median value rather than the value from a single day when comparing a potential replacement to the original index rate.

This final rule is consistent with the condition in the unavailability provision in current § 1026.40(f)(3)(ii), in the sense that it provides that the new index and margin must result in an APR that is substantially similar to the rate in effect on a single day. Nonetheless, the Bureau recognizes that there is a possibility that the spread between the replacement index and the original index could differ significantly on a particular day from the historical spread in certain unusual circumstances.

Nonetheless, generally using the October 18, 2021 date allowed the Bureau sufficient time before issuing this final rule to analyze the LIBOR indices on that date with the publicly available data for potential replacement rates that existed as of October 18, 2021, to ensure that the spreads on that day were not outliers to the historical spreads between the rates. The Bureau believes that the spread between the LIBOR rates and potential replacement rates that were published on October 18, 2021, generally do not differ significantly from the 5-year median historical spreads on October 18, 2021. For example, between October 17, 2017,

[124] *Id.*

[125] *Id.*

and October 17, 2021, the median spread between Prime and 1-month LIBOR was 306 basis points. On October 18, 2021, the spread between Prime and 1-month LIBOR was 316 basis points.

The Bureau notes that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace 1-month, 3-month, 6-month, or 1-year USD LIBOR were not being published as of October 18, 2021, and the ARRC has indicated that these SOFR-based spread-adjusted indices for consumer products will not be published until Monday, July 3, 2023. Accordingly, the Bureau has included an exception in § 1026.40(f)(3)(ii)(B), which provides that the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace 1-month, 3-month, 6-month, or 1-year USD LIBOR, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. As discussed in the section-by-section analysis of § 1026.20(a), for consumer products, the ARRC is recommending a 1-year transition period to the five-year median spread adjustment methodology used to develop the long-term spread-adjustment values as shown in Table 1, contained in the section-by-section analysis of § 1026.20(a). The initial short-term spread adjustment will be the 2-week average of the LIBOR–SOFR spread up to July 3, 2023. For these indices, over the first ''transition'' year following July 3, 2023, the daily published short-term spread adjustment will move linearly toward the longer-term fixed spread adjustment.[126] After the initial transition year, the spread adjustment will be permanently set at the longer-term fixed rate spread.[127]

The Bureau believes that the approach in this final rule properly minimizes the concerns the replacement index and the LIBOR index could differ significantly on a particular day from the historical spread in certain unusual circumstances discussed above without adding additional complexity to the rule.

Under § 1026.40(f)(3)(ii)(B), in calculating the comparison rates using the replacement index and the LIBOR index used under the HELOC plan, the creditor must use the margin that applied to the variable rate immediately prior to when the creditor provides the change-in-terms notice disclosing the replacement index for the variable rate. This final rule adopts § 1026.40(f)(3)(ii)(B) as proposed to require that creditors must use this margin.

Comment 40(f)(3)(ii)(B)–2 explains that the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the creditor provides the change-in-terms notice disclosing the replacement index for the variable rate. Comment 40(f)(3)(ii)(B)–2.i provides an example to illustrate this comment, when the margin used to calculate the variable rate is increased pursuant to a written agreement under § 1026.40(f)(3)(iii), and this change in the margin occurs after October 18, 2021, but prior to the date that the creditor provides a change-in-terms notice under § 1026.9(c)(1) disclosing the replacement index for the variable rate. This final rule adopts this example in comment 40(f)(3)(ii)(B)–2.i generally as proposed with revisions consistent with the revisions to § 1026.40(f)(3)(ii)(B) and to clarify the references to the prime rate and the LIBOR index used in the example.

The Bureau recognizes that creditors for HELOCs in certain instances may change the margin that is used to calculate the LIBOR variable rate after October 18, 2021, but prior to when the creditor provides a change-in-terms notice to replace the LIBOR index used under the plan. If the Bureau were to require that the creditor use the margin in effect on October 18, 2021, this would undo any margin changes that occurred after October 18, 2021, but prior to the creditor providing a change-in-terms notice of the replacement of the LIBOR index used under the plan, which would be inconsistent with the purpose of the comparisons of the rates under § 1026.40(f)(3)(ii)(B).

Comment 40(f)(3)(ii)(B)–3 clarifies that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Comment 40(f)(3)(ii)(B)–3.i also provides an example to illustrate this comment. This final rule adopts comment 40(f)(3)(ii)(B)–3 generally as proposed with several revisions consistent with the revisions to § 1026.40(f)(3)(ii)(B) to: (1) Set April 1, 2022, as the date on or after which HELOC creditors are permitted to replace the LIBOR index used under the plan pursuant to § 1026.40(f)(3)(ii)(B) prior to LIBOR becoming unavailable; (2) set October 18, 2021, as the date creditors generally must use for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar; and (3) provide that if the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[128] This final rule also revises the example set forth in proposed comment 40(f)(3)(ii)(B)–3 to clarify the prime index and LIBOR index used in the example. As discussed in more detail below, this final rule also revises proposed comment 40(f)(3)(ii)(B)–3 to provide additional detail on how the condition in § 1026.40(f)(3)(ii)(B) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index applies to the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index.

The Bureau believes that it would raise compliance issues if the rate calculated using the replacement index and replacement margin at the time the replacement index and replacement margin became effective had to be substantially similar to the rate calculated using the LIBOR index in effect on October 18, 2021. Under § 1026.9(c)(1), the creditor must provide a change-in-terms notice of the replacement index and replacement margin (including a reduced margin in a change-in-terms notice provided on or after October 1, 2022, as required by revised § 1026.9(c)(1)(ii)) at least 15 days prior to the effective date of the changes. The Bureau believes that this advance notice is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced. Because advance notice of the changes must be given prior to the

[126] Summary of Fallback Recommendations, *supra* note 5, at 11.

[127] *Id.*

[128] The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

changes becoming effective, a creditor would not be able to ensure that the rate based on the replacement index and replacement margin at the time the change-in-terms notice becomes effective will be substantially similar to the rate calculated using the LIBOR index in effect on October 18, 2021. The value of the replacement index may change after October 18, 2021, and before the change-in-terms notice becomes effective.

This final rule does not provide additional details on the ''substantially similar'' standard in comparing the rates for purposes of § 1026.40(f)(3)(ii)(B). For the reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), the Bureau declines to adopt industry commenters' suggestions that the Bureau should provide greater detail as to the process creditors must use to determine whether an APR calculated using a replacement index is substantially similar to the APR using the LIBOR index for purposes of §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). The Bureau also declines to adopt consumer group commenters' suggestion that the Bureau should interpret ''substantially similar'' to require creditors to minimize any value transfer when selecting a replacement index and setting a new margin for purposes of §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii).

As discussed above, comment 40(f)(3)(ii)(B)–1.ii clarifies that in order to use the SOFR-based spread-adjusted index recommended by the ARRC for consumer products as the replacement index for the applicable LIBOR index, the creditor must comply with the condition in § 1026.40(f)(3)(ii)(B) that the SOFR-based spread-adjusted index for consumer products and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This final rule revises comment 40(f)(3)(ii)(B)–1.ii from the proposal to provide that because of the exception in § 1026.40(f)(3)(ii)(B), the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

For the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for adopting comment 40(f)(3)(ii)(A)–3, this final rule revises comment 40(f)(3)(ii)(B)–3 from the proposal to provide that for purposes of § 1026.40(f)(3)(ii)(B), if a creditor uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the condition in § 1026.40(f)(3)(ii)(B) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index. Thus, a creditor that uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index still must comply with the condition in § 1026.40(f)(3)(ii)(B) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index, but the creditor will be deemed to be in compliance with this condition if the creditor uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. For the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) in relation to comment 40(f)(3)(ii)(A)–3, the Bureau is reserving judgment about whether to include a reference to the 1-year USD LIBOR index in comment 40(f)(3)(ii)(B)–3 until it obtains additional information.

Section 1026.55 Limitations on Increasing Annual Percentage Rates, Fees, and Charges

55(b) Exceptions

55(b)(7) Index Replacement and Margin Change Exception

TILA section 171(a), which was added by the Credit CARD Act, provides that in the case of a credit card account under an open-end consumer credit plan, no creditor may increase any APR, fee, or finance charge applicable to any outstanding balance, except as permitted under TILA section 171(b).[129] TILA section 171(b)(2) provides that the prohibition under TILA section 171(a) does not apply to an increase in a variable APR in accordance with a credit card agreement that provides for changes in the rate according to the operation of an index that is not under the control of the creditor and is available to the general public.[130]

In implementing these provisions of TILA section 171, § 1026.55(a) prohibits a card issuer from increasing an APR or certain enumerated fees or charges set forth in § 1026.55(a) on a credit card account under an open-end (not home-secured) consumer credit plan, except as provided in § 1026.55(b). Section 1026.55(b)(2) provides that a card issuer may increase an APR when: (1) The APR varies according to an index that is not under the card issuer's control and is available to the general public; and (2) the increase in the APR is due to an increase in the index.

Comment 55(b)(2)–6 provides that a card issuer may change the index and margin used to determine the APR under § 1026.55(b)(2) if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

The Bureau's Proposal

As discussed in part III, the industry has requested that the Bureau permit card issuers to replace the LIBOR index used in setting the variable rates on existing accounts prior to when the LIBOR indices become unavailable to facilitate compliance. Among other things, the industry is concerned that if card issuers must wait until LIBOR becomes unavailable to replace the LIBOR index used on existing accounts, card issuers would not have sufficient time to inform consumers of the replacement index and update their systems to implement the change. To reduce uncertainty with respect to selecting a replacement index, the industry also has requested that the Bureau determine that Prime has historical fluctuations that are substantially similar to those of the LIBOR indices.

To address these concerns, as discussed in more detail in the section-by-section analysis of § 1026.55(b)(7)(ii), the Bureau proposed to add new LIBOR-specific provisions to proposed

[129] 15 U.S.C. 1666i–1(a).

[130] 15 U.S.C. 1666i–1(b)(2).

§ 1026.55(b)(7)(ii) that would permit card issuers for a credit card account under an open-end (not home-secured) consumer credit plan that uses a LIBOR index under the plan to replace LIBOR and change the margin on such plans on or after March 15, 2021, in certain circumstances.

Specifically, proposed § 1026.55(b)(7)(ii) provided that if a variable rate on a credit card account under an open-end (not home-secured) consumer credit plan is calculated using a LIBOR index, a card issuer may replace the LIBOR index and change the margin for calculating the variable rate on or after March 15, 2021, as long as: (1) The historical fluctuations in the LIBOR index and replacement index were substantially similar; and (2) the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The proposed rule also provided that if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on December 31, 2020, and the replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

Also, as discussed in more detail in the section-by-section analysis of § 1026.55(b)(7)(ii), to reduce uncertainty with respect to selecting a replacement index that meets the standards in proposed § 1026.55(b)(7)(ii), the Bureau proposed to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices. The Bureau also proposed to determine that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the LIBOR indices that they are intended to replace. The Bureau also proposed additional detail in comments 55(b)(7)(ii)–1 through –3 with respect to proposed § 1026.55(b)(7)(ii).

In addition, as discussed in more detail in the section-by-section analysis of § 1026.55(b)(7)(i), the Bureau proposed to move the unavailability provisions in current comment 55(b)(2)–6 to proposed § 1026.55(b)(7)(i) and to revise the proposed moved provisions for clarity and consistency. The Bureau also proposed additional detail in comments 55(b)(7)(i)–1 and –2 with respect to proposed § 1026.55(b)(7)(i). For example, to reduce uncertainty with respect to selecting a replacement index that meets the standards under proposed § 1026.55(b)(7)(i), the Bureau proposed to make the same determinations discussed above related to Prime and the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products in relation to proposed § 1026.55(b)(7)(i). The Bureau proposed to make these revisions and provide additional detail in case card issuers use the unavailability provision in proposed § 1026.55(b)(7)(i) to replace a LIBOR index used for their credit card accounts, as discussed in more detail below.

Proposed comment 55(b)(7)–1 addressed the interaction among the unavailability provisions in proposed § 1026.55(b)(7)(i), the LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii), and the contractual provisions applicable to the credit card account. Specifically, proposed comment 55(b)(7)–1 provided that a card issuer may use either the provision in proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) to replace a LIBOR index used under a credit card account under an open-end (not home-secured) consumer credit plan so long as the applicable conditions are met for the provision used. This proposed comment made clear, however, that neither proposed provision excuses the card issuer from noncompliance with contractual provisions.

To facilitate compliance, proposed comment 55(b)(7)-1 also provided examples of the interaction among the unavailability provisions in proposed § 1026.55(b)(7)(i), the LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii), and three types of contractual provisions for credit card accounts. The Bureau understands that credit card contracts generally allow a card issuer to change the terms of the contract (including the index) as permitted by law. Proposed comment 55(b)(7)–1 provided detail where this contract language applies. In addition, consistent with the detail proposed in relation to HELOCs subject to § 1026.40 in proposed comment 40(f)(3)(ii)–1, proposed comment 55(b)(7)–1 also provided detail on two other types of contract language, in case any credit card contracts include such language. Specifically, proposed comment 55(b)(7)–1 also provided detail for credit card contracts that contain language providing that: (1) A card issuer can replace the LIBOR index and the margin for calculating the variable rate unilaterally only if the original index is no longer available or becomes unavailable; and (2) the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable. Proposed comment 55(b)(7)–1 also provided details for credit card contracts that include language providing that the card issuer can replace the original index and the margin for calculating the variable rate unilaterally only if the original index is no longer available or becomes unavailable, but does not require that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable.

Comments Received

In response to the proposal, the industry commenters generally provided the same comments for both proposed §§ 1026.40(f)(3)(ii) for HELOCs and 1026.55(b)(7) for credit card accounts under an open-end (not home-secured) consumer credit plan. Similarly, the consumer group commenters also provided the same comments for both proposed §§ 1026.40(f)(3)(ii) for HELOCs and 1026.55(b)(7) for credit card accounts under an open-end (not home-secured) consumer credit plan. These comments from industry and consumer groups are described in the section-by-section analysis of § 1026.40(f)(3)(ii).

The Final Rule

As discussed in the section-by-section analysis of § 1026.55(b)(7)(i), this final rule adopts § 1026.55(b)(7)(i) as proposed. As discussed in the section-by-section analysis of § 1026.55(b)(7)(ii), this final rule adopts § 1026.55(b)(7)(ii) generally as proposed with revisions to: (1) Set April 1, 2022, as the date on or after which card issuers are permitted to replace the LIBOR index used under the plan pursuant to § 1026.55(b)(7)(ii) prior to LIBOR becoming unavailable; (2) set October 18, 2021, as the date card issuers generally must use for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar; and (3) provide that if the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and

the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[131] Revisions to comment 55(b)(7)–1 as proposed are discussed in more detail below.[132]

This final rule adopts new LIBOR-specific provisions rather than interpreting when LIBOR is unavailable. For the same reasons that the Bureau is adopting LIBOR-specific provisions for HELOCs under § 1026.40(f)(3)(ii)(B), this final rule adopts new LIBOR-specific provisions under § 1026.55(b)(7)(ii), rather than interpreting LIBOR indices to be unavailable as of a certain date prior to LIBOR being discontinued under current comment 55(b)(2)–6 (as moved to § 1026.55(b)(7)(i)).

Interaction among § 1026.55(b)(7)(i) and (ii) and contractual provisions. Comment 55(b)(7)–1 addresses the interaction among the unavailability provisions in § 1026.55(b)(7)(i), the LIBOR-specific provisions in § 1026.55(b)(7)(ii), and the contractual provisions applicable to the credit card account. This final rule adopts comment 55(b)(7)–1 generally as proposed, with several revisions consistent with the changes this final rule makes to proposed § 1026.55(b)(7)(ii). Specifically, this final rule revises comment 55(b)(7)–1 from the proposal to reflect that: (1) April 1, 2022, is the date on or after which card issuers may replace a LIBOR index under § 1026.55(b)(7)(ii) if certain conditions are met; (2) October 18, 2021, is the date that card issuers generally must use for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar under § 1026.55(b)(7)(ii);[133] and (3) if the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[134]

Specifically, comment 55(b)(7)–1 provides that a card issuer may use either the provision in § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) to replace a LIBOR index used under a credit card account under an open-end (not home-secured) consumer credit plan so long as the applicable conditions are met for the provision used. This comment makes clear, however, that neither provision excuses the card issuer from noncompliance with contractual provisions. For the same reasons discussed in § 1026.40(f)(3)(ii) for HELOC accounts, the Bureau does not believe that it is appropriate for the LIBOR-specific provisions in § 1026.55(b)(7)(ii) to override the consumer's contract with the card issuer.

To facilitate compliance, comment 55(b)(7)–1 also provides examples of the interaction among the unavailability provisions in § 1026.55(b)(7)(i), the LIBOR-specific provisions in § 1026.55(b)(7)(ii), and three types of contractual provisions for credit card accounts. Each of these examples assumes that the LIBOR index used under the plan becomes unavailable after June 30, 2023.

Specifically, comment 55(b)(7)–1.i provides an example where a contract for a credit card account under an open-end (not home-secured) consumer credit plan provides that a card issuer may not unilaterally replace an index under a plan unless the original index becomes unavailable and provides that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, comment 55(b)(7)–1.i explains that the card issuer may use the unavailability provisions in § 1026.55(b)(7)(i) to replace the LIBOR index used under the plan so long as the conditions of that provision are met. Comment 55(b)(7)–1.i also explains that the LIBOR-specific provisions in § 1026.55(b)(7)(ii) provide that a card issuer may replace the LIBOR index if the replacement index value in effect on October 18, 2021, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. Comment 55(b)(7)–1.i notes, however, that the card issuer in this example would be contractually prohibited from replacing the LIBOR index used under the plan unless the replacement index and replacement margin also will produce an APR substantially similar to a rate that is in effect when the LIBOR index becomes unavailable.

Comment 55(b)(7)–1.ii provides an example of a contract for a credit card account under an open-end (not home-secured) consumer credit plan under which a card issuer may not replace an index unilaterally under a plan unless the original index becomes unavailable but does not require that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the card issuer would be contractually prohibited from unilaterally replacing a LIBOR index used under the plan until it becomes unavailable. At that time, the card issuer has the option of using § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) to replace the LIBOR index if the conditions of the applicable provision are met. For the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)

[131] As set forth in § 1026.55(b)(7)(ii), one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

[132] Revisions to comments 55(b)(7)(i)–1 through –2 as proposed are discussed in the section-by-section analysis of § 1026.55(b)(7)(i). Revisions to comments 55(b)(7)(ii)–1 through –3 as proposed are discussed in the section-by-section analysis of § 1026.55(b)(7)(ii).

[133] See the section-by-section analysis of § 1026.40(f)(3)(ii)(B) for the rationale for why the Bureau selected the October 18, 2021, date.

[134] The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

for HELOC accounts, this final rule allows the card issuer in this case to use either the unavailability provisions in § 1026.55(b)(7)(i) or the LIBOR-specific provisions in § 1026.55(b)(7)(ii).

Comment 55(b)(7)–1.iii provides an example of a contract for a credit card account under an open-end (not home-secured) consumer credit plan under which a card issuer may change the terms of the contract (including the index) as permitted by law. Comment 55(b)(7)–1.iii explains in this case, if the card issuer replaces a LIBOR index under a plan on or after April 1, 2022, but does not wait until LIBOR becomes unavailable to do so, the card issuer may only use § 1026.55(b)(7)(ii) to replace the LIBOR index if the conditions of that provision are met. In this case, the card issuer may not use § 1026.55(b)(7)(i). Comment 55(b)(7)–1.iii also explains that if the card issuer waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index, the card issuer has the option of using § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) to replace the LIBOR index if the conditions of the applicable provision are met. For the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii) for HELOC accounts, this final rule allows the card issuer, in this case, to use either the unavailability provisions in § 1026.55(b)(7)(i) or the LIBOR-specific provisions in § 1026.55(b)(7)(ii) if the card issuer waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index.

55(b)(7)(i)

Section 1026.55(a) prohibits a card issuer from increasing an APR or certain enumerated fees or charges set forth in § 1026.55(a) on a credit card account under an open-end (not home-secured) consumer credit plan, except as provided in § 1026.55(b). Section 1026.55(b)(2) provides that a card issuer may increase an APR when: (1) The APR varies according to an index that is not under the card issuer's control and is available to the general public; and (2) the increase in the APR is due to an increase in the index. Comment 55(b)(2)–6 provides that a card issuer may change the index and margin used to determine the APR under § 1026.55(b)(2) if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

The Bureau's Proposal

The Bureau proposed to move the unavailability provisions in current comment 55(b)(2)–6 to proposed § 1026.55(b)(7)(i) and to revise the proposed moved provisions for clarity and consistency. The Bureau also proposed comments 55(b)(7)(i)–1 through –2 with respect to proposed § 1026.55(b)(7)(i).

Specifically, proposed § 1026.55(b)(7)(i) provided that a card issuer may increase an APR when the card issuer changes the index and margin used to determine the APR if the original index becomes unavailable, as long as: (1) The historical fluctuations in the original and replacement indices were substantially similar; and (2) the replacement index and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the original index became unavailable. Proposed § 1026.55(b)(7)(i) provided that if the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce a rate substantially similar to the rate in effect when the original index became unavailable.

Proposed § 1026.55(b)(7)(i) differed from current comment 55(b)(2)–6 in three ways. First, proposed § 1026.55(b)(7)(i) provided that if an index that is not newly established is used to replace the original index, the replacement index and replacement margin will produce a rate ''substantially similar'' to the rate that was in effect at the time the original index became unavailable. Currently, comment 55(b)(2)–6 uses the term ''similar'' instead of ''substantially similar'' for the comparison of these rates. Nonetheless, comment 55(b)(2)–6 provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate ''substantially similar'' to the rate in effect when the original index became unavailable. To correct this inconsistency between the comparison of rates when an existing replacement index is used and when a newly established index is used, the Bureau proposed to use ''substantially similar'' consistently in proposed § 1026.55(b)(7)(i) for the comparison of rates. As discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), the Bureau also proposed to use ''substantially similar'' as the standard for the comparison of rates for HELOC plans when the LIBOR index used under the plan becomes unavailable.

Second, proposed § 1026.55(b)(7)(i) differed from current comment 55(b)(2)–6 in that the proposed provision would have made clear that a card issuer that is using a newly established index may also adjust the margin so that the newly established index and replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable. The newly established index may not have the same index value as the original index, and the card issuer may need to adjust the margin to meet the condition that the newly established index and replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable.

Third, proposed § 1026.55(b)(7)(i) differed from current comment 55(b)(2)–6 in that the proposed provision used the term ''the replacement index and replacement margin'' instead of ''the replacement index and margin'' to make clear when proposed § 1026.55(b)(7)(i) is referring to a replacement margin and not the original margin.

Proposed comment 55(b)(7)(i)–1 provided detail on determining whether a replacement index that is not newly established has historical fluctuations that are substantially similar to those of the LIBOR index used under the plan for purposes of proposed § 1026.55(b)(7)(i). Specifically, proposed comment 55(b)(7)(i)–1 provided that for purposes of replacing a LIBOR index used under a plan pursuant to § 1026.55(b)(7)(i), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier. To facilitate compliance, proposed comment 55(b)(7)(i)–1.i included a proposed determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices and includes a placeholder for the date when this proposed determination would be effective, if adopted in the final rule. The Bureau understands that some card issuers may choose to replace a LIBOR index with Prime. Proposed comment 55(b)(7)(i)–1.i also provided

that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(i) that Prime and the replacement margin will produce a rate substantially similar to the rate that was in effect at the time the LIBOR index became unavailable. This condition for comparing the rates under proposed § 1026.55(b)(7)(i) is discussed in more detail below.

To facilitate compliance, proposed comment 55(b)(7)(i)–1.ii provided a proposed determination that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, or 1-year USD LIBOR indices respectively. The proposed comment provided a placeholder for the date when this proposed determination would be effective, if adopted in the final rule. The Bureau proposed this determination in case some card issuers choose to replace a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products.

Proposed comment 55(b)(7)(i)–1.ii also provided that in order to use this SOFR-based spread-adjusted index recommended by the ARRC for consumer products as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(i) that the SOFR-based spread-adjusted index for consumer products and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. This condition under proposed § 1026.55(b)(7)(i) is discussed in more detail below.

As discussed above, proposed § 1026.55(b)(7)(i) provided that the replacement index and replacement margin must produce an APR substantially similar to the rate that was in effect based on the LIBOR index used under the plan when the LIBOR index became unavailable. Proposed comment 55(b)(7)(i)–2 provided that for the comparison of the rates, a card issuer must use the value of the replacement index and the LIBOR index on the day that LIBOR becomes unavailable. Proposed comment 55(b)(7)(i)–2 also provided that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan.

Proposed comment 55(b)(7)(i)–2.i provided an example to illustrate this comment.

Comments Received

In response to the proposal, the industry commenters generally provided the same comments for both proposed § 1026.40(f)(3)(ii) for HELOCs and § 1026.55(b)(7) for credit card accounts under an open-end (not home-secured) consumer credit plan. Similarly, the consumer group commenters also provided the same comments for both proposed § 1026.40(f)(3)(ii) for HELOCs and § 1026.55(b)(7) for credit card accounts under an open-end (not home-secured) consumer credit plan. These comments from industry and consumer groups are described in the section-by-section analysis of § 1026.40(f)(3)(ii).

The Final Rule

This final rule adopts § 1026.55(b)(7)(i) as proposed. This final rule adopts comments 55(b)(7)(i)–1 through –2 generally as proposed with several revisions to provide additional detail on the § 1026.55(b)(7)(i) provision, including providing (1) examples of the type of factors to be considered in whether a replacement index meets the Regulation Z ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index for credit card accounts; and (2) if a card issuer uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the card issuer will be deemed to be in compliance with the condition in § 1026.55(b)(7)(i) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable.

To effectuate the purposes of TILA and to facilitate compliance, the Bureau is using its TILA section 105(a) authority to adopt § 1026.55(b)(7)(i). TILA section 105(a) [135] directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that, in the judgment of the Bureau, are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. The Bureau is adopting this exception to facilitate compliance with TILA and effectuate its purposes. Specifically, the Bureau interprets ''facilitate compliance'' to include enabling or fostering continued operation of variable-rate accounts in conformity with the law.

This final rule moves comment 55(b)(2)–6 to § 1026.55(b)(7)(i) as an exception to the general rule in current § 1026.55(a) restricting rate increases. The Bureau believes that an index change could produce a rate increase at the time of the replacement or in the future. The Bureau provides this exception to the general rule in § 1026.55(a) in the circumstances in which an index becomes unavailable in the limited conditions set forth in § 1026.55(b)(7)(i) to enable or foster continued operation in conformity with the law. If the index that is used under a credit card account under an open-end (not home-secured) consumer credit plan becomes unavailable, the card issuer would need to replace the index with another index, so the rate remains a variable rate under the plan. The Bureau is adopting this exception to facilitate compliance with the rule by allowing the card issuer to maintain the rate as a variable rate, which is also likely to be consistent with the consumer's expectation that the rate on the account will be a variable rate. As noted in the preamble to the 2020 Proposal, the Bureau is not aware of legislative history suggesting that Congress intended card issuers, in this case, to be required to convert variable-rate plans to a non-variable-rate plans when the index becomes unavailable; commenters did not identify any such legislative history.

Historical fluctuations substantially similar for the LIBOR index and replacement index. This final rule adopts comment 55(b)(7)(i)–1 generally as proposed with several revisions as discussed below. Comment 55(b)(7)(i)–1 provides detail on determining whether a replacement index that is not newly established has historical fluctuations that are substantially similar to those of the LIBOR index used under the plan for purposes of § 1026.55(b)(7)(i). Specifically, comment 55(b)(7)(i)–1 provides that for purposes of replacing a LIBOR index used under a plan pursuant to § 1026.55(b)(7)(i), a replacement index that is not newly established must have historical fluctuations that are substantially

[135] 15 U.S.C. 1604(a).

similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

Prime has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. To facilitate compliance, comment 55(b)(7)(i)–1.i includes a determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices.[136] This final rule revises comment 55(b)(7)(i)–1.i from the proposal to provide that this determination is effective as of April 1, 2022, the date on which this final rule becomes effective. The Bureau understands that some card issuers may choose to replace a LIBOR index with Prime. Comment 55(b)(7)(i)–1.i also clarifies that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(i) that Prime and the replacement margin will produce a rate substantially similar to the rate that was in effect at the time the LIBOR index became unavailable. This condition for comparing the rates under § 1026.55(b)(7)(i) is discussed in more detail below.

Certain SOFR-based spread-adjusted indices recommended by the ARRC for consumer products have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. To facilitate compliance, comment 55(b)(7)(i)–1.ii provides a determination that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month USD LIBOR indices respectively.[137] The Bureau makes this determination in case some card issuers choose to replace a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products. This final rule revises comment 55(b)(7)(i)–1.ii from the proposal to provide that this determination is effective as of April 1, 2022, when this final rule becomes effective as discussed in more detail in part VI.[138] For the same reasons as discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) with respect to comment 40(f)(3)(ii)(A)–2.ii, this final rule also revises comment 55(b)(7)(i)–1.ii from the proposal to not include 1-year USD LIBOR in the comment at this time pending the Bureau's receipt of additional information and further consideration by the Bureau.

Comment 55(b)(7)(i)–1.ii also clarifies that in order to use the SOFR-based spread-adjusted index recommended by the ARRC for consumer products discussed above as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(i) that the SOFR-based spread-adjusted index for consumer products and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. Nonetheless, for the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), this final rule revises comment 55(b)(7)(i)–2 from the proposal to provide that for purposes of § 1026.55(b)(7)(i), if a card issuer uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the card issuer will be deemed to be in compliance with the condition in § 1026.55(b)(7)(i) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. Thus, a card issuer that uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index still must comply with the condition in § 1026.55(b)(7)(i) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable, but the card issuer will be deemed to be in compliance with this condition if the card issuer uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This condition under § 1026.55(b)(7)(i) and the related comment 55(b)(7)(i)–2 are discussed in more detail below.

Additional examples of indices that have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. As discussed in the section-by-section analysis of § 1026.40(f)(3)(ii), many industry commenters generally urged the Bureau to provide additional examples of indices that have historical fluctuations that are substantially similar to those of particular LIBOR indices. Specifically, the Bureau received comments from industry requesting that the Bureau provide safe harbors for the following indices specifying that these indices have historical fluctuations that are substantially similar to those of certain LIBOR indices: (1) AMERIBOR® rates; (2) the EFFR; and (3) the CMT rates. For the reasons discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), this final rule does not provide safe harbors indicating that the AMERIBOR® rates, the EFFR, or the CMT rates meet the Regulation Z ''historical fluctuations are substantially similar'' standard for appropriate replacement indices for a particular LIBOR index.

Additional guidance on determining whether a replacement index has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. As discussed in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii), several industry commenters asked the Bureau to provide additional guidance on how to determine whether a replacement index has historical fluctuations that are substantially similar to those of a particular LIBOR index, including providing a principles-based standard for determining when a replacement index has historical fluctuations that are substantially similar to those of LIBOR. For the same reasons discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for adopting new comment 40(f)(3)(ii)(A)–2.iii, this final rule adopts new comment 55(b)(7)(i)–1.iii to provide a non-exhaustive list of factors to be considered in whether a replacement index meets the Regulation Z ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index. For the same reasons discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), this final rule does not set forth a principles-based standard for determining whether a replacement index has historical fluctuations that are substantially similar to those of the LIBOR index that is being replaced.

[136] See the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau making this determination.

[137] *Id.*

[138] *Id.*

Newly established index as replacement for a LIBOR index. Section 1026.55(b)(7)(i) provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable. This final rule adopts § 1026.55(b)(7)(i) as proposed to provide the flexibility for card issuers to use newly established indices if certain conditions are met. The Bureau declines to adopt industry commenters' suggestions that the Bureau should provide greater detail to card issuers regarding the factors or considerations that should be taken into account to determine that an index is newly established. The Bureau also declines to adopt consumer groups' suggestion that the Bureau should restrict the use of new indices that lack historical data. For the reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), the Bureau: (1) Believes it is appropriate to provide flexibility in § 1026.55(b)(7)(i) for card issuers to use a newly established index to replace a LIBOR index if certain conditions are met; and (2) is not providing additional details in this final rule on the factors or considerations that must be taken into account to determine that an index is newly established.

Substantially similar rate when LIBOR becomes unavailable. Under § 1026.55(b)(7)(i), the replacement index and replacement margin must produce an APR substantially similar to the rate that was in effect based on the LIBOR index used under the plan when the LIBOR index became unavailable. Comment 55(b)(7)(i)–2 generally provides detail on this condition. This final rule adopts comment 55(b)(7)(i)–2 generally as proposed with several revisions to provide more clarity on this condition. Comment 55(b)(7)(i)–2 provides that a card issuer generally must use the value of the replacement index and the LIBOR index on the day that the LIBOR index becomes unavailable. To facilitate compliance, this final rule revises comment 55(b)(7)(i)–2 from the proposal to address the situation where the replacement index is not published on the day that LIBOR becomes unavailable. Specifically, comment 55(b)(7)(i)–2 provides that if the replacement index is not published on the day that the LIBOR index becomes unavailable, the card issuer generally must use the previous calendar day that both indices are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR. The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

This final rule adopts § 1026.55(b)(7)(i) as proposed to use a single day to compare the rates. The Bureau declines to adopt industry commenters' suggestions that the Bureau should (1) give card issuers the option to either use a single date for purposes of the index values or use the median value of the difference between the two indices over a slightly longer period of time; or (2) require the use of the historical spread rather than the spread on a specific day in comparing rates to help ensure such rates are substantially similar to each other. The Bureau also declines to adopt consumer group commenters' suggestion that the Bureau should require card issuers to use a historical median value rather than the value from a single day when comparing a potential replacement to the original index rate.

This final rule is consistent with the condition in the unavailability provision in current comment 55(b)(2)–6, in the sense that it provides that the new index and margin must result in an APR that is substantially similar to the rate in effect on a single day. Nonetheless, the Bureau recognizes that there is a possibility that the spread between the replacement index and the original index could differ significantly on a particular day from the historical spread in certain unusual circumstances. For the same reasons set forth in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for HELOC accounts, to mitigate this concern, this final rule provides card issuers with the flexibility generally to choose to compare the rates using the index values for the LIBOR index and the replacement index on October 18, 2021, (provided the replacement index is published on that day), by using the LIBOR-specific provisions under § 1026.55(b)(7)(ii), rather than using the unavailability provisions in § 1026.55(b)(7)(i).

Comment 55(b)(7)(i)–2 also clarifies that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Comment 55(b)(7)(i)–2.i provides an example to illustrate this comment. This final rule adopts these details in comment 55(b)(7)(i)–2 generally as proposed with revisions to clarify the references to the prime rate and the LIBOR index used in the example and to revise the dates used in the example to be consistent with the June 30, 2023 date that most USD LIBOR tenors are expected to be discontinued. The Bureau believes that it would raise compliance issues if the rate calculated using the replacement index and replacement margin at the time the replacement index and replacement margin became effective had to be substantially similar to the rate in effect calculated using the LIBOR index on the date that the LIBOR index became unavailable. Specifically, under § 1026.9(c)(2), the creditor must provide a change-in-terms notice of the replacement index and replacement margin (including disclosing any reduced margin in change-in-terms notices provided on or after October 1, 2022, as required by § 1026.9(c)(2)(v)(A)) at least 45 days prior to the effective date of the changes. The Bureau believes that this advance notice is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced. Because advance notice of the changes must be given prior to the changes becoming effective, a creditor would not be able to ensure that the rate based on the replacement index and margin at the time the change-in-terms notice becomes effective will be substantially similar to the rate in effect calculated using the LIBOR index at the time the LIBOR index becomes unavailable. The value of the replacement index may change after the LIBOR index becomes unavailable and before the change-in-terms notice becomes effective.

This final rule does not provide additional details on the ''substantially similar'' standard in comparing the rates for purposes of § 1026.55(b)(7)(i). For the reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for HELOC accounts, the Bureau declines to adopt industry commenters' suggestions that the Bureau should provide greater detail as to the process card issuers must use to determine whether an APR calculated using a replacement index is substantially

similar to the APR using the LIBOR index for purposes of §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). The Bureau also declines to adopt consumer group commenters' suggestion that the Bureau should interpret substantially similar to require card issuers to minimize any value transfer when selecting a replacement index and setting a new margin for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii).

As discussed above, comment 55(b)(7)(i)–1.ii clarifies that in order to use the SOFR-based spread-adjusted index recommended by the ARRC for consumer products as the replacement index for the applicable LIBOR index, the card issuer must comply with the condition in § 1026.55(b)(7)(i) that the SOFR-based spread-adjusted index for consumer products and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable.

For the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for adopting comment 40(f)(3)(ii)(A)–3, this final rule revises comment 55(b)(7)(i)–2 from the proposal to provide that for purposes of § 1026.55(b)(7)(i), if a card issuer uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the card issuer will be deemed to be in compliance with the condition in § 1026.55(b)(7)(i) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable.[139] Thus, a card issuer that uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index still must comply with the condition in § 1026.55(b)(7)(i) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable, but the card issuer will be deemed to be in compliance with this condition if the card issuer uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. For the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) in relation to comment 40(f)(3)(ii)(A)–3, the Bureau is reserving judgment about whether to include a reference to the 1-year USD LIBOR index in comment 55(b)(7)(i)–2 until it obtains additional information.

[139] See the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau making this determination.

55(b)(7)(ii)

The Bureau's Proposal

For the reasons discussed below and in the section-by-section analysis of § 1026.55(b)(7), the Bureau proposed to add new LIBOR-specific provisions to proposed § 1026.55(b)(7)(ii) that would permit card issuers for a credit card account under an open-end (not home-secured) consumer credit plan that uses a LIBOR index under the plan for calculating variable rates to replace the LIBOR index and change the margins for calculating the variable rates on or after March 15, 2021, in certain circumstances. In addition, the Bureau proposed to add detail in proposed comments 55(b)(7)(ii)–1 through –3 on the conditions set forth in proposed § 1026.55(b)(7)(ii).

Specifically, proposed § 1026.55(b)(7)(ii) provided that if a variable rate on a credit card account under an open-end (not home-secured) consumer credit plan is calculated using a LIBOR index, a card issuer may replace the LIBOR index and change the margin for calculating the variable rate on or after March 15, 2021, as long as: (1) The historical fluctuations in the LIBOR index and replacement index were substantially similar; and (2) the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed § 1026.55(b)(7)(ii) also provided that if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. In addition, proposed § 1026.55(b)(7)(ii) provided that if either the LIBOR index or the replacement index is not published on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the APR based on the replacement index must be substantially similar to the rate based on the LIBOR index.

Proposed comment 55(b)(7)(ii)–1 provided detail on determining whether a replacement index that is not newly established has historical fluctuations that are substantially similar to those of the LIBOR index used under the plan for purposes of proposed § 1026.55(b)(7)(ii). Specifically, proposed comment 55(b)(7)(ii)–1 provided that for purposes of replacing a LIBOR index used under a plan pursuant to proposed § 1026.55(b)(7)(ii), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through December 31, 2020, or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier. The Bureau proposed the December 31, 2020, date to be consistent with the date that card issuers generally would have been required to use for selecting the index values in comparing the rates under proposed § 1026.55(b)(7)(ii).

To facilitate compliance, proposed comment 55(b)(7)(ii)–1.i included a proposed determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices and included a placeholder for the date when this proposed determination would be effective, if adopted in the final rule. The Bureau understands some card issuers may choose to replace a LIBOR index with Prime. Proposed comment 55(b)(7)(ii)–1.i also provided that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(ii) that the Prime index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed comment 55(b)(7)(ii)–1 provided that if either the LIBOR index or Prime is not published

on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the APR based on Prime must be substantially similar to the rate based on the LIBOR index. This condition for comparing the rates under proposed § 1026.55(b)(7)(ii) is discussed in more detail below.

To facilitate compliance, proposed comment 55(b)(7)(ii)–1.ii provided a proposed determination that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, or 1-year USD LIBOR indices respectively. The proposed comment provided a placeholder for the date when this proposed determination would be effective, if adopted in the final rule. The Bureau made this proposed determination in case some card issuers choose to replace a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products. Proposed comment 55(b)(7)(ii)–1.ii also provided that in order to use this SOFR-based spread-adjusted index recommended by the ARRC for consumer products as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(ii) that the SOFR-based spread-adjusted index for consumer products' value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed comment 55(b)(7)(ii)–1.ii also provided that if either the LIBOR index or the SOFR-based spread-adjusted index recommended by the ARRC for consumer products is not published on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the APR based on the SOFR-based spread-adjusted index for consumer products must be substantially similar to the rate based on the LIBOR index. This condition for comparing the rates under proposed § 1026.55(b)(7)(ii) is discussed in more detail below.

As discussed above, proposed § 1026.55(b)(7)(ii) provided that if both the replacement index and LIBOR index used under the plan are published on December 31, 2020, the replacement index value in effect on December 31, 2020, and replacement margin must produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed comment 55(b)(7)(ii)–2 provided that the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the card issuer provides the change-in-terms notice disclosing the replacement index for the variable rate. Proposed comment 55(b)(7)(ii)–2.i and ii provided examples to illustrate this comment for the following two different scenarios: (1) When the margin used to calculate the variable rate is increased pursuant to § 1026.55(b)(3) for new transactions; and (2) when the margin used to calculate the variable rate is increased for the outstanding balances and new transactions pursuant to § 1026.55(b)(4) because the consumer pays the minimum payment more than 60 days late. In both these proposed examples, the change in the margin occurs after December 31, 2020, but prior to the date that the card issuer provides a change-in-terms notice under § 1026.9(c)(2), disclosing the replacement index for the variable rates.

Proposed comment 55(b)(7)(ii)–3 provided that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Proposed comment 55(b)(7)(ii)–3.i provided an example to illustrate this comment.

Comments Received

In response to the proposal, the industry commenters generally provided the same comments for both proposed §§ 1026.40(f)(3)(ii) for HELOCs and 1026.55(b)(7) for credit card accounts under an open-end (not home-secured) consumer credit plan. Similarly, the consumer group commenters also provided the same comments for both proposed §§ 1026.40(f)(3)(ii) for HELOCs and 1026.55(b)(7) for credit card accounts under an open-end (not home-secured) consumer credit plan. These comments from industry and consumer groups are described in the section-by-section analysis of § 1026.40(f)(3)(ii).

The Final Rule

This final rule adopts § 1026.55(b)(7)(ii) generally as proposed with the following three revisions: (1) Sets April 1, 2022, as the date on or after which card issuers are permitted to replace the LIBOR index used under the plan pursuant to § 1026.55(b)(7)(ii) prior to LIBOR becoming unavailable; (2) sets October 18, 2021, as the date card issuers generally must use for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar; and (3) provides that if the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[140] This final rule adopts comments 55(b)(7)(ii)–1 through –3 generally as proposed with several revisions to provide additional detail on the § 1026.55(b)(7)(ii) provision, including providing (1) examples of the type of factors to be considered in whether a replacement index meets the Regulation Z ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index for credit card accounts; and (2) if a card issuer uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the card issuer will be deemed to be in compliance with the condition in § 1026.55(b)(7)(ii) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index.

To effectuate the purposes of TILA and to facilitate compliance, the Bureau is using its TILA section 105(a) authority to adopt new LIBOR-specific provisions under § 1026.55(b)(7)(ii).

[140] As set forth in § 1026.55(b)(7)(ii), one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

TILA section 105(a) [141] directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that, in the judgment of the Bureau, are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. In this final rule, the Bureau is adopting these LIBOR-specific provisions to facilitate compliance with TILA and effectuate its purposes. Specifically, the Bureau interprets ''facilitate compliance'' to include enabling or fostering continued operation of variable-rate accounts in conformity with the law.

As a practical matter, § 1026.55(b)(7)(ii) will allow card issuers to provide the 45-day change-in-terms notices required under § 1026.9(c)(2) prior to the LIBOR indices becoming unavailable, and thus will allow those card issuers to avoid being left without a LIBOR index to use in calculating the variable rate before the replacement index and margin become effective. Also, § 1026.55(b)(7)(ii) will allow card issuers to provide the change-in-terms notices, and replace the LIBOR index used under the plans, on accounts on a rolling basis, rather than having to provide the change-in-terms notices, and replace the LIBOR index, for all its accounts at the same time as the LIBOR index used under the plan becomes unavailable.

The ARRC has indicated that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace 1-month, 3-month, 6-month, or 1-year USD LIBOR index will not be published until Monday, July 3, 2023, which is the first weekday after Friday, June 30, 2023, when LIBOR is currently anticipated to sunset for those USD LIBOR tenors. However, the Bureau wishes to facilitate an earlier transition for those card issuers who may want to transition to an index other than the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products. Accordingly, the Bureau is making this rule effective on April 1, 2022.

Without the LIBOR-specific provisions in § 1026.55(b)(7)(ii), as a practical matter, card issuers would need to wait until the LIBOR index becomes unavailable to provide the 45-day change-in-terms notice under § 1026.9(c)(2), disclosing the replacement index and replacement margin if the margin is changing (including disclosing any reduced margin in change-in-terms notices provided on or after October 1, 2022, as required by revised § 1026.9(c)(2)(v)(A)), and any increase in the periodic rate or APR as calculated using the replacement index [142] The Bureau believes that this advance notice of the replacement index and any change in the margin is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced.

Card issuers generally would not be able to send out change-in-terms notices disclosing the replacement index and replacement margin prior to LIBOR becoming unavailable.[143] Card issuers generally would need to know the index values of the LIBOR index and the replacement index prior to sending out the change-in-terms notice so that they could disclose the replacement margin in the change-in-terms notice. Card issuers generally will not know these index values until the day that LIBOR becomes unavailable. Thus, card issuers generally would need to wait until LIBOR becomes unavailable before they could send the 45-day change-in-terms notices under § 1026.9(c)(2) to replace the LIBOR index with a replacement index. Some card issuers could be left without a LIBOR index value to use during the 45-day period before the replacement index and replacement margin become effective, depending on their existing contractual terms. The Bureau believes this could cause compliance and systems issues.

Consistent conditions with § 1026.55(b)(7)(i). For the same reasons discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(B) for HELOC accounts, this final rule adopts conditions in the LIBOR-specific provisions in § 1026.55(b)(7)(ii) for how a card issuer must select a replacement index and compare rates that are consistent with the conditions set forth in the unavailability provisions in § 1026.55(b)(7)(i). For example, the availability provisions in § 1026.55(b)(7)(i) and the LIBOR-specific provisions in § 1026.55(b)(7)(ii) contain a consistent requirement that the APR calculated using the replacement index must be substantially similar to the rate calculated using the LIBOR index.[144] In addition, both § 1026.55(b)(7)(i) and (ii) contain consistent conditions for how a card issuer must select a replacement index.

Historical fluctuations substantially similar for the LIBOR index and replacement index. This final rule adopts comment 55(b)(7)(ii)–1 generally as proposed with several revisions as described below. Comment 55(b)(7)(ii)–1 provides detail on determining whether a replacement index that is not newly established has historical fluctuations that are substantially similar to those of the LIBOR index used under the plan for purposes of § 1026.55(b)(7)(ii).

Proposed comment 55(b)(7)(ii)–1 provided that for purposes of replacing a LIBOR index used under a plan pursuant to proposed § 1026.55(b)(7)(ii), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through December 31, 2020, or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

For the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(B) for HELOC accounts, this final rule revised comment 55(b)(7)(ii)–1 from the proposal to provide that for purposes of replacing a LIBOR index used under a plan pursuant to § 1026.55(b)(7)(ii), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through the relevant date. If the Bureau has made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the date indicated in that determination

[141] 15 U.S.C. 1604(a).

[142] See new comment 9(c)(2)(iv)–2.ii for additional details on how a card issuer may disclose information about the periodic rate and APR in a change-in-terms notice for credit card accounts when the card issuer is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products in certain circumstances.

[143] One exception is when a card issuer is replacing the LIBOR index with the SOFR-based spread-adjusted index recommended by ARRC for consumer products as described in new comment 9(c)(2)(iv)–2.ii. See the section-by-section analysis of § 1026.9(c)(2)(iv) for a discussion of this comment.

[144] The conditions in § 1026.55(b)(7)(i) and (ii) are consistent, but they are not the same. For example, although both provisions use the ''substantially similar'' standard to compare the rates, they use different dates for selecting the index values in calculating the rates. The provisions in § 1026.55(b)(7)(i) and (ii) differ in the timing of when card issuers are permitted to transition away from LIBOR, which creates some differences in how the conditions apply.

by the Bureau. If the Bureau has not made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the later of April 1, 2022, or the date no more than 30 days before the card issuer makes a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar.

Prime has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. To facilitate compliance, comment 55(b)(7)(ii)–1.i includes a determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices.[145] This final rule revises comment 55(b)(7)(ii)–1.i from the proposal to provide that this determination is effective as of April 1, 2022, the date on which this final rule becomes effective. The Bureau understands that some card issuers may choose to replace a LIBOR index with Prime. Comment 55(b)(7)(ii)–1.i also clarifies that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(ii) that the Prime index value in effect on October 18, 2021, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This final rule revises 55(b)(7)(ii)–1 from the proposal to delete the reference to the exception in § 1026.55(b)(7)(ii) from using the index values on October 18, 2021. This exception is inapplicable because Prime and the LIBOR indices were published on October 18, 2021. This condition for comparing the rates under § 1026.55(b)(7)(ii) is discussed in more detail below.

Certain SOFR-based spread-adjusted indices recommended by the ARRC for consumer products have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. To facilitate compliance, comment 55(b)(7)(ii)–1.ii provides a determination that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month USD LIBOR indices respectively.[146] The Bureau makes this determination in case some card issuers choose to replace a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products.

This final rule revises comment 55(b)(7)(ii)–1.ii from the proposal to provide that this determination is effective as of April 1, 2022, when this final rule becomes effective as discussed in more detail in part VI. For the same reasons as discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) with respect to comment 40(f)(3)(ii)(A)–2.ii, this final rule also revises comment 55(b)(7)(ii)–1.ii from the proposal to not include 1-year USD LIBOR in the comment at this time pending the Bureau's receipt of additional information and further consideration by the Bureau.

Comment 55(b)(7)(ii)–1.ii also clarifies that in order to use the SOFR-based spread-adjusted index recommended by the ARRC for consumer products discussed above as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(ii) that the SOFR-based spread-adjusted index for consumer products and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This final rule revises comment 55(b)(7)(ii)–1.ii from the proposal to clarify that because of the exception in § 1026.55(b)(7)(ii), the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. Nonetheless, for the reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(B), this final rule revises comment 55(b)(7)(ii)–3 from the proposal to provide that for purposes of § 1026.55(b)(7)(ii), if a card issuer uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD index as the replacement index and uses as the replacement margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the card issuer will be deemed to be in compliance with the condition in § 1026.55(b)(7)(ii) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index. Thus, a card issuer that uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index still must comply with the condition in § 1026.55(b)(7)(ii) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index, but the card issuer will be deemed to be in compliance with this condition if it uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This condition under § 1026.55(b)(7)(ii) and the related comment 55(b)(7)(ii)–3 are discussed in more detail below.

Additional examples of indices that have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. As discussed in the section-by-section analysis of § 1026.40(f)(3)(ii), many industry commenters generally urged the Bureau to provide additional examples of indices that have historical fluctuations that are substantially similar to those of particular LIBOR indices. Specifically, the Bureau received comments from industry requesting that the Bureau provide safe harbors for the following indices specifying that these indices have historical fluctuations that are substantially similar to those of certain LIBOR indices: (1) AMERIBOR® rates; (2) the EFFR; and (3) the CMT rates. For the reasons discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), this final rule does not provide safe harbors indicating that the AMERIBOR® rates, the EFFR, or the CMT rates meet the Regulation Z ''historical fluctuations are substantially similar'' standard for appropriate replacement indices for a particular LIBOR index.

Additional guidance on determining whether a replacement index has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. As discussed in more detail in the section-by-section analysis of § 1026.40(f)(3)(ii), several

[145] See the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau making this determination.

[146] See the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau making this determination.

industry commenters asked the Bureau to provide additional guidance on how to determine whether a replacement index has historical fluctuations that are substantially similar to those of a particular LIBOR index, including providing a principles-based standard for determining when a replacement index has historical fluctuations that are substantially similar to those of LIBOR. For the same reasons discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for adopting new comment 40(f)(3)(ii)(A)–2.iii, this final rule adopts new comment 55(b)(7)(ii)–1.iii to provide a non-exhaustive list of factors to be considered in whether a replacement index meets the Regulation Z ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index. For the same reasons discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), this final rule does not set forth a principles-based standard for determining whether a replacement index has historical fluctuations that are substantially similar to those of the LIBOR index that is being replaced.

Newly established index as replacement for the LIBOR index. Section 1026.55(b)(7)(ii) generally provides if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on October 18, 2021, and the replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[147]

This final rule adopts § 1026.55(b)(7)(ii) as proposed to provide the flexibility for card issuers to use newly established indices if certain conditions are met. The Bureau declines to adopt industry commenters' suggestions that the Bureau should provide greater detail to card issuers regarding the factors or considerations that should be taken into account to determine that an index is newly established. The Bureau also declines to adopt consumer groups' suggestion that the Bureau should restrict the use of new indices that lack historical data. For the reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), the Bureau: (1) Believes it is appropriate to provide flexibility in § 1026.55(b)(7)(ii) for card issuers to use a newly established index to replace a LIBOR index if certain conditions are met; and (2) is not providing additional details in this final rule on the factors or considerations that must be taken into account to determine that an index is newly established.

Substantially similar rate using index values in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Section 1026.55(b)(7)(ii) provides that, if the replacement index used under the plan is published on October 18, 2021, the replacement index value in effect on October 18, 2021, and the replacement margin must produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[148] Comment 55(b)(7)(ii)–2 provides details on this condition. This final rule adopts comment 55(b)(7)(ii)–2 as proposed with several revisions consistent with the revisions to § 1026.55(b)(7)(ii) to: (1) Set April 1, 2022, as the date on or after which card issuers are permitted to replace the LIBOR index used under the plan pursuant to § 1026.55(b)(7)(ii) prior to LIBOR becoming unavailable; (2) set October 18, 2021, as the date card issuers generally must use for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar; and (3) provide that if the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[149]

In calculating the comparison rates using the replacement index and the LIBOR index used under the credit card account, § 1026.55(b)(7)(ii) generally require card issuers to use the index values for the replacement index and the LIBOR index in effect on October 18, 2021, (if the replacement index is published on that day).[150] Section 1026.55(b)(7)(ii) provides exceptions to the general requirement to use the index values for the replacement index and the LIBOR index used under the plan in effect on October 18, 2021. Section 1026.55(b)(7)(ii) provides that if the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day that both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. If the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

This final rule adopts § 1026.55(b)(7)(ii) as proposed to use a single day to compare the rates. For the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(B) for HELOCs, the Bureau declines to adopt industry

[147] The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

[148] The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

[149] *Id.*

[150] See the section-by-section analysis of § 1026.40(f)(3)(ii)(B) for a discussion of why the Bureau adopted the October 18, 2021, date.

commenters' suggestions that the Bureau should (1) give card issuers the option to either use a single date for purposes of the index values or use the median value of the difference between the two indices over a slightly longer period of time; or (2) require the use of the historical spread rather than the spread on a specific day in comparing rates to help ensure such rates are substantially similar to each other. The Bureau also declines to adopt consumer group commenters' suggestion that the Bureau should require card issuers to use a historical median value rather than the value from a single day when comparing a potential replacement to the original index rate.

Under § 1026.55(b)(7)(ii), in calculating the comparison rates using the replacement index and the LIBOR index used under the credit card plan, the card issuer must use the margin that applied to the variable rate immediately prior to when the card issuer provides the change-in-terms notice disclosing the replacement index for the variable rate. For the same reasons as discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(B) for HELOCs, this final rule adopts § 1026.55(b)(7)(ii) as proposed to require that card issuers must use this margin.

Comment 55(b)(7)(ii)–2 also explains that the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the card issuer provides the change-in-terms notice disclosing the replacement index for the variable rate. Comment 55(b)(7)(ii)–2.i provided examples to illustrate this comment for the following two different scenarios: (1) When the margin used to calculate the variable rate is increased pursuant to § 1026.55(b)(3) for new transactions; and (2) when the margin used to calculate the variable rate is increased for the outstanding balances and new transactions pursuant to § 1026.55(b)(4) because the consumer pays the minimum payment more than 60 days late. This final rule adopts these examples in comment 55(b)(7)(ii)–2.i as proposed with revisions consistent with the revisions to § 1026.55(b)(7)(ii) and to clarify the references to the prime rate and the LIBOR index used in the examples.

Comment 55(b)(7)(ii)–3 clarifies that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Comment 55(b)(7)(ii)–3.i also provides an example to illustrate this comment. This final rule adopts comment 55(b)(7)(ii)–3 generally as proposed with several revisions consistent with the revisions to § 1026.55(b)(7)(ii) to: (1) Set April 1, 2022, as the date on or after which card issuers are permitted to replace the LIBOR index used under the plan pursuant to § 1026.55(b)(7)(ii) prior to LIBOR becoming unavailable; (2) set October 18, 2021, as the date card issuers generally must use for selecting indices values in determining whether the APRs using the LIBOR index and the replacement index are substantially similar; and (3) provide that if the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.[151] This final rule also revises the example set forth in comment 55(b)(7)(ii)–3 from the proposal to clarify the prime index and LIBOR index used in the example. As discussed in more detail below, this final rule also revises comment 55(b)(7)(ii)–3 from the proposal to provide additional detail on how the condition in § 1026.55(b)(7)(ii) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index applies to the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month, USD LIBOR index.

The Bureau believes that it would raise compliance issues if the rate calculated using the replacement index and replacement margin at the time the replacement index and replacement margin became effective had to be substantially similar to the rate calculated using the LIBOR index in effect on October 18, 2021. Under § 1026.9(c)(2), the card issuer must provide a change-in-terms notice of the replacement index and replacement margin (including a reduced margin in a change-in-terms notice provided on or after October 1, 2022, as required by revised § 1026.9(c)(2)(v)(A)) at least 45 days prior to the effective date of the changes. The Bureau believes that this advance notice is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced. Because advance notice of the changes must be given prior to the changes becoming effective, a card issuer would not be able to ensure that the rate based on the replacement index and replacement margin at the time the change-in-terms notice becomes effective will be substantially similar to the rate calculated using the LIBOR index in effect on October 18, 2021. The value of the replacement index may change after October 18, 2021, and before the change-in-terms notice becomes effective.

This final rule does not provide additional details on the ''substantially similar'' standard in comparing the rates for purposes of § 1026.55(b)(7)(ii). For the reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A), the Bureau declines to adopt industry commenters' suggestions that the Bureau should provide greater detail as to the process card issuers must use to determine whether an APR calculated using a replacement index is substantially similar to the APR using the LIBOR index for purposes of §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii). The Bureau also declines to adopt consumer group commenters' suggestion that the Bureau should interpret ''substantially similar'' to require card issuers to minimize any value transfer when selecting a replacement index and setting a new margin for purposes of §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii).

As discussed above, comment 55(b)(7)(ii)–1.ii clarifies that in order to use the SOFR-based spread-adjusted index recommended by the ARRC for consumer products as the replacement index for the applicable LIBOR index, the card issuer must comply with the condition in § 1026.55(b)(7)(ii) that the SOFR-based spread-adjusted index for consumer products and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index. This final rule revises comment 55(b)(7)(ii)–1.ii from the proposal to provide that because of the exception in § 1026.55(b)(7)(ii), the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

For the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for adopting comment 40(f)(3)(ii)(A)–3, this final rule revises comment 55(b)(7)(ii)–3 from the

[151] *Id.*

proposal to provide that for purposes of § 1026.55(b)(7)(ii), if a card issuer uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the card issuer will be deemed to be in compliance with the condition in § 1026.55(b)(7)(ii) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index.[152] Thus, a card issuer that uses the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index as the replacement index still must comply with the condition in § 1026.55(b)(7)(ii) that the replacement index and replacement margin would have resulted in an APR substantially similar to the rate calculated using the LIBOR index, but the card issuer will be deemed to be in compliance with this condition if the card issuer uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. For the same reasons discussed in the section-by-section analysis of § 1026.40(f)(3)(ii)(A) in relation to comment 40(f)(3)(ii)(A)–3, the Bureau is reserving judgment about whether to include a reference to the 1-year USD LIBOR index in comment 55(b)(7)(ii)–3 until it obtains additional information.

Section 1026.59 Reevaluation of Rate Increases

TILA section 148, which was added by the Credit CARD Act, provides that if a creditor increases the APR applicable to a credit card account under an open-end consumer credit plan, based on factors including the credit risk of the obligor, market conditions, or other factors, the creditor shall consider changes in such factors in subsequently determining whether to reduce the APR for such obligor.[153] Section 1026.59 implements this provision. The provisions in § 1026.59 generally apply to card issuers that increase an APR applicable to a credit card account, based on the credit risk of the consumer, market conditions, or other factors. For any rate increase imposed on or after January 1, 2009, card issuers generally are required to review the account no less frequently than once each six months and, if appropriate based on that review, reduce the APR. The requirement to reevaluate rate increases applies both to increases in APRs based on consumer-specific factors, such as changes in the consumer's creditworthiness, and to increases in APRs imposed based on factors that are not specific to the consumer, such as changes in market conditions or the card issuer's cost of funds. If based on its review a card issuer is required to reduce the rate applicable to an account, the rule requires that the rate be reduced within 45 days after completion of the evaluation. Section 1026.59(f) requires that a card issuer continue to review a consumer's account each six months unless the rate is reduced to the rate in effect prior to the increase.

As discussed in part III, the industry has raised concerns about how the requirements in § 1026.59 would apply to accounts that are transitioning away from using LIBOR indices. The Bureau believes that the anticipated sunset of the LIBOR indices and transition to a new index for credit card accounts presents two interrelated issues with respect to compliance with § 1026.59 generally. First, the transition from a LIBOR index to a different index on an account under § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) may constitute a rate increase for purposes of whether an account is subject to § 1026.59. Under current § 1026.59, a potential rate increase could occur at the time of transition from the LIBOR index to a different index, or it could occur at a later time. Second, § 1026.59(f) states that, once an account is subject to the general provisions of § 1026.59, the obligation to review factors under § 1026.59(a) ceases to apply if the card issuer reduces the APR to a rate equal to or less than the rate applicable immediately prior to the increase, or if the rate immediately prior to the increase was a variable rate, to a rate equal to or less than a variable rate determined by the same index and margin that applied prior to the increase. In the case where the LIBOR index is no longer available to serve as the ''same index'' that applied prior to the increase, the current regulation does not provide a mechanism by which a card issuer can determine the rate at which it can discontinue the obligation to review factors.

The Bureau proposed revisions and additions to the regulation and commentary of § 1026.59 to address these two issues. With respect to the first issue, the addition of proposed § 1026.59(h) would have excepted rate increases that occur as a result of the transition from the LIBOR index to another index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) from triggering the requirements of § 1026.59. The proposed provision would not have excepted rate increases already subject to the requirements of § 1026.59 prior to the transition from the LIBOR index from the requirements of § 1026.59. With respect to the second issue, proposed § 1026.59(f)(3) provided a mechanism by which card issuers can determine the rate at which they can discontinue the obligations under § 1026.59 where the rate applicable immediately prior to the increase was a variable rate with a formula based on a LIBOR index.

As discussed in more detail below, the Bureau also proposed technical edits to comment 59(d)–2 to replace references to LIBOR with references to the SOFR index.

This final rule adopts § 1026.59(f)(3) generally as proposed with several revisions to be consistent with revisions to § 1026.55(b)(7)(ii) as proposed. The final rule adopts § 1026.59(h) and comment 59(d)–2 as proposed.

59(d) Factors

Section 1026.59(d) identifies the factors that card issuers must review if they increase an APR that applies to a credit card account under an open-end (not home-secured) consumer credit plan. Under § 1026.59(a), if a card issuer evaluates an existing account using the same factors that it considers in determining the rates applicable to similar new accounts, the review of factors need not result in existing accounts being subject to exactly the same rates and rate structure as a creditor imposes on similar new accounts. Comment 59(d)–2 provides an illustrative example in which a creditor may offer variable rates on similar new accounts that are computed by adding a margin that depends on various factors to the value of the LIBOR index. In light of the anticipated discontinuation of LIBOR, the Bureau proposed to amend the example in comment 59(d)–2 to substitute a SOFR index for the LIBOR index. The Bureau also proposed to make technical changes for clarity by changing ''prime rate'' to ''prime index.'' In addition, the Bureau proposed to change ''creditor'' to ''card issuer'' in the comment to be consistent with the terminology used in § 1026.59. No commenters addressed the proposed amendments to comment 59(d)–2. The

[152] See the section-by-section analysis of § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau making this determination.

[153] 15 U.S.C. 1665c.

Bureau is finalizing the amendments to comment 59(d)–2 as proposed.

59(f) Termination of the Obligation To Review Factors

59(f)(3)

The Bureau's Proposal

Section 1026.59(f) provides that the obligation to review factors under § 1026.59(a) ceases to apply if the card issuer reduces the APR to a rate equal to or less than the rate applicable immediately prior to the increase, or if the rate applicable immediately prior to the increase was a variable rate, to a rate determined by the same index and margin (previous formula) that applied prior to the increase. Once LIBOR is discontinued, it will not be possible for card issuers to use the ''same index.'' Thus, the existing methods to terminate the obligation to review would not apply when LIBOR discontinues to accounts in which the comparison rate is derived using a LIBOR index.

Accordingly, the Bureau proposed to add § 1026.59(f)(3) to provide a replacement formula that the card issuers could use, effective March 15, 2021, to terminate the obligation to review factors under § 1026.59(a) when the rate applicable immediately prior to the increase was a variable rate with a formula based on a LIBOR index. Under proposed § 1026.59(f)(3), the replacement formula, which included the replacement index [154] on December 31, 2020, plus replacement margin, would have been required to equal the LIBOR index value on December 31, 2020, plus the margin used to calculate the rate immediately prior to the increase. Proposed § 1026.59(f)(3) also provided that a card issuer must satisfy the conditions set forth in proposed § 1026.55(b)(7)(ii) for selecting a replacement index.

In addition, the Bureau proposed comment 59(f)–3 to set forth two examples of how to calculate the replacement formula: One to illustrate how to calculate the replacement formula if the account is subject to § 1026.59 as of March 15, 2021, and one to illustrate how to calculate the replacement formula where the account is not subject to § 1026.59 at that time, but would have become subject prior to the account transitioning from LIBOR in accordance with § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). The Bureau also proposed comment 59(f)–4 to provide further clarification on how the replacement index must be selected and to refer to the requirements described in proposed § 1026.55(b)(7)(ii) and proposed comment 55(b)(7)(ii)–1.

Proposed § 1026.59(f)(3) was intended to apply to situations in which a LIBOR index was used as the index in the formula used to determine the rate at which the obligation to review factors ceases,[155] and as a result would be impacted by the LIBOR discontinuation.

Proposed § 1026.59(f)(3) used December 31, 2020, as the value of both indices to provide a static and consistent reference point by which to determine the formula and was consistent with the index values used in proposed § 1026.55(b)(7)(ii). If either the replacement index or the LIBOR index were not published on December 31, 2020, under the proposed rule, the card issuer would have been required to use the next available date that both indices are published as the index values to use to determine the replacement formula. Proposed § 1026.59(f)(3) also provided that in calculating the replacement formula, the card issuer must use the margin used to calculate the rate immediately prior to the rate increase.

In essence, the proposed replacement formula would have been calculated as: (Replacement index on December 31, 2020) plus (replacement margin) equals (LIBOR index on December 31, 2020) plus (margin immediately prior to the rate increase). If the replacement index on December 31, 2020, the LIBOR index on December 31, 2020, and the margin immediately prior to the rate increase were known, the replacement margin would have been calculated. Once the replacement margin was calculated, the replacement formula was the replacement index value plus the replacement margin value.

Proposed § 1026.59(f)(3) provided that the replacement formula must *equal* the previous formula, within the context of the timing constraints (namely the value of the replacement and LIBOR indices as of December 31, 2020). The Bureau recognized that the requirement for the replacement formula to equate to the previous formula would potentially create inconsistency in rate identification for accounts that were subject to § 1026.59 prior to the transition from LIBOR and those that were excepted from coverage due to the LIBOR transition under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii), in that the latter only required the new rate be substantially similar to the account's pre-transition rate. The Bureau solicited comment on whether the standard for proposed § 1026.59(f)(3) should be that the replacement formula should be substantially similar to the previous formula (rather than equal to as in the proposal) to provide consistency with the language in proposed § 1026.55(b)(7)(ii).

As discussed in part VI, the Bureau proposed § 1026.59(f)(3) to be effective as of March 15, 2021, for accounts that are subject to § 1026.59 and use a LIBOR index as the index in the formula to determine the rate at which a card issuer can cease the obligation to review factors under § 1026.59(a).

Comments Received and the Final Rule

While the Bureau received general support for the provisions in § 1026.59, as discussed in § 1026.59(h)(3), it did not receive comments specific to its proposal in § 1026.59(f)(3). For the reasons discussed in the proposal and having received no comments on proposed § 1026.59(f)(3), the Bureau is finalizing it as proposed except to (1) adjust the effective date to April 1, 2022 and to adjust the date of comparison in the formula from December 31, 2020, to October 18, 2021, as discussed in the section-by-section of § 1026.55(b)(7)(ii); and (2) provide that if the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting the index values to use to determine the replacement formula.[156]

Specifically, the Bureau is finalizing the addition of § 1026.59(f)(3), which provides a replacement formula that card issuers can use to terminate the obligation to review factors under § 1026.59(a) in the LIBOR transition for accounts where a LIBOR index was used as the index of comparison in the

[154] While other parts of the rule use ''replacement index'' to refer to the index used in the general variable rate that prices the account and in determining the account's interest rate, for purposes of § 1026.59(f)(3) ''replacement index,'' as defined in final comment 59(f)–4, refers to the index used in the replacement formula, which identifies the value for benchmark comparison to determine if the obligation to conduct rate reevaluations terminates.

[155] As noted below in the discussion regarding the Bureau's proposed § 1026.59(h)(3), proposed § 1026.59(f)(3) was not intended to apply to rate increases that may result from the switch from a LIBOR index to another index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) as those potential rate increases would be excepted from the provisions of § 1026.59 under those provisions. Proposed § 1026.59(f)(3) was, however, intended to cover rate increases that were already subject to the provisions of § 1026.59 and use a formula under § 1026.59(f) based on a LIBOR index to determine whether to terminate the review obligations under § 1026.59.

[156] The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index, must use the index value on the first date that index is published, as the index values to use to determine the replacement formula.

formula for determining cessation. Assuming the replacement index is published on October 18, 2021, in the formula, the replacement index on October 18, 2021, plus replacement margin, must equal the LIBOR index value on October 18, 2021, plus the margin used to calculate the rate immediately prior to the increase.

The Bureau is also finalizing comment 59(f)–3 and comment 59(f)–4, which provide examples and methods for identifying the replacement index to be used in the formula, generally as proposed, except to (1) adjust the effective date and date of comparison as discussed above for comment 59(f)–3; (2) clarify which prime index and LIBOR index are used in the examples in comment 59(f)–3; and (3) make revisions to comment 59(f)–4 consistent with changes to § 1026.55(b)(7)(ii) and accompanying commentary as proposed, as described in more detail in the section-by-section analysis of § 1026.55(b)(7)(ii).

As discussed below in part VI, the effective date for this provision is April 1, 2022.

59(h) Exceptions

59(h)(3) Transition From LIBOR Exception

The Bureau's Proposal

Section 1026.59(h) provides two situations that are excepted from the requirements of § 1026.59. Proposed § 1026.59(h)(3) would have added a third exception based upon the transition from a LIBOR index to a replacement index used in setting a variable rate. Specifically, proposed § 1026.59(h)(3) would have excepted from the requirements of § 1026.59 increases in an APR that occurred as the result of the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a replacement index in setting a variable rate if the change from the use of the LIBOR index to a replacement index occurred in accordance with proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii).

Proposed comment 59(h)–1 provided that the proposed exception to the requirements of § 1026.59 did not apply to rate increases *already* subject to § 1026.59 prior to the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a different index in setting a variable rate, where the change from the use of a LIBOR index to a different index occurred in accordance with proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). In these circumstances, the Bureau proposed that the accounts should continue to be subject to the requirements of § 1026.59 and consumers should not have to forego reviews on their accounts that could potentially result in rate reductions. In particular, proposed § 1026.55(b)(7)(i) and (ii) provided that the replacement index plus replacement margin must produce a rate that was substantially similar to the rate that was in effect at the time the original index became unavailable or the rate that was in effect based on the LIBOR index on December 31, 2020, depending on the provision. These provisions provided safeguards that the consumer will not be unduly harmed after the transition away from a LIBOR index with a rate that is not substantially similar to the rate prior to the transition. No similar safeguard exists for accounts on which a rate increase occurred prior to the transition away from LIBOR that subjected the account to the requirements of § 1026.59. Absent the requirements of § 1026.59, issuers would not have to continue to review these accounts for possible rate reductions that could potentially bring the rate on the account in line with the rate prior to the increase, as the requirements of § 1026.59 (and proposed § 1026.59(f)(3)) ensure that the account continues to be reviewed for a rate reduction that could potentially return the rate on the account to a rate that is the same as the rate before the increase.

The Bureau sought comment on issuers' understanding as to whether, and to what extent, the accounts in their portfolios would become subject to § 1026.59 in the transition away from a LIBOR index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii), absent the proposed § 1026.59(h)(3) exception. The Bureau also sought comment on potential compliance issues in transitioning away from a LIBOR index if they became subject to the requirements of § 1026.59.

Comments Received

The Bureau received comments from a few trade associations discussing the proposed changes. The commenters generally supported the proposed provisions in § 1026.59, and specifically supported the Bureau's proposed changes for credit card issuers that would except them from requirements in § 1026.59 should a LIBOR transition completed in accordance with final rule § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) result in an APR increase. Commenters encouraged the Bureau to finalize as proposed.

The Final Rule

For the reasons discussed in the proposal and given the support from the comments received, the Bureau is finalizing the amendments to § 1026.59(h)(3) as proposed.

Specifically, § 1026.59(h)(3) as finalized adds a third exception from the requirements of § 1026.59 for increases in an APR that occur as the result of the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a replacement index in setting a variable rate if the change from the use of the LIBOR index to a replacement index occurs in accordance with § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii).

The Bureau is also finalizing comment 59(h)–1 as proposed, which clarifies that the exception to the requirements of § 1026.59 does not apply to rate increases already subject to § 1026.59 prior to the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a different index in setting a variable rate, where the change from the use of a LIBOR index to a different index occurred in accordance with § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii).

Appendix H to Part 1026—Closed-End Model Forms and Clauses

Appendix H to part 1026 provides a sample form for ARMs for complying with the requirements of § 1026.20(c) in form H–4(D)(2) and a sample form for ARMs for complying with the requirements of § 1026.20(d) in form H–4(D)(4).[157] Both of these sample forms refer to the 1-year LIBOR. In light of the anticipated discontinuation of LIBOR, the Bureau proposed to substitute the 30-day average SOFR index for the 1-year LIBOR index in the explanation of how the interest rate is determined in sample forms H–4(D)(2) and H–4(D)(4) in appendix H to provide more relevant samples. The Bureau also proposed to make related changes to other information listed on these sample forms, such as the effective date of the interest rate adjustment, the dates when future interest rate adjustments are scheduled to occur, the date the first new payment is due, the source of information about the index, the margin added in determining the new payment, and the limits on interest rate increases at each interest rate adjustment. To conform to the requirements in § 1026.20(d)(2)(i) and (d)(3)(ii) and to make form H–4(D)(4) consistent with form H–4(D)(3), the Bureau also proposed to add the date of the disclosure at the top of form H–4(D)(4),

[157] The Bureau notes that these are not required forms and that forms that meet the requirements of § 1026.20(c) or (d) would be considered in compliance with those subsections, respectively.

which was inadvertently omitted from the original form H–4(D)(4) as published in the **Federal Register** on February 14, 2013.[158]

The Bureau requested comment on whether the proposed revisions to sample forms H–4(D)(2) and H–4(D)(4) were appropriate and whether the Bureau should make any other changes to the forms in appendix H in connection with the LIBOR transition. The Bureau also requested comment on whether some creditors, assignees, or servicers might still wish to use the original forms H–4(D)(2) and H–4(D)(4) as published on February 14, 2013, after this final rule's effective date if the Bureau finalized the proposed changes to forms H–4(D)(2) and H–4(D)(4). The Bureau explained that this might include, for example, creditors, assignees, or servicers who might wish to rely on the original sample forms for notices sent out for LIBOR loans after the proposed March 15, 2021, effective date but before the LIBOR index is replaced or, alternatively, for non-LIBOR loans after the proposed effective date. The Bureau requested comment on whether it would be helpful for the Bureau to indicate in the final rule that the Bureau will deem creditors, assignees, or servicers properly using the original forms H–4(D)(2) and H–4(D)(4) to be in compliance with the regulation with regard to the disclosures required by § 1026.20(c) and (d) respectively, even after the final rule's effective date.

The Bureau did not receive any comments on the proposed amendments to H–4(D)(2) and H–4(D)(4) in appendix H or on the issues on which the Bureau solicited comment. The Bureau is finalizing the amendments as proposed, with certain exceptions. The Bureau understands that the inadvertent omission of the date from the top sample form H–4(D)(4) may have caused some confusion. The Bureau also understands that some creditors, assignees, and servicers may find an example using a LIBOR index useful beyond the April 1, 2022, effective date.

Accordingly, with respect to H–4(D)(4), from April 1, 2022, through September 30, 2023, the Bureau will consider creditors, assignees, or servicers to be in compliance with the requirements in § 1026.20(d) if they use a format substantially similar to form H–4(D)(4) by either using the version of the form in effect prior to April 1, 2022 (denoted as ''Legacy Form'' in appendix H) that does not include the date at the top of the form, or by using the revised form put into effect on April 1, 2022 (denoted as ''Revised Form'' in appendix H) that includes the date at the top of the form. Both versions of this form will be available for use in appendix H to demonstrate compliance with § 1026.20(d) from April 1, 2022, through September 30, 2023. On October 1, 2023, the version of the form in effect prior to April 1, 2022, (denoted as ''Legacy Form'' in appendix H) will be removed and will no longer be available for use to demonstrate compliance with § 1026.20(d). In addition, the revised form of H–4(D)(4) that will become effective on April 1, 2022, (denoted as ''Revised Form'' in appendix H) provides an example of the form using a SOFR index. Because most tenors of USD LIBOR are not expected to be discontinued until June 30, 2023, this final rule retains through September 30, 2023, the sample form H–4(D)(4) that was in effect prior to April 1, 2022, (denoted as ''Legacy Form'' in appendix H) that references a LIBOR index.

New sample form H–4(D)(2) in appendix H effective April 1, 2022, (denoted as ''Revised Form'' in appendix H) that can be used for complying with § 1026.20(c) provides an example using a SOFR index. This final rule also retains through September 30, 2023, the sample form H–4(D)(2) that was in effect prior to April 1, 2022, (denoted as ''Legacy Form'' in appendix H) that provides an example using a LIBOR index.

VI. Effective Date

In the 2020 Proposed Rule, the Bureau proposed to set the effective date for this final rule as March 15, 2021, with the exception of the updated change-in-term disclosure requirements for HELOCs and credit-card accounts which would go into effect on October 1, 2021, consistent with TILA section 105(d).

The Bureau received comments from industry and individual commenters on the proposed effective date. A trade association commenter and an individual commenter supported the March 15, 2021, proposed effective date, stating that it provided sufficient time for industry participants and consumers to prepare for the shift from LIBOR to an alternative index. Several trade associations that represented credit unions, student loan servicers, student loan lenders, collection agencies, and institutes of higher education requested that the Bureau consider setting an earlier effective date. These trade associations each individually cited the risk that the LIBOR index could become unrepresentative or unreliable before it became unavailable as the reason for setting an earlier date. A trade association commenter representing reverse mortgage creditors also requested that the Bureau set an earlier effective date for the final rule. This trade association was concerned that HUD may require reverse mortgage creditors for existing HECM products to begin using a replacement index identified by the Secretary of HUD earlier than March 15, 2021, which would conflict with the proposed provision allowing creditors for HELOCs to replace the LIBOR index on or after March 15, 2021.

The Bureau is finalizing an effective date of April 1, 2022, for this final rule. The Bureau believes that the April 1, 2022, effective date will provide sufficient time for HELOC creditors and card issuers to transition away from a LIBOR index prior to LIBOR becoming unavailable, unreliable, or unrepresentative. This effective date generally would mean that the changes to the regulation and commentary would be effective for a long period of time prior to the expected discontinuation of LIBOR, which is projected to occur for most USD LIBOR tenors in June 2023. As discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii)(B), with respect to HECM reverse mortgages, the Bureau does not believe that the April 1, 2022, date will create conflicts with any rules issued by HUD related to the transition of existing HECMs to a replacement index.

This final rule provides creditors, assignees, and servicers with flexibility and options regarding the requirements for the change-in-terms notice and the post-consummation disclosure forms that may be used to demonstrate compliance. The Bureau notes that the updated change-in-terms disclosure requirements for HELOCs and credit card accounts in this final rule related to disclosing a reduction in a margin in the change-in-terms notices are effective on April 1, 2022, with a mandatory compliance date of October 1, 2022. This October 1, 2022 date is consistent with TILA section 105(d), which generally requires that changes in disclosures required by TILA or Regulation Z have an effective date of the October 1 that is at least six months after the date the final rule is promulgated.[159] Also, permitting optional compliance with the updated change-in-terms notice requirements from April 1, 2022, through September 30, 2022, is consistent with TILA section 105(d) which provides that a creditor may comply with newly promulgated disclosure requirements

[158] 78 FR 10902, 11012 (Feb. 14, 2013).

[159] 15 U.S.C. 1604(d).

prior to the effective date of the requirement.

The updated post-consummation disclosure forms in this final rule are effective on April 1, 2022, but are not the only forms available for use until October 1, 2023. This will provide creditors, assignees, or servicers with ample time to include a date at the top of the form that can be used for complying with § 1026.20(d), if they are not doing so already, by providing time to transition away from relying on the currently-used sample form H–4(D)(4). Creditors, assignees, or servicers will have an 18-month interim period between April 1, 2022, through September 30, 2023, to make revisions to their forms. As stated above, from April 1, 2022, through September 30, 2023, the Bureau will consider creditors, assignees, or servicers to be in compliance with the requirements in § 1026.20(d) if they use a format substantially similar to form H–4(D)(4), by either using the version of the form in effect prior to April 1, 2022 (denoted as ''Legacy Form'' in appendix H), or by using the revised form put into effect on April 1, 2022 (denoted as ''Revised Form'' in appendix H). Both versions of form H–4(D)(4) will be available for use in appendix H to demonstrate compliance with § 1026.20(d) from April 1, 2022, through September 30, 2023. On October 1, 2023, the version of the form in effect prior to April 1, 2022, (denoted as the ''Legacy Form'' in appendix H) will be removed and will no longer be available for use to demonstrate compliance with § 1026.20(d) because it omitted the date at the top of the form. Also, a sample form using a LIBOR index will no longer be a relevant example. This final rule also adds a new sample form H–4(D)(2) in appendix H effective April 1, 2022, (denoted as ''Revised Form'' in appendix H) that can be used for complying with § 1026.20(c) and provides an example using a SOFR index. This final rule also retains through September 30, 2023, the sample form H–4(D)(2) that was in effect prior to April 1, 2022, (denoted as ''Legacy Form'' in appendix H) that provides an example using a LIBOR index. On October 1, 2023, the Legacy Form will be removed because a sample form using a LIBOR index will no longer be a relevant example.

The Bureau recognizes that the use of forms H–4(D)(2) and H–4(D)(4) of appendix H to this part is not required. However, creditors, assignees, or servicers using them properly will be deemed to be in compliance with § 1026.20(c) and (d).

VII. Dodd-Frank Act Section 1022(b) Analysis

A. Overview

In developing this final rule, the Bureau has considered this final rule's potential benefits, costs, and impacts.[160] In developing this final rule, the Bureau has consulted, or offered to consult with, the appropriate prudential regulators and other Federal agencies, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies. The Bureau did not receive specific comments on its proposed section 1022(b) analysis.

This final rule is primarily designed to address potential compliance issues for creditors affected by the anticipated sunset of LIBOR. At this time, most tenors of USD LIBOR are expected to be discontinued in June 2023.

This final rule amends and adds several provisions for open-end credit. First, this final rule adds LIBOR-specific provisions that permit creditors for HELOCs and card issuers for credit card accounts to replace the LIBOR index and adjust the margin used to set a variable rate on or after April 1, 2022, if certain conditions are met. Specifically, under this final rule, the APR calculated using the replacement index must be substantially similar to the rate calculated using the LIBOR index, based generally on the values of these indices on October 18, 2021.[161] In addition, creditors for HELOCs and card issuers will be required to meet certain requirements in selecting a replacement index. Under this final rule, creditors for HELOCs and card issuers can select an index that is not newly established as a replacement index only if the index has historical fluctuations that are substantially similar to those of the LIBOR index. Creditors for HELOCs or card issuers can also use a replacement index that is newly established in certain circumstances. To reduce uncertainty with respect to selecting a replacement index that meets these standards, the Bureau is providing a non-exhaustive list of examples of the types of factors used to determine whether a replacement index has historical fluctuations that are substantially similar to those of the LIBOR index. Further, the Bureau is determining that Prime is an example of an index that has historical fluctuations that are substantially similar to those of certain USD LIBOR indices.[162] The Bureau is also determining that certain spread-adjusted indices based on the SOFR recommended by the ARRC for consumer products are indices that have historical fluctuations that are substantially similar to those of certain USD LIBOR indices.[163] Finally, the Bureau is determining that if a HELOC creditor or card issuer replaces LIBOR indices with the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index, the APR that is calculated using those rates is substantially similar to the rate calculated using the LIBOR index so long as the creditor or card issuer uses as the replacement margin the same margin that was used prior to the index change.

Second, the Bureau is providing additional details on how a creditor may disclose information about the periodic rate and APR in a change-in-terms notice for HELOCs and credit card accounts when the creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index in certain circumstances. Specifically, the Bureau is providing new commentary applicable to HELOCs and credit card accounts, providing that a creditor may comply with any requirement to disclose in the change-in-terms notice the amount of the periodic rate or APR (or changes in

[160] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act (12 U.S.C. 5512(b)(2)(A)) requires the Bureau to consider the potential benefits and costs of the regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products and services; the impact of rules on insured depository institutions and insured credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act (12 U.S.C. 5516); and the impact on consumers in rural areas.

[161] If the replacement index is not published on October 18, 2021, the creditor or card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index, the creditor or card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index, must use the index value on the first date that index is published, in determining whether the APR based on the replacement index is substantially similar to the rate based on the LIBOR index.

[162] Specifically, the Bureau is adding to the commentary a determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR.

[163] Specifically, the Bureau is adding to the commentary a determination that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month USD LIBOR indices respectively.

these amounts) as calculated using the replacement index based on the best information reasonably available, clearly stating that the disclosure is an estimate. For example, in this situation, this new commentary provides the creditor may state that: (1) Information about the rate is not yet available but that the creditor estimates that, at the time the index is replaced, the rate will be substantially similar to what it would be if the index did not have to be replaced; and (2) the rate will vary with the market based on a SOFR index.

Third, this final rule revises existing language in Regulation Z to allow creditors for HELOCs and card issuers to replace an index and adjust the margin on an account if the index becomes unavailable, if certain conditions are met.

Fourth, this final rule revises change-in-terms notice requirements, effective April 1, 2022, with a mandatory compliance date of October 1, 2022, for HELOCs and credit card accounts to provide that if a creditor is replacing a LIBOR index on an account pursuant to the LIBOR-specific provisions or because the LIBOR index becomes unavailable as discussed above, the creditor must provide a change-in-terms notice of any reduced margin that will be used to calculate the consumer's variable rate. This will help ensure that consumers are notified of how their variable rates will be determined after the LIBOR index is replaced.

Fifth, this final rule adds a LIBOR-specific exception from the rate reevaluation requirements of § 1026.59 applicable to credit card accounts for increases that occur as a result of replacing a LIBOR index with another index in accordance with the LIBOR-specific provisions or as a result of the LIBOR indices becoming unavailable as discussed above.

Sixth, this final rule adds provisions to address how a card issuer, where an account was subject to the requirements of the reevaluation reviews in § 1026.59 prior to the switch from a LIBOR index, can terminate the obligation to review where the rate applicable immediately prior to the increase was a variable rate calculated using a LIBOR index.

Seventh, this final rule makes technical edits to existing commentary to replace LIBOR references with references to a SOFR index and to make related changes.

The Bureau is also making several amendments to the closed-end provisions to address the anticipated sunset of LIBOR. First, the Bureau is providing a non-exhaustive list of examples of the types of factors used to determine whether a replacement index is comparable to a LIBOR index, and is amending existing commentary to identify specific indices as an example of a comparable index for purposes of the closed-end refinancing provisions.[164] Second, the Bureau is making technical edits to various closed-end provisions to replace LIBOR references with references to a SOFR index and to make related changes and corrections.

B. Provisions To Be Analyzed

The analysis below considers the potential benefits, costs, and impacts to consumers and covered persons of significant provisions of this final rule (final provisions), which include the first, second, fourth, and fifth open-end provisions described above. The analysis also includes the first closed-end provision described above.[165] Therefore, the Bureau has analyzed in more detail the following five final provisions:

1. LIBOR-specific provisions for index changes for HELOCs and credit card accounts;
2. Commentary providing details on how a creditor may disclose information about the periodic rate and APR in a change-in-terms notice for HELOCs and credit card accounts when the creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products in certain circumstances;
3. Revisions to change-in-terms notices requirements for HELOCs and credit card accounts to disclose margin decreases, if any;
4. LIBOR-specific exception from the rate reevaluation provisions applicable to credit card accounts; and
5. Commentary providing a non-exhaustive list of examples of the types of factors used to determine whether a replacement index is comparable to a LIBOR index and stating that specific indices are comparable to certain LIBOR tenors for purposes of the closed-end refinancing provisions.

Because this final rule addresses the transition of credit products from LIBOR to other indices, which should be complete within the next several years under both the baseline and this final rule, the analysis below is limited to considering the benefits, costs, and impacts of the final provisions over the next several years.

C. Data Limitations and Quantification of Benefits, Costs, and Impacts

The discussion below relies on information that the Bureau has obtained from industry, other regulatory agencies, and publicly available sources. The Bureau has performed outreach on many of the issues addressed by this final rule, as described in part III. However, as discussed further below, the data are generally limited with which to quantify the potential costs, benefits, and impacts of the final provisions.

In light of these data limitations, the analysis below generally provides a qualitative discussion of the benefits, costs, and impacts of the final provisions. General economic principles and the Bureau's expertise in consumer financial markets, together with the limited data that are available, provide insight into these benefits, costs, and impacts.

D. Baseline for Analysis

In evaluating the potential benefits, costs, and impacts of this final rule, the Bureau takes as a baseline the current legal framework governing changes in indices used for variable-rate open-end and closed-end credit products, as applicable. The FCA has announced that it cannot guarantee the publication of certain USD LIBOR tenors beyond June 30, 2023, and has urged relevant parties to prepare for the transition to alternative reference rates. Therefore, it is likely that even under current regulations, existing contracts for HELOCs, credit card accounts, and closed-end credit that used those USD LIBOR tenors as an index will have transitioned to other indices soon after June 30, 2023. Furthermore, for HELOCs, credit card accounts, and closed-end credit, this final rule will not significantly alter the requirements that replacement indices for a LIBOR index must satisfy, nor will it alter how these requirements must be evaluated. Hence, the analysis below assumes this final rule will not substantially alter the number of HELOCs, credit card accounts, and closed-end credit accounts switched from a LIBOR index to other indices nor is it likely to significantly alter the indices that HELOC creditors, card issuers, and closed-end creditors use to replace a LIBOR index (although, as discussed below, it is possible the final rule may

[164] Specifically, the Bureau is adding to the commentary an illustrative example indicating that a creditor does not add a variable-rate feature by changing the index of a variable-rate transaction from the 1-month, 3-month, or 6-month USD LIBOR index to the spread-adjusted index based on the SOFR recommended by the ARRC for consumer products as replacements for these indices, because the replacement index is a comparable index to the corresponding USD LIBOR index.

[165] The Bureau does not believe that the other provisions described above would have any significant costs, benefits, or impacts for consumers or covered persons.

cause some HELOC creditors or card issuers to replace a LIBOR index with a SOFR-based spread-adjusted index, when under the baseline they would switch to a non SOFR-based index). This final rule will enable HELOC creditors, card issuers, and closed-end creditors under Regulation Z to transfer existing contracts away from a LIBOR index with more certainty about what is required by and permitted under Regulation Z. This final rule may also enable HELOC creditors and card issuers to transfer existing contracts away from a LIBOR index earlier than they could under the baseline, if they choose to do so.

This final rule, however, does not excuse creditors or card issuers from noncompliance with contractual provisions. For example, a contract for a HELOC or a credit card account may provide that the creditor or card issuer respectively may not replace an index unilaterally under a plan unless the original index becomes unavailable. This final rule does not grant the creditor or card issuer authority to unilaterally replace a LIBOR index used under the plan before LIBOR becomes unavailable.

E. Potential Benefits and Costs of the Rule for Consumers and Covered Persons

Reliable data on the indices credit products are linked to is not generally available, so the Bureau cannot estimate the dollar value of debt tied to LIBOR in the distinct credit markets that will be impacted by this final rule. However, the ARRC has estimated that in 2021 there was $1.3 trillion of mortgage debt (including ARMs and HELOCs) and $100 billion of non-mortgage debt tied to LIBOR.[166]

1. LIBOR-Specific Provisions for Index Changes for HELOCs and Credit Card Accounts

For consumers with HELOCs and credit card accounts with APRs tied to a LIBOR index, and for creditors of HELOCs and card issuers with APRs tied to a LIBOR index, the main effect of the LIBOR-specific provisions that allow HELOC creditors or card issuers under Regulation Z to replace a LIBOR index before it becomes unavailable will be that some creditors and card issuers for HELOCs and credit card accounts respectively will switch those contracts from a LIBOR index to other indices earlier than they would have without the final provision.[167] Since the LIBOR indices are likely to become unavailable after June 30, 2023, and the final provision will allow creditors and card issuers under Regulation Z to switch on or after April 1, 2022, creditors and card issuers may be able to switch contracts from a LIBOR index to other indices roughly 15 months earlier than they would without the final provision (if permitted by the contractual provisions as discussed above). However, the ARRC has indicated that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index will not be published until Monday, July 3, 2023, and creditors switching contracts from a LIBOR index to a SOFR-based spread-adjusted index for consumer products will not be able to switch those contracts until the SOFR-based spread-adjusted index for consumer products is published. Since the LIBOR indices are likely to become unavailable after June 30, 2023, this provision is unlikely to allow creditors switching contracts from a LIBOR index to a SOFR-based spread-adjusted index for consumer products to switch earlier than they otherwise would. The Bureau cannot estimate how many accounts will be switched early because of this final provision, and it cannot estimate when these accounts will be switched from a LIBOR index under the final provision. The Bureau also cannot estimate the number of accounts that contractually cannot be switched from a LIBOR index until that LIBOR index becomes unavailable, although the Bureau believes that a larger proportion of HELOC contracts than credit card contracts are affected by this issue.[168]

The final provision also includes revisions to commentary to Regulation Z to (1) provide a non-exhaustive list of examples of the types of factors used to determine whether a replacement index has historical fluctuations that are substantially similar to those of the LIBOR index, (2) state that SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index have historical fluctuations that are substantially similar to the applicable tenor of LIBOR, (3) state that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR, and (4) state that if a HELOC creditor or card issuer replaces LIBOR indices with the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index, the APR that is calculated using those rates is substantially similar to the rate calculated using the LIBOR index so long as the creditor or card issuer uses as the replacement margin the same margin that was used prior to the index change. The Bureau believes that market participants, using analysis similar to that the Bureau has performed, would come to these conclusions even without this final commentary. Therefore, the Bureau estimates that this final commentary will not significantly change the indices that HELOC creditors or card issuers switch to, the dates on which indices are switched, or the manner in which those switches are made.

Potential Benefits and Costs to Consumers

The Bureau believes that this final provision will benefit consumers primarily by making their experience transitioning from a LIBOR index more informed and less disruptive than it otherwise could be, although the Bureau does not have the data to quantify the value of this benefit. The Bureau expects this consumer benefit to arise because creditors for HELOCs and card issuers will have more time to transition contracts from LIBOR indices to replacement indices, giving them more time to plan for the transition, communicate with consumers about the transition, and avoid technical or system issues that could affect consumers' accounts during the transition. However, as discussed above, because the ARRC has indicated that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index will not be published until Monday, July 3, 2023, the Bureau expects that this final provision is unlikely to allow creditors to switch to SOFR-based spread-adjusted indices for consumer products earlier than they would under the baseline. This will

[166] Alt. Reference Rates Comm., *Progress Report: The Transition from U.S. Dollar LIBOR* (Mar. 2021), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/USD-LIBOR-transition-progress-report-mar-21.pdf.*

[167] The LIBOR-specific provisions are set forth in § 1026.40(f)(3)(ii)(B) and related commentary for HELOC accounts, and in § 1026.55(b)(7)(ii) and related commentary for credit card accounts.

[168] Furthermore, some HELOC creditors and card issuers may be able to switch indices from LIBOR to replacement indices even before LIBOR becomes unavailable (under the baseline) or April 1, 2022 (under this final rule). For HELOCs, some creditors may be able to switch earlier if the consumer specifically agrees to the change in writing under § 1026.40(f)(3)(iii). For credit card accounts that have been open for at least a year, card issuers may be able to switch indices earlier for new transactions under § 1026.55(b)(3). The Bureau cannot estimate the number of such accounts that could be switched early.

limit the benefits of this final provision to consumers.

The Bureau does not anticipate that the final provision will impose any significant costs on consumers on average. Under the final provision, creditors for HELOCs and card issuers will generally have to adjust margins used to calculate the variable rates on the accounts so that consumers' APRs are calculated using the value of the replacement index in effect on October 18, 2021, and the replacement margin will produce a rate that is substantially similar to their rates calculated using the value of the LIBOR index in effect on October 18, 2021, and the margins that applied to the variable rates immediately prior to the replacement of the LIBOR index. After the transition, consumers' APRs will be tied to the replacement indices and not to the LIBOR indices. Because the replacement indices creditors for HELOCs and card issuers will switch to are not identical to the LIBOR indices, they will not move identically to the LIBOR indices, and so for the roughly 15 months affected by this final provision (for contracts being switched to an index other than a SOFR-based spread-adjusted index recommended by the ARRC for consumer products), affected consumers' payments will be different under the final provision than they would be under the baseline. On some dates in which indexed rates reset, some replacement indices may have increased relative to the LIBOR index. Consumers with these indices will then pay a cost due to this final provision until the next rate reset. On some dates in which indexed rates reset, some replacement indices may have decreased relative to the LIBOR index. Consumers with these indices will then benefit from this final provision until the next rate reset. Consumers vary in their constraints and preferences, the credit products they have, the dates those credit products reset, the replacement indices their creditors or card issuers will choose, and the transition dates their creditors or card issuers will choose. The benefits and costs that will accrue to consumers from this final provision and that arise because of differences in index movements will vary across consumers and over time. However, the Bureau expects ex-ante for these benefits and costs to be small on average, because the rates creditors or card issuers switch to must be substantially similar to existing LIBOR-based rates generally using index values in effect on October 18, 2021, and because replacement indices that are not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index.

Potential Benefits and Costs to Covered Persons

The Bureau believes this final provision will have three primary benefits for creditors for HELOCs and card issuers. First, under this final provision, these creditors and card issuers will have more certainty about the transition date and more time to make the transition away from the LIBOR indices. This should increase the ability of HELOC creditors and card issuers to plan for the transition, improving their communication with consumers about the transition, and decreasing the likelihood of technical or system issues that affect consumers' accounts during the transition. Both of these effects should lower the cost of the transition to creditors. However, as discussed above, because the ARRC has indicated that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, 6-month, or 1-year USD LIBOR index will not be published until Monday, July 3, 2023, this final provision is unlikely to allow creditors to switch to SOFR-based spread-adjusted indices for consumer products earlier than they would under the baseline. This will limit the benefits of this final provision to creditors.

Second, this final provision will provide creditors for HELOCs and card issuers with additional detail for how to comply with their legal obligations under Regulation Z with respect to the LIBOR transition. This should decrease the cost of legal and compliance staff time preparing for the transition beforehand and dealing with litigation after.

Third, this final provision will also include revisions to commentary on Regulation Z (1) providing a non-exhaustive list of examples of the types of factors used to determine whether a replacement index has historical fluctuations that are substantially similar to those of the LIBOR index, (2) stating that SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index have historical fluctuations that are substantially similar to the applicable tenor of LIBOR, (3) stating that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR index, and (4) stating that if a HELOC creditor or card issuer replaces LIBOR indices with the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index, the APR that is calculated using those rates is substantially similar to the rate calculated using the LIBOR index so long as the creditor or card issuer uses as the replacement margin the same margin that was used prior to the index change. This should decrease the cost of compliance staff time coming to the same conclusions as the commentary before the transition from LIBOR, and it should decrease the cost of litigation after.

As discussed under ''Potential Benefits and Costs to Consumers'' above, because the replacement indices that creditors for HELOCs and card issuers will switch to are not identical to the LIBOR indices, they will not move identically to the LIBOR indices, and so for the roughly 15 months affected by this final provision (for contracts being switched to an index other than a SOFR-based spread-adjusted index recommended by the ARRC for consumer products), affected consumers' payments will be different under this final provision than they would be under the baseline. On some dates in which indexed rates reset, some replacement indices will have increased relative to the LIBOR index. HELOC creditors and card issuers with rates linked to these indices will then benefit from this final provision until the next rate reset. On some dates on which indexed rates reset, some replacement indices will have decreased relative to the LIBOR index. HELOC creditors and card issuers with rates linked to these indices will then pay a cost due to this final provision until the next rate reset. Creditors and card issuers vary in their constraints and preferences, the credit products they issue, the dates those credit products reset, the replacement indices they will choose under this final provision, and the transition dates they will choose under this final provision. The benefits and costs that will accrue to HELOC creditors and card issuers from this final provision and that arise because of differences in index movements will vary across creditors and card issuers and over time. However, the Bureau expects ex-ante for these benefits and costs to be small on average, because the rates creditors or card issuers switch to must be substantially similar to existing LIBOR-based rates generally using index values in effect on October 18, 2021, and replacement indices that are not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index.

This final provision will allow creditors for HELOCs and card issuers

under Regulation Z to switch contracts from a LIBOR index earlier than they otherwise would have, but it does not require them to do so. Therefore, this aspect of this final provision does not impose any significant costs on HELOC creditors and card issuers. The final commentary does not determine that any specific indices have historical fluctuations that are not substantially similar to those of LIBOR, so the final revisions will not prevent creditors or card issuers from switching to other indices as long as those indices still satisfy regulatory requirements. Therefore, the final commentary also does not impose any significant costs on HELOC creditors and card issuers. However, as noted above, the replacement indices HELOC creditors and card issuers choose may move less favorably for them than the LIBOR indices would have.

2. Commentary Providing Details on How a Creditor May Disclose Information About the Periodic Rate and APR in a Change-in-Terms Notice for HELOCs and Credit Card Accounts When the Creditor Is Replacing a LIBOR Index With the SOFR-Based Spread-Adjusted Index Recommended by the ARRC for Consumer Products in Certain Circumstances

The Bureau is providing comment 9(c)(1)–4 for HELOCs and comment 9(c)(2)(iv)–2.ii for credit card accounts to provide additional details for situations where (1) a creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index, (2) the creditor is not changing the margin used to calculate the variable rate as a result of the replacement, and (3) a periodic rate or the corresponding annual percentage rate based on the replacement index is unknown to the creditor at the time the change-in-terms notice is provided because the SOFR index has not been published at the time the creditor provides the change-in-terms notice but will be published by the time the replacement of the index takes effect on the account. In this case, new comments 9(c)(1)–4 and 9(c)(2)(iv)–2.ii provide that a creditor may comply with any requirement to disclose the amount of the periodic rate or APR (or changes in these amounts) as calculated using the replacement index based on the best information reasonably available, clearly stating that the disclosure is an estimate. For example, in this situation, comments 9(c)(1)–4 and 9(c)(2)(iv)–2.ii provide the creditor may state that: (1) Information about the rate is not yet available but that the creditor estimates that, at the time the index is replaced, the rate will be substantially similar to what it would be if the index did not have to be replaced; and (2) the rate will vary with the market based on a SOFR index.

In these unique circumstances, the Bureau interprets § 1026.5(c) to be consistent with new comments 9(c)(1)–4 and 9(c)(2)(iv)–2.ii. Section 1026.5(c) provides, in relevant part, that if any information necessary for accurate disclosure is unknown to the creditor, it must make the disclosure based on the best information reasonably available and must state clearly that the disclosure is an estimate. The Bureau believes that the main effect of this final commentary will be to facilitate compliance with change-in-terms notice requirements for creditors who wish to switch existing accounts from a LIBOR index to the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index in certain circumstances.

Without this final commentary, it is not clear how creditors could provide required change-in-terms notices to switch consumers from a LIBOR index to a SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index, prior to the SOFR-based spread-adjusted index for consumer products being published. Therefore, it is not clear what creditors would do under the baseline absent this final commentary.

Some creditors may be legally required to switch consumers to a SOFR-based spread-adjusted index for consumer products. Presumably, they would still do so even absent this final commentary, although they might face significant legal uncertainty and experience significant legal costs by doing so. They might face this legal uncertainty if they decide to send out the change-in-terms notice prior to the SOFR-based spread-adjusted index for consumer products being published. Alternatively, if they decide not to send out the change-in-terms notice until after the SOFR-based spread-adjusted index for consumer products is published, they might face legal uncertainty in how to calculate the rate after the LIBOR index is discontinued but prior to the SOFR-based spread-adjusted rate becoming effective on the account.

Other creditors could choose under the baseline to switch to a SOFR-based spread-adjusted index for consumer products even if not required to do so. For these creditors, these final provisions will decrease costs by providing additional clarity and certainty about the required change-in-terms notices. These final provisions may also decrease litigation costs for these creditors after the transition from certain LIBOR indices to certain SOFR-based spread-adjusted indices for consumer products.

Consumers with loans from these creditors would have their loans switched from LIBOR indices to SOFR-spread adjusted indices for consumer products both under this final rule and under the baseline. The Bureau expects that, under this final rule and under the baseline, these consumers would receive similar change-in-terms notices with only minimal adjustments to the content of those notices. Hence, the Bureau estimates that these final revisions will have no significant benefits, costs, or impacts for these consumers.

However, other creditors that will switch to SOFR-based spread-adjusted indices for consumer products under this final rule might be deterred by existing change-in-terms notice requirements from switching consumers to SOFR-based spread-adjusted indices for consumer products without this final provision. These creditors would choose different indices to replace LIBOR indices. Because these creditors would prefer to switch to SOFR-based spread-adjusted indices for consumer products and this final commentary will allow them to do so, the Bureau expects that this final commentary will generate substantial benefits for these creditors. However, the Bureau cannot estimate how many such creditors exist or the size of these benefits to them.

Consumers with loans from these creditors would have their loans switched to a SOFR-based index for consumer products under this final rule but would have their loans switched to some other index under the baseline. After the transition, consumers' APRs will be tied to these other indices rather than to the SOFR-based indices. Because these other replacement indices creditors would switch to are not identical to the SOFR-based indices, they will not move identically to the SOFR-based indices, so affected consumers' payments will be different under the final commentary than they would be under the baseline. On some dates in which indexed rates reset, some replacement indices may have increased relative to a SOFR-based spread-adjusted index for consumer products. Consumers with these indices will then pay a cost due to this final provision

until the next rate reset. On some dates in which indexed rates reset, some replacement indices may have decreased relative to a SOFR-based spread-adjusted index for consumer products. Consumers with these indices will then benefit from this final provision until the next rate reset. Consumers vary in their constraints and preferences, the credit products they have, the dates those credit products reset, the replacement indices their creditors would choose, and the transition dates their creditors will choose. The benefits and costs that will accrue to consumers from this final provision and that arise because of differences in index movements will vary across consumers and over time. However, the Bureau expects ex-ante for these benefits and costs to be small on average, because the rates creditors switch to must be substantially similar to existing LIBOR-based rates generally using index values in effect on October 18, 2021, and because replacement indices that are not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index.

While the final commentary provisions make minimal adjustments to the content of change-in-terms notices, they do not impose extra change-in-term requirements on creditors. Therefore, these final provisions will impose no significant costs on creditors.

3. Revisions to Change-in-Terms Notices Requirements for HELOCs and Credit Card Accounts To Disclose Margin Decreases, if Any

The amendments to § 1026.9(c)(1)(ii) and (c)(2)(v)(A) will, effective April 1, 2022, with a mandatory compliance date of October 1, 2022, require creditors for HELOCs and card issuers to disclose margin reductions to consumers when they switch contracts from using LIBOR indices to other indices. Under both the existing regulation and this final provision, creditors for HELOCs and card issuers are required to send consumers change-in-terms notices when indices change, disclosing the replacement index and any increase in the margin. Therefore, this final provision will not affect the number of consumers who receive change-in-terms notices nor the number of change-in-terms notices creditors for HELOCs or card issuers must provide.

The benefits, costs, and impacts of this final provision depend on whether HELOC creditors or card issuers would choose to disclose margin decreases even if not required to do so, as under the existing regulation. Creditors for HELOCs or card issuers that would not otherwise disclose margin decreases in their change-in-terms notices will bear the cost of having to provide slightly longer notices. They may also have to develop distinct notices for different groups of consumers with different initial margins. Consumers with HELOC or credit card accounts from those creditors or card issuers will benefit by having an improved understanding of how and why their APRs would change. However, the Bureau believes it is likely that most creditors for HELOCs and card issuers would choose to disclose margin decreases in their change-in-terms notices even if not required to do so, because margin decreases are beneficial for consumers, and because in these situations the creditors or card issuers likely benefit from improved consumer understanding. Further, compliance with this final provision will be mandatory only beginning October 1, 2022. HELOC creditors and card issuers that would prefer not to disclose margin decreases can choose to change indices before compliance with this final provision becomes mandatory (if the change in indices is permitted by the contractual provisions at that time). Therefore, the Bureau expects that both the benefits and costs of this final provision for consumers and HELOC creditors and card issuers will be small.

4. LIBOR-Specific Exception From the Rate Reevaluation Provisions Applicable to Credit Card Accounts

Rate increases may occur due to the LIBOR transition either at the time of transition from the LIBOR index to a different index or at a later time. Under current § 1026.59, in these scenarios card issuers would need to reevaluate the APRs until they equal or fall below what they would have been had they remained tied to LIBOR. This final provision set forth in new § 1026.59(h)(3) and related commentary will except card issuers from these rate reevaluation requirements for rate increases that occur as a result of the transition from the LIBOR index to another index under the LIBOR-specific provisions discussed above or under the existing regulation that allows card issuers to replace an index when the index becomes unavailable. This final provision will not except rate increases already subject to the rate reevaluation requirements prior to the transition from the LIBOR index to another index as discussed above. Because relative rate movements are hard to anticipate ex-ante, it is unlikely that this final provision will affect the indices that card issuers use as replacements. Because card issuers can only switch from LIBOR-based rates to rates that are substantially similar generally using index values in effect on October 18, 2021, and use a replacement index (if the replacement index is not newly established) that has historical fluctuations that are substantially similar to those of the LIBOR index, it is unlikely such rate reevaluations will result in significant rate reductions for consumers before LIBOR is discontinued. Therefore, before LIBOR is discontinued, the impact of this final provision on consumers is likely to be small. After LIBOR is discontinued, it will not be possible to compute what consumer rates would have been under the LIBOR indices, and so it is not clear how card issuers would conduct such rate reevaluations after that time. Therefore, after LIBOR is discontinued, the impact of this final provision on consumers is not clear. This final provision will benefit affected card issuers by saving them the cost of reevaluating rates until LIBOR is discontinued. This final provision will impose no costs on affected card issuers because they can still perform rate reevaluations if they choose to do so prior to LIBOR being discontinued.

5. Commentary Providing a Non-Exhaustive List of Examples of the Types of Factors Used To Determine Whether a Replacement Index Is Comparable to a LIBOR Index and Stating That Specific Indices Are Comparable to Certain LIBOR Tenors for Purposes of the Closed-End Refinancing Provisions

The Bureau is adding comment 20(a)–3.iv to provide a non-exhaustive list of examples of the types of factors used to determine whether a replacement index is comparable to a LIBOR index and is amending comment 20(a)–3.ii.B to state that the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or6-month USD LIBOR index are comparable to the applicable tenor of LIBOR. The Bureau believes that market participants, using analysis similar to that the Bureau has performed, would come to this conclusion even without this final commentary. Therefore, the Bureau believes that this final commentary will not significantly change the indices that creditors switch to, the dates on which indices are switched, or the manner in which those switches are made. Hence, the Bureau estimates that these final revisions will have no significant benefits, costs, or impacts for consumers.

For creditors, this final provision will decrease costs by providing additional

clarity and certainty about whether indices are comparable for purposes of Regulation Z. For creditors that will switch from certain LIBOR indices to certain SOFR-based spread-adjusted indices for consumer products, this final provision will decrease the compliance staff time required to come to the conclusion that the SOFR index is comparable to the LIBOR index. This final provision will also decrease litigation costs for creditors after the transition from certain LIBOR indices to certain SOFR-based spread-adjusted indices for consumer products.

The final commentary does not determine that any specific indices are not comparable to LIBOR. Therefore, this final provision will not prevent creditors from switching to other indices as long as those indices still satisfy regulatory requirements. Therefore, this final provision will impose no significant costs on creditors.

F. Alternative Provisions Considered

As discussed above in the section-by-section analyses of §§ 1026.40(f)(3)(ii) and 1026.55(b)(7), the Bureau considered interpreting the LIBOR indices to be unavailable as of a certain date prior to LIBOR being discontinued. The Bureau briefly discusses the costs, benefits, and impacts of the considered interpretation below.

If the Bureau were to interpret the LIBOR indices to be unavailable as of the effective date of this final rule (*i.e.,* April 1, 2022) under the existing Regulation Z rules prior to LIBOR being discontinued, it could provide benefits similar to those of this final rule by allowing creditors and card issuers to switch away from LIBOR indices before LIBOR is discontinued. It might also potentially provide some benefit to consumers and covered persons whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index, by providing some additional clarity in interpreting that provision of their contracts.

However, a determination by the Bureau that the LIBOR indices are unavailable as of the effective date of this final rule (*i.e.,* April 1, 2022) could have unintended consequences on other products or markets. For example, the Bureau believes that such a determination could unintentionally cause confusion for creditors for other products (*e.g.,* ARMs) about whether the LIBOR indices are also unavailable for those products and could possibly put pressure on those creditors to replace the LIBOR index used for those products before those creditors are ready for the change. This could impose significant costs on affected consumers and creditors in the markets for these other products.

In addition, even if the Bureau interpreted unavailability to indicate that the LIBOR indices are unavailable as of the effective date of this final rule (*i.e.,* April 1, 2022) or as of June 30, 2023, (the date after which the FCA will consider most USD LIBOR tenors to be unrepresentative even if the rates are still being published), this interpretation would not completely solve the contractual issues for creditors and card issuers whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index. Creditors and card issuers still would need to decide for their contracts whether the LIBOR indices are unavailable, and that decision could result in litigation or arbitration under the contracts. Thus, even if the Bureau decided that the LIBOR indices are unavailable under Regulation Z as described above, creditors and card issuers whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index essentially would be in the same position under this considered interpretation as they would be under the current rule. Therefore, the benefits of the considered interpretation would be small even for the main intended beneficiaries of such an interpretation, specifically the consumers, creditors, and card issuers under contracts that require creditors and card issuers to wait until the LIBOR indices become unavailable before replacing the LIBOR index.

G. Potential Specific Impacts of This Final Rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026

The Bureau believes that the consideration of benefits and costs of covered persons presented above provides a largely accurate analysis of the impacts of these final provisions on depository institutions and credit unions with $10 billion or less in total assets that issue credit products that are tied to LIBOR and are covered by these final provisions.

2. Impact of This Final Rule on Consumer Access to Credit and on Consumers in Rural Areas

Because this final rule will affect only existing accounts that are tied to LIBOR and will generally not affect new loans, this final rule will not directly impact consumer access to credit. While this final rule will provide some benefits and costs to creditors and card issuers in connection to the transition away from LIBOR, it is unlikely to affect the costs of providing new credit and therefore the Bureau believes that any impact on creditors and card issuers from this final rule is not likely to have a significant impact on consumer access to credit.

Consumers in rural areas may experience benefits or costs from this final rule that are larger or smaller than the benefits and costs experienced by consumers in general if credit products in rural areas are more or less likely to be linked to LIBOR than credit products in other areas. The Bureau does not have any data or other information to understand whether this is the case.

VIII. Regulatory Flexibility Act Analysis

A. Overview

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[169] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives before proposing a rule for which an IRFA is required.[170]

A final regulatory flexibility analysis is not required for this final rule because it will not have a significant economic impact on a substantial number of small entities.

B. Impact of Provisions on Small Entities

The analysis below evaluates the potential economic impact of the final provisions on small entities as defined by the RFA.[171] A card issuer or depository institution is considered ''small'' if it has $600 million or less in

[169] 5 U.S.C. 601 *et seq.*

[170] 5 U.S.C. 609.

[171] For purposes of assessing the impacts of this final rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

assets.[172] Except for card issuers, non-depository creditors are considered ''small'' if their average annual receipts are less than $41.5 million.[173]

Based on its market intelligence, the Bureau believes that there are few, if any, small card issuers with LIBOR-based cards. Based on its market intelligence, the Bureau estimates that there are approximately 200 to 300 small institutional lenders with variable-rate student loans tied to LIBOR. There are also a few state-sponsored nonbank lenders that offer variable-rate student loans based on LIBOR.

To estimate the number of small mortgage lenders that will be impacted by this final rule, the Bureau has analyzed the 2019 Home Mortgage Disclosure Act (HMDA) data.[174] The HMDA data cover mortgage originations, while entities may be impacted by the rule if they hold debt tied to LIBOR. The HMDA data will not include entities that originated LIBOR-linked debt before 2019 but not during 2019, even if those entities still hold that debt. The data will include entities that originated LIBOR-linked debt in 2019 but will have sold it before this final rule comes into effect, and so will not be impacted by this final rule. Other limitations of the data are discussed below. Despite these limitations, the HMDA data are the best data source currently available to the Bureau to quantify the number of small mortgage lenders that will be impacted by this final rule.

The HMDA data include entities that originate ARMs and HELOCs. The data include information on whether mortgages are open-end or closed-end, although some entities are exempt from reporting this information.[175] The data do not include information on whether or not mortgages have rates that are tied to LIBOR. The data do indicate whether or not mortgages have rates that may change. This measure is used as a proxy for potential exposure to the rule. Mortgages may have rates that are linked to indices besides LIBOR. They may also have ''step rates'' that switch from one pre-determined rate to another pre-determined rate that is not linked to any index. Therefore, the proxy for potential exposure to this final rule likely overstates the number of entities with rates tied to LIBOR.

Based on these data, the Bureau estimates that there are 131 small depositories that originated at least one closed-end adjustable-rate mortgage product in 2019 and so may be affected by the closed-end provisions of this final rule, and there are 710 small depositories that originated at least one open-end adjustable-rate mortgage product and so may be affected by the open-end provisions of this final rule. Of these, 92 small depositories originated at least one closed-end adjustable-rate mortgage product and one open-end adjustable-rate mortgage product, and so may be affected by both the open-end and closed-end provisions of this final rule.

The definition of ''small'' for purposes of the RFA for non-depository institutions that originate mortgages depends on average annual receipts. The HMDA data do not include this information, and so the Bureau cannot estimate the number of small non-depository mortgage lenders that may be affected by this final rule. The Bureau estimates that there are 50 non-depository mortgage lenders that originated at least one closed-end adjustable-rate mortgage product and 564 non-depository mortgage lenders that originated at least one open-end adjustable-rate mortgage product. Of these, 42 originated at least one closed-end and one open-end adjustable-rate mortgage product.

The numbers above do not include entities that reported originating mortgages but under the EGRRCPA were exempt from reporting whether or not those mortgages had adjustable rates. There are 2,047 such small depositories in the 2019 HMDA data. There are two such non-depository institutions in the 2019 HMDA data. These entities may have originated adjustable-rate mortgage products that were not explicitly reported as such.

Finally, the numbers above also do not include entities that may have originated adjustable-rate mortgages in 2019 that were exempt entirely from reporting any 2019 HMDA data. The Bureau has estimated that approximately 11,200 institutions originated at least one closed-end mortgage loan in 2019, and 5,496 institutions reported HMDA data in 2019.[176] This implies that approximately 5,704 institutions originated at least one closed-end mortgage in 2019 but are not in the HMDA data. Because these institutions are not in the HMDA data, the Bureau cannot estimate the number that may have originated adjustable-rate mortgages. Furthermore, the Bureau cannot confirm that they are small for purposes of the RFA, although it is likely they are because HMDA reporting thresholds are based in part on origination volume. Finally, the Bureau cannot estimate the number of institutions that did not report HMDA data in 2019 but did originate at least one open-end mortgage loan in 2019, or at least one closed-end and one open-end mortgage loan in 2019.

As discussed above in part VII, there are five main final provisions:

1. LIBOR-specific provisions for index changes for HELOCs and credit card accounts;
2. Commentary providing details on how a creditor may disclose information about the periodic rate and APR in a change-in-terms notice for HELOCs and credit card accounts when the creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products in certain circumstances;
3. Revisions to change-in-terms notices requirements for HELOCs and credit card accounts to disclose margin decreases, if any;
4. LIBOR-specific exception from the rate reevaluation provisions applicable to credit card accounts; and
5. Commentary providing a non-exhaustive list of examples of the types of factors used to determine whether a replacement index is comparable to a

[172] U.S. Small Bus. Admin., *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 19, 2019), *https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf* (current SBA size standards).

[173] *Id.*

[174] *See* Bureau of Consumer Fin. Prot., *Data Point: 2019 Mortgage Market Activity and Trends* (June 2020), *https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf.* (2019 Mortgage Market Activity) The Bureau has analyzed 2019 HMDA data rather than 2020 HMDA data for the purposes of the RFA because in 2020 the HMDA reporting threshold for closed-end transactions increased from 25 to 100. Thus, the 2020 HMDA data will not include information on many lenders that originated between 25 and 100 closed-end loans, while the 2019 HMDA data will. These lenders are likely to be small as defined by the RFA, so in order to avoid understating the number of small lenders affected by the rule we use the 2019 HMDA data.

[175] In May 2017, Congress passed the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) that granted certain HMDA reporters partial exemptions from HMDA reporting. The closed-end partial exemption applies to HMDA reporters that are insured depository institutions or insured credit unions and that originated fewer than 500 closed-end mortgages in each of the two preceding years. HMDA reporters that are insured depository institutions or insured credit unions that originated fewer than 500 open-end lines of credit in each of the two preceding years also qualify for a partial exemption with respect to reporting their open-end transactions. The insured depository institutions must also not have received certain less than satisfactory examination ratings under the Community Reinvestment Act of 1977 to qualify for the partial exemptions.

[176] *See* 2019 Mortgage Market Activity, *supra* note 174.

LIBOR index and stating that specific indices are comparable to certain LIBOR tenors for purposes of the closed-end refinancing provisions.

The final LIBOR-specific provisions for index change requirements for open-end credit will allow HELOC creditors and card issuers, including small entities, under Regulation Z to switch away from LIBOR earlier than they would under the baseline, but it will not require them to do so.[177] This additional flexibility will benefit small entities with these outstanding credit products tied to LIBOR, by reducing uncertainty and allowing them to implement the switch in a more orderly way. This additional flexibility will not impose any significant costs on HELOC creditors and card issuers, including small entities.

The final LIBOR-specific provisions for index change requirements for open-end credit also include revisions to commentary to Regulation Z (1) providing a non-exhaustive list of examples of the types of factors used to determine whether a replacement index has historical fluctuations that are substantially similar to those of the LIBOR index, (2) stating that SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index have historical fluctuations that are substantially similar to the applicable tenor of LIBOR, (3) stating that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR, and (4) stating that if a HELOC creditor or card issuer replaces LIBOR indices with the SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR index, the APR that is calculated using those rates is substantially similar to the rate calculated using LIBOR so long as the creditor or card issuer uses as the replacement margin the same margin that was used prior to the index change. The final commentary does not determine that any specific indices have historical fluctuations that are not substantially similar to those of LIBOR, so the final revisions will not prevent creditors or card issuers from switching to other indices as long as those indices still satisfy regulatory requirements. Therefore, the final commentary does not impose any significant costs on HELOC creditors and card issuers, including small entities. Therefore, the final LIBOR-specific provisions for index change requirements for open-end credit impose no significant burden on small entities.

The commentary provisions providing details on how a creditor may disclose information about the periodic rate and APR in a change-in-terms notice for HELOCs and credit card accounts when the creditor is replacing a LIBOR index with the SOFR-based spread-adjusted index recommended by the ARRC for consumer products to replace the 1-month, 3-month or 6-month USD LIBOR indices in certain circumstances make minimal adjustments to the content of change-in-terms notices, they do not impose extra disclosure requirements on creditors. Therefore, the final commentary provisions will impose no significant costs on creditors, including small entities.

The final revisions to change-in-terms notices requirements to disclose margin decreases, if any, expand regulatory requirements for creditors for HELOCs and card issuers, including small entities, and therefore may increase their compliance costs. The final provision will on or after October 1, 2022, require creditors for HELOCs and card issuers, including small entities, to disclose margin reductions to consumers when they switch contracts from using LIBOR indices to other indices. Under both the existing regulation and the final provision, creditors for HELOCs and card issuers, including small entities, are required to send consumers change-in-terms notices when indices change, disclosing the replacement index and any increase in the margin. Therefore, this final provision will not affect the number of consumers who receive change-in-terms notices nor the number of change-in-terms notices creditors for HELOCs or card issuers, including small entities, must provide.

The benefits, costs, and impacts of this final provision depend on whether HELOC creditors or card issuers, including small entities, would choose to disclose margin decreases even if not required to do so under the existing regulation. Creditors for HELOCs or card issuers, including small entities, that would not otherwise disclose margin decreases in their change-in-terms notices will bear the cost of having to provide slightly longer notices. They may also have to develop distinct notices for different groups of consumers with different initial margins. However, the Bureau believes it is likely that most creditors for HELOCs and card issuers, including small entities, would choose to disclose margin decreases in their change-in-terms notices even if not required to, because margin decreases are beneficial for consumers, and because in these situations the creditors or card issuers likely benefit from improved consumer understanding. Further, compliance with this final provision will be mandatory only beginning October 1, 2022. HELOC creditors and card issuers, including small entities, that would prefer not to disclose margin decreases could choose to change indices before this proposed provision becomes effective (if the change in indices is permitted by the contractual provisions at that time). Therefore, the Bureau expects that both the benefits and costs of this final provision for HELOC creditors and card issuers, including small entities, will be small. Therefore, this final provision will not impose significant costs on a significant number of small entities.

The LIBOR-specific exception from the rate reevaluation provisions applicable to credit card accounts will benefit affected card issuers, including small entities, by saving them the cost of reevaluating rate increases that occur as a result of the transition from the LIBOR index to another index under the LIBOR-specific provisions discussed above or under the existing regulation that allows card issuers to replace an index when the index becomes unavailable. This final provision will impose no costs on affected card issuers, including small entities, because they could still perform rate reevaluations if they choose to do so until LIBOR is discontinued. Therefore, this final provision will impose no significant burden on small entities.

The Bureau is adding commentary to provide a non-exhaustive list of examples of the types of factors used to determine whether a replacement index is comparable to a LIBOR index and is amending commentary to state that SOFR-based spread-adjusted indices recommended by the ARRC for consumer products to replace the 1-month, 3-month, or 6-month USD LIBOR indices are comparable to the applicable tenor of LIBOR. This final commentary does not determine that any specific indices are not comparable to LIBOR. Therefore, this final provision will not prevent creditors from switching to other indices as long as

[177] As discussed in the section-by-section analyses of §§ 1026.40(f)(3)(ii) and 1026.55(b)(7) above, this final rule, however, will not excuse creditors or card issuers from noncompliance with contractual provisions. For example, a contract for a HELOC or a credit card account may provide that the creditor or card issuer respectively may not replace an index unilaterally under a plan unless the original index becomes unavailable. This final rule does not grant the creditor or card issuer authority to unilaterally replace a LIBOR index used under the plan before LIBOR becomes unavailable.

those indices still satisfy regulatory requirements. Therefore, this final provision will impose no significant costs on creditors, including small entities.

Accordingly, the Director certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Thus, a FRFA is not required for this final rule.

IX. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[178] Federal agencies are generally required to seek the Office of Management and Budget's (OMB's) approval for information collection requirements prior to implementation. The collections of information related to Regulation Z have been previously reviewed and approved by OMB and assigned OMB Control number 3170–0015. Under the PRA, the Bureau may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB.

The Bureau has determined that this final rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.

List of Subjects in 12 CFR Part 1026

Advertising, Banks, Banking, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth-in-lending.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau revises Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 3353, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart B—Open-End Credit

■ 2. Effective April 1, 2022, § 1026.9 is amended by revising paragraphs (c)(1)(ii) and (c)(2)(v)(A) to read as follows:

§ 1026.9 Subsequent disclosure requirements.

* * * * *

(c) * * *

(1) * * *

(ii) *Notice not required.* For home-equity plans subject to the requirements of § 1026.40, a creditor is not required to provide notice under this section when the change involves a reduction of any component of a finance or other charge (except that on or after October 1, 2022, this provision on when the change involves a reduction of any component of a finance or other charge does not apply to any change in the margin when a LIBOR index is replaced, as permitted by § 1026.40(f)(3)(ii)(A) or (B)) or when the change results from an agreement involving a court proceeding.

* * * * *

(2) * * *

(v) * * *

(A) When the change involves charges for documentary evidence; a reduction of any component of a finance or other charge (except that on or after October 1, 2022, this provision on when the change involves a reduction of any component of a finance or other charge does not apply to any change in the margin when a LIBOR index is replaced, as permitted by § 1026.55(b)(7)(i) or (ii)); suspension of future credit privileges (except as provided in paragraph (c)(2)(vi) of this section) or termination of an account or plan; when the change results from an agreement involving a court proceeding; when the change is an extension of the grace period; or if the change is applicable only to checks that access a credit card account and the changed terms are disclosed on or with the checks in accordance with paragraph (b)(3) of this section;

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

§ 1026.36 [Amended]

■ 3. Effective April 1, 2022, § 1026.36 is amended by removing ''LIBOR'' and adding in its place ''SOFR'' in paragraphs (a)(4)(iii)(C) and (a)(5)(iii)(B).

■ 4. Effective April 1, 2022, § 1026.40 is amended by revising paragraph (f)(3)(ii) to read as follows:

§ 1026.40 Requirements for home equity plans.

* * * * *

(f) * * *

(3) * * *

(ii)(A) Change the index and margin used under the plan if the original index is no longer available, the replacement index has historical fluctuations substantially similar to that of the original index, and the replacement index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce an annual percentage rate substantially similar to the rate in effect when the original index became unavailable; or

(B) If a variable rate on the plan is calculated using a LIBOR index, change the LIBOR index and the margin for calculating the variable rate on or after April 1, 2022, to a replacement index and a replacement margin, as long as historical fluctuations in the LIBOR index and replacement index were substantially similar, and as long as the replacement index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on October 18, 2021, and the replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the spread-adjusted index based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the

[178] 44 U.S.C. 3501 *et seq.*

replacement index is substantially similar to the rate based on the LIBOR index.

* * * * *

Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

■ 5. Effective April 1, 2022, § 1026.55 is amended by adding paragraph (b)(7) to read as follows:

§ 1026.55 Limitations on increasing annual percentage rates, fees, and charges.

* * * * *

(b) * * *

(7) *Index replacement and margin change exception.* A card issuer may increase an annual percentage rate when:

(i) The card issuer changes the index and margin used to determine the annual percentage rate if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce a rate substantially similar to the rate in effect when the original index became unavailable; or

(ii) If a variable rate on the plan is calculated using a LIBOR index, the card issuer changes the LIBOR index and the margin for calculating the variable rate on or after April 1, 2022, to a replacement index and a replacement margin, as long as historical fluctuations in the LIBOR index and replacement index were substantially similar, and as long as the replacement index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on October 18, 2021, and the replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the spread-adjusted index based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index.

* * * * *

■ 6. Effective April 1, 2022, § 1026.59 is amended by adding paragraphs (f)(3) and (h)(3) to read as follows:

§ 1026.59 Reevaluation of rate increases.

* * * * *

(f) * * *

(3) Effective April 1, 2022, in the case where the rate applicable immediately prior to the increase was a variable rate with a formula based on a LIBOR index, the card issuer reduces the annual percentage rate to a rate determined by a replacement formula that is derived from a replacement index value on October 18, 2021, plus replacement margin that is equal to the LIBOR index value on October 18, 2021, plus the margin used to calculate the rate immediately prior to the increase (previous formula). A card issuer must satisfy the conditions set forth in § 1026.55(b)(7)(ii) for selecting a replacement index. If the replacement index is not published on October 18, 2021, the card issuer generally must use the values of the indices on the next calendar day for which both the LIBOR index and the replacement index are published as the index values to use to determine the replacement formula. The one exception is that if the replacement index is the spread-adjusted index based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, as the index values to use to determine the replacement formula.

* * * * *

(h) * * *

(3) *Transition from LIBOR.* The requirements of this section do not apply to increases in an annual percentage rate that occur as a result of the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a replacement index in setting a variable rate if the change from the use of the LIBOR index to a replacement index occurs in accordance with § 1026.55(b)(7)(i) or (ii).

■ 7. Effective April 1, 2022, appendix H to part 1026 is amended by revising the entries for H–4(D)(2) and H–4(D)(4) to read as follows:

Appendix H to Part 1026—Closed-End Model Forms and Clauses

* * * * *

BILLING CODE 4810–AM–P

H-4(D)(2) Sample Form for § 1026.20(c)

Legacy Form – Can Only Be Used Through September 30, 2023

July 20, 2012

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Springside Mortgage
1234 Main St
Memphis, TN 31801

Changes to Your Mortgage Interest Rate and Payments on September 1, 2012

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a three-year period during which your interest rate stayed the same. That period ends on September 1, 2012, so on that date your interest rate and mortgage payment change. After that, your interest rate may change annually for the rest of your loan term.

	Current Rate and Monthly Payment	**New** Rate and Monthly Payment
Interest Rate	4.25%	6.25%
Total Monthly Payment	**$983.88**	**$1,211.81 (due October 1, 2012)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is the 1-year LIBOR and your margin is 2.25%. The LIBOR index is published daily in the Wall Street Journal.

Rate Limits: Your rate cannot go higher than 11.625% over the life of the loan. Your rate can change each year by no more than 2.00%.

New Interest Rate and Monthly Payment: The table above shows your new interest rate and new monthly payment. Your new payment is based on the LIBOR index, your margin, your loan balance of $189,440, and your remaining loan term of 324 months.

Prepayment Penalty: Keep in mind that if you pay off your loan, refinance or sell your home before September 1, 2012, you could be charged a penalty. Contact Springside Mortgage at (800) 765-4321 for more information, such as the maximum amount of the penalty you could be charged.

REVISED FORM – CAN BE USED ON OR AFTER APRIL 1, 2022

July 20, 2022

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Springside Mortgage
1234 Main St
Memphis, TN 31801

Changes to Your Mortgage Interest Rate and Payments on September 1, 2022

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a three-year period during which your interest rate stayed the same. That period ends on September 1, 2022, so on that date your interest rate and mortgage payment change. After that, your interest rate may change every six months for the rest of your loan term.

	Current Rate and Monthly Payment	**New** Rate and Monthly Payment
Interest Rate	4.25%	6.25%
Total Monthly Payment	**$983.88**	**$1,211.81 (due October 1, 2022)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is the 30-day Average SOFR (SOFR) and your margin is 2.75%. The SOFR index is published daily on the website of the Federal Reserve Bank of New York.

Rate Limits: Your rate cannot go higher than 11.625% over the life of the loan. Your rate can change every six months by no more than 1.00%.

New Interest Rate and Monthly Payment: The table above shows your new interest rate and new monthly payment. Your new payment is based on the SOFR index, your margin, your loan balance of $189,440, and your remaining loan term of 324 months.

Prepayment Penalty: Keep in mind that if you pay off your loan, refinance or sell your home before September 1, 2022, you could be charged a penalty. Contact Springside Mortgage at (800) 765-4321 for more information, such as the maximum amount of the penalty you could be charged.

H-4(D)(4) Sample Form for § 1026.20(d)

Legacy Form – Can Only Be Used Through September 30, 2023

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Springside Mortgage
1234 Main St
Memphis, TN 31801

Changes to Your Mortgage Interest Rate and Payments on September 1, 2012

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a three-year period during which your interest rate stayed the same. That period ends on September 1, 2012, so on that date your interest rate may change. After that, your interest rate may change annually for the rest of your loan term. Any change in your interest rate may also change your mortgage payment. Also, as of September 1, 2012 your mortgage payment will include principal as well as interest.

	Current Rate and Monthly Payment	**Estimated New** Rate and Monthly Payment
Interest Rate	4.25%	6.25%
Principal	- **none** -	$237.70
Interest	$708.33	$1,041.66
Escrow (Taxes and Insurance)	$450.00	$450.00
Total Monthly Payment	**$1,158.33**	**$1,729.36 (due October 1, 2012)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is the 1-year LIBOR and your margin is 2.25%. The LIBOR index is published daily in the Wall Street Journal.

Rate Limits: Your rate cannot go higher than 11.625% over the life of the loan. Your rate can change each year by no more than 2.00%. We did not include an additional 1.00% interest rate increase to your new rate because a rate limit applied. This additional increase may be applied to your interest rate when it adjusts again on September 1, 2013.

New Interest Rate and Monthly Payment: The table above shows our estimate of your new interest rate and new monthly payment. These amounts are based on the LIBOR index as of now, your margin, your loan balance of $200,000, and your remaining loan term of 324 months. **However, if the LIBOR index has changed when we calculate the exact amount of your new interest rate and payment, your new interest rate and payment may be different from the estimate above. We will send you another notice with the exact amount of your new interest rate and payment 2 to 4 months before the first new payment is due, if your new payment will be different from your current payment.**

Prepayment Penalty: None

If You Anticipate Problems Making Your Payments:

- Contact Springside Mortgage at 1-800-555-4567 as soon as possible.
- If you seek an alternative to the upcoming changes to your interest rate and payment, the following options **may** be possible (most are subject to lender approval):
  - Refinance your loan with us or another lender;
  - Sell your home and use the proceeds to pay off your current loan;
  - Modify your loan terms with us;
  - Payment forbearance temporarily gives you more time to pay your monthly payment.
- If you would like contact information for counseling agencies or programs in your area, call the U.S. Department of Housing and Urban Development (HUD) at 800-569-4287 or visit www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm. If you would like contact information for a State housing finance agency, visit the U.S. Consumer Financial Protection Bureau (CFPB) at http://www.consumerfinance.gov.

REVISED FORM – CAN BE USED ON OR AFTER APRIL 1, 2022

April 15, 2022

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Springside Mortgage
1234 Main St
Memphis, TN 31801

Changes to Your Mortgage Interest Rate and Payments on November 1, 2022

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a three-year period during which your interest rate stayed the same. That period ends on November 1, 2022, so on that date your interest rate may change. After that, your interest rate may change every six months for the rest of your loan term. Any change in your interest rate may also change your mortgage payment. Also, as of November 1, 2022 your mortgage payment will include principal as well as interest.

	Current Rate and Monthly Payment	**Estimated** New Rate and Monthly Payment
Interest Rate	4.25%	6.25%
Principal	**- none -**	$237.70
Interest	$708.33	$1,041.66
Escrow (Taxes and Insurance)	$450.00	$450.00
Total Monthly Payment	**$1,158.33**	**$1,729.36 (due December 1, 2022)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is the 30-day Average SOFR (SOFR) and your margin is 2.75%. The SOFR index is published daily on the website of the Federal Reserve Bank of New York.

Rate Limits: Your rate cannot go higher than 11.625% over the life of the loan. Your rate can change every six months by no more than 1.00%. We did not include an additional 1.00% interest rate increase to your new rate because a rate limit applied. This additional increase may be applied to your interest rate when it adjusts again on May 1, 2023.

New Interest Rate and Monthly Payment: The table above shows our estimate of your new interest rate and new monthly payment. These amounts are based on the SOFR index as of now, your margin, your loan balance of $200,000, and your remaining loan term of 324 months. **However, if the SOFR index has changed when we calculate the exact amount of your new interest rate and payment, your new interest rate and payment may be different from the estimate above. We will send you another notice with the exact amount of your new interest rate and payment 2 to 4 months before the first new payment is due, if your new payment will be different from your current payment.**

Prepayment Penalty: None

If You Anticipate Problems Making Your Payments:

- Contact Springside Mortgage at 1-800-555-4567 as soon as possible.
- If you seek an alternative to the upcoming changes to your interest rate and payment, the following options **may** be possible (most are subject to lender approval):
  - Refinance your loan with us or another lender;
  - Sell your home and use the proceeds to pay off your current loan;
  - Modify your loan terms with us;
  - Payment forbearance temporarily gives you more time to pay your monthly payment.
- If you would like contact information for counseling agencies or programs in your area, call the U.S. Department of Housing and Urban Development (HUD) at 800-569-4287 or visit www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm. If you would like contact information for a State housing finance agency, visit the U.S. Consumer Financial Protection Bureau (CFPB) at http://www.consumerfinance.gov.

* * * * *

■ 8. Effective October 1, 2023, appendix H to part 1026 is further amended by revising the entries for H–4(D)(2) and H–4(D)(4) to read as follows:

Appendix H to Part 1026—Closed-End Model Forms and Clauses

H-4(D)(2) Sample Form for § 1026.20(c)

July 20, 2022

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Springside Mortgage
1234 Main St
Memphis, TN 31801

Changes to Your Mortgage Interest Rate and Payments on September 1, 2022

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a three-year period during which your interest rate stayed the same. That period ends on September 1, 2022, so on that date your interest rate and mortgage payment change. After that, your interest rate may change every six months for the rest of your loan term.

	Current Rate and Monthly Payment	**New** Rate and Monthly Payment
Interest Rate	4.25%	6.25%
Total Monthly Payment	**$983.88**	**$1,211.81 (due October 1, 2022)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is the 30-day Average SOFR (SOFR) and your margin is 2.75%. The SOFR index is published daily on the website of the Federal Reserve Bank of New York.

Rate Limits: Your rate cannot go higher than 11.625% over the life of the loan. Your rate can change every six months by no more than 1.00%.

New Interest Rate and Monthly Payment: The table above shows your new interest rate and new monthly payment. Your new payment is based on the SOFR index, your margin, your loan balance of $189,440, and your remaining loan term of 324 months.

Prepayment Penalty: Keep in mind that if you pay off your loan, refinance or sell your home before September 1, 2022, you could be charged a penalty. Contact Springside Mortgage at (800) 765-4321 for more information, such as the maximum amount of the penalty you could be charged.

* * * * *

H-4(D)(4) SAMPLE FORM FOR § 1026.20(D)

April 15, 2022

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Springside Mortgage
1234 Main St
Memphis, TN 31801

Changes to Your Mortgage Interest Rate and Payments on November 1, 2022

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a three-year period during which your interest rate stayed the same. That period ends on November 1, 2022, so on that date your interest rate may change. After that, your interest rate may change every six months for the rest of your loan term. Any change in your interest rate may also change your mortgage payment. Also, as of November 1, 2022 your mortgage payment will include principal as well as interest.

	Current Rate and Monthly Payment	**Estimated New** Rate and Monthly Payment
Interest Rate	4.25%	6.25%
Principal	- **none** -	$237.70
Interest	$708.33	$1,041.66
Escrow (Taxes and Insurance)	$450.00	$450.00
Total Monthly Payment	**$1,158.33**	**$1,729.36 (due December 1, 2022)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is the 30-day Average SOFR (SOFR) and your margin is 2.75%. The SOFR index is published daily on the website of the Federal Reserve Bank of New York.

Rate Limits: Your rate cannot go higher than 11.625% over the life of the loan. Your rate can change every six months by no more than 1.00%. We did not include an additional 1.00% interest rate increase to your new rate because a rate limit applied. This additional increase may be applied to your interest rate when it adjusts again on May 1, 2023.

New Interest Rate and Monthly Payment: The table above shows our estimate of your new interest rate and new monthly payment. These amounts are based on the SOFR index as of now, your margin, your loan balance of $200,000, and your remaining loan term of 324 months. **However, if the SOFR index has changed when we calculate the exact amount of your new interest rate and payment, your new interest rate and payment may be different from the estimate above. We will send you another notice with the exact amount of your new interest rate and payment 2 to 4 months before the first new payment is due, if your new payment will be different from your current payment.**

Prepayment Penalty: None

If You Anticipate Problems Making Your Payments:

- Contact Springside Mortgage at 1-800-555-4567 as soon as possible.
- If you seek an alternative to the upcoming changes to your interest rate and payment, the following options **may** be possible (most are subject to lender approval):
  - Refinance your loan with us or another lender;
  - Sell your home and use the proceeds to pay off your current loan;
  - Modify your loan terms with us;
  - Payment forbearance temporarily gives you more time to pay your monthly payment.
- If you would like contact information for counseling agencies or programs in your area, call the U.S. Department of Housing and Urban Development (HUD) at 800-569-4287 or visit www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm. If you would like contact information for a State housing finance agency, visit the U.S. Consumer Financial Protection Bureau (CFPB) at http://www.consumerfinance.gov.

BILLING CODE 4810–AM–C

* * * * *

■ 9. In supplement I to part 1026:

■ a. Under *Section 1026.9—Subsequent Disclosure Requirements*, revise *9(c)(1) Rules Affecting Home-Equity Plans*, *9(c)(1)(ii) Notice not Required*, *9(c)(2)(iv) Disclosure Requirements*, and *9(c)(2)(v) Notice not Required*.

■ b. Under *Section 1026.20—Disclosure Requirements Regarding Post-Consummation Events*, revise *20(a) Refinancings*.

■ c. Under *Section 1026.37—Content of Disclosures for Certain Mortgage Transactions (Loan Estimate)*, revise *37(j)(1) Index and margin*.

■ d. Under *Section 1026.40—Requirements for Home-Equity Plans*, revise *Paragraph 40(f)(3)(ii)* and add *Paragraph 40(f)(3)(ii)(A)* and *Paragraph 40(f)(3)(ii)(B)*.

■ e. Under *Section 1026.55—Limitations on Increasing Annual Percentage Rates, Fees, and Charges*, revise *55(b)(2) Variable rate exception* and add *55(b)(7) Index replacement and margin change exception*.

■ f. Under *Section 1026.59—Reevaluation of Rate Increases,* revise *59(d) Factors* and *59(f) Termination of Obligation to Review Factors* and add *59(h) Exceptions.*

The revisions and additions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Section 1026.9—Subsequent Disclosure Requirements

* * * * *

9(c)(1) Rules Affecting Home-Equity Plans

1. *Changes initially disclosed.* No notice of a change in terms need be given if the specific change is set forth initially, such as: Rate increases under a properly disclosed variable-rate plan, a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment, or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum. The rules in § 1026.40(f) relating to home-equity plans limit the ability of a creditor to change the terms of such plans.

2. *State law issues.* Examples of issues not addressed by § 1026.9(c) because they are controlled by state or other applicable law include:

i. The types of changes a creditor may make. (*But see* § 1026.40(f).)

ii. How changed terms affect existing balances, such as when a periodic rate is changed and the consumer does not pay off the entire existing balance before the new rate takes effect.

3. *Change in billing cycle.* Whenever the creditor changes the consumer's billing cycle, it must give a change-in-terms notice if the change either affects any of the terms required to be disclosed under § 1026.6(a) or increases the minimum payment, unless an exception under § 1026.9(c)(1)(ii) applies; for example, the creditor must give advance notice if the creditor initially disclosed a 25-day grace period on purchases and the consumer will have fewer days during the billing cycle change.

4. *Changing index for calculating a variable rate from LIBOR to SOFR in specified circumstances.* If a creditor is replacing a LIBOR index with the index based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR index, the creditor is not changing the margin used to calculate the variable rate as a result of the replacement, and a periodic rate or the corresponding annual percentage rate based on the replacement index is unknown to the creditor at the time the change-in-terms notice is provided because the SOFR index has not been published at the time the creditor provides the change-in-terms notice but will be published by the time the replacement of the index takes effect on the account, the creditor may comply with any requirement to disclose the amount of the new rate (as calculated using the new index), or a change in the periodic rate or the corresponding annual percentage rate (as calculated using the replacement index), based on the best information reasonably available, clearly stating that the disclosure is an estimate. For example, in this situation, the creditor may state that: {1} Information about the rate is not yet available but that the creditor estimates that, at the time the index is replaced, the rate will be substantially similar to what it would be if the index did not have to be replaced; and {2} the rate will vary with the market based on a SOFR index.

* * * * *

9(c)(1)(ii) Notice Not Required

1. *Changes not requiring notice.* The following are examples of changes that do not require a change-in-terms notice:

i. A change in the consumer's credit limit.

ii. A change in the name of the credit card or credit card plan.

iii. The substitution of one insurer for another.

iv. A termination or suspension of credit privileges. (*But see* § 1026.40(f).)

v. Changes arising merely by operation of law; for example, if the creditor's security interest in a consumer's car automatically extends to the proceeds when the consumer sells the car.

2. *Skip features.* If a credit program allows consumers to skip or reduce one or more payments during the year, or involves temporary reductions in finance charges, no notice of the change in terms is required either prior to the reduction or upon resumption of the higher rates or payments if these features are explained on the initial disclosure statement (including an explanation of the terms upon resumption). For example, a merchant may allow consumers to skip the December payment to encourage holiday shopping, or a teachers' credit union may not require payments during summer vacation. Otherwise, the creditor must give notice prior to resuming the original schedule or rate, even though no notice is required prior to the reduction. The change-in-terms notice may be combined with the notice offering the reduction. For example, the periodic statement reflecting the reduction or skip feature may also be used to notify the consumer of the resumption of the original schedule or rate, either by stating explicitly when the higher payment or charges resume, or by indicating the duration of the skip option. Language such as ''You may skip your October payment,'' or ''We will waive your finance charges for January,'' may serve as the change-in-terms notice.

3. *Replacing LIBOR.* The exception in § 1026.9(c)(1)(ii) under which a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(1) when the change involves a reduction of any component of a finance or other charge does not apply on or after October 1, 2022, to margin reductions when a LIBOR index is replaced, as permitted by § 1026.40(f)(3)(ii)(A) or (B). For change-in-terms notices provided under § 1026.9(c)(1) on or after October 1, 2022, covering changes permitted by § 1026.40(f)(3)(ii)(A) or (B), a creditor must provide a change-in-terms notice under § 1026.9(c)(1) disclosing the replacement index for a LIBOR index and any adjusted margin that is permitted under § 1026.40(f)(3)(ii)(A) or (B), even if the margin is reduced. From April 1, 2022, through September 30, 2022, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by § 1026.40(f)(3)(ii)(A) or (B).

* * * * *

9(c)(2)(iv) Disclosure Requirements

1. *Changing margin for calculating a variable rate.* If a creditor is changing a margin used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new margin) in the table described in § 1026.9(c)(2)(iv), and include a reminder that the rate is a variable rate. For example, if a creditor is changing the margin for a variable rate that uses the prime rate as an index, the creditor must disclose in the table the new rate (as calculated using the new margin) and indicate that the rate varies with the market based on the prime rate.

2. *Changing index for calculating a variable rate.* i. *In general.* If a creditor is changing the index used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new index) and indicate that the rate varies and how the rate is determined, as explained in § 1026.6(b)(2)(i)(A). For example, if a creditor is changing from using a LIBOR index to using a prime index in calculating a variable rate, the creditor would disclose in the table the new rate (using the new index) and indicate that the rate varies with the market based on a prime index.

ii. *Changing index for calculating a variable rate from LIBOR to SOFR in specified circumstances.* If a creditor is replacing a LIBOR index with an index based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR index, the creditor is not changing the margin used to calculate the variable rate as a result of the replacement, and a periodic rate or the corresponding annual percentage rate based on the replacement index is unknown to the creditor at the time the change-in-terms notice is provided because the SOFR index has not been published at the time the creditor provides the change-in-terms notice, but will be published by the time the replacement of the index takes effect on the account, the creditor may comply with any requirement to disclose the amount of the new rate (as calculated using the new index), or a change in the periodic rate or the corresponding annual percentage rate (as calculated using the replacement index), based on the best information reasonably available, clearly stating that the disclosure is an estimate. For example, in this situation, the creditor may state that: {1} information about the rate is not yet available but that the creditor estimates that, at the time the index is replaced, the rate will be substantially similar to what it would be if the index did not have to be replaced; and {2} the rate will vary with the market based on a SOFR index.

3. *Changing from a variable rate to a non-variable rate.* If a creditor is changing a rate applicable to a consumer's account from a variable rate to a non-variable rate, the creditor generally must provide a notice as otherwise required under § 1026.9(c) even if the variable rate at the time of the change is higher than the non-variable rate. However, a creditor is not required to provide a notice under § 1026.9(c) if the creditor provides the disclosures required by § 1026.9(c)(2)(v)(B) or (D) in connection with changing a variable rate to a lower non-variable rate. Similarly, a creditor is not required to provide a notice under § 1026.9(c) when changing a variable rate to a lower non-variable rate in order to comply with 50 U.S.C. app. 527 or a similar Federal or state statute or regulation. Finally, a creditor is not required to provide a notice under § 1026.9(c) when changing a variable rate to a lower non-variable rate in order to comply with § 1026.55(b)(4).

4. *Changing from a non-variable rate to a variable rate.* If a creditor is changing a rate applicable to a consumer's account from a non-variable rate to a variable rate, the creditor generally must provide a notice as otherwise required under § 1026.9(c) even if the non-variable rate is higher than the variable rate at the time of the change. However, a creditor is not required to provide a notice under § 1026.9(c) if the creditor provides the disclosures required by § 1026.9(c)(2)(v)(B) or (D) in connection with changing a non-variable rate to a lower variable rate. Similarly, a creditor is not required to provide a notice under § 1026.9(c) when changing a non-variable rate to a lower variable rate in order to comply with 50 U.S.C. app. 527 or a similar Federal or state statute or regulation. Finally, a creditor is not required to provide a notice under § 1026.9(c) when changing a non-variable rate to a lower variable rate in order to comply with § 1026.55(b)(4). *See* comment 55(b)(2)–4 regarding the limitations in § 1026.55(b)(2) on changing the rate that applies to a protected balance from a non-variable rate to a variable rate.

5. *Changes in the penalty rate, the triggers for the penalty rate, or how long the penalty rate applies.* If a creditor is changing the amount of the penalty rate, the creditor must also redisclose the triggers for the penalty rate and the information about how long the penalty rate applies even if those terms are not changing. Likewise, if a creditor is changing the triggers for the penalty rate, the creditor must redisclose the amount of the penalty rate and information about how long the penalty rate applies. If a creditor is changing how long the penalty rate applies, the creditor must redisclose the amount of the penalty rate and the triggers for the penalty rate, even if they are not changing.

6. *Changes in fees.* If a creditor is changing part of how a fee that is disclosed in a tabular format under § 1026.6(b)(1) and (2) is determined, the creditor must redisclose all relevant information related to that fee regardless of whether this other information is changing. For example, if a creditor currently charges a cash advance fee of ''Either $5 or 3% of the transaction amount, whichever is greater (Max: $100),'' and the creditor is only changing the minimum dollar amount from $5 to $10, the issuer must redisclose the other information related to how the fee is determined. For example, the creditor in this example would disclose the following: ''Either $10 or 3% of the transaction amount, whichever is greater (Max: $100).''

7. *Combining a notice described in § 1026.9(c)(2)(iv) with a notice described in § 1026.9(g)(3).* If a creditor is required to provide a notice described in § 1026.9(c)(2)(iv) and a notice described in § 1026.9(g)(3) to a consumer, the creditor may combine the two notices. This would occur if penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

8. *Content.* Sample G–20 contains an example of how to comply with the requirements in § 1026.9(c)(2)(iv) when a variable rate is being changed to a non-variable rate on a credit card account. The sample explains when the new rate will apply to new transactions and to which balances the current rate will continue to apply. Sample G–21 contains an example of how to comply with the requirements in § 1026.9(c)(2)(iv) when the late payment fee on a credit card account is being increased, and the returned payment fee is also being increased. The sample discloses the consumer's right to reject the changes in accordance with § 1026.9(h).

9. *Clear and conspicuous standard. See* comment 5(a)(1)–1 for the clear and conspicuous standard applicable to disclosures required under § 1026.9(c)(2)(iv)(A)(*1*).

10. *Terminology. See* § 1026.5(a)(2) for terminology requirements applicable to disclosures required under § 1026.9(c)(2)(iv)(A)(*1*).

11. *Reasons for increase.* i. *In general.* Section 1026.9(c)(2)(iv)(A)(*8*) requires card issuers to disclose the principal reason(s) for increasing an annual percentage rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan. The regulation does not mandate a minimum number of reasons that must be disclosed. However, the specific reasons disclosed under § 1026.9(c)(2)(iv)(A)(*8*) are required to relate to and accurately describe the principal factors actually considered by the card issuer in increasing the rate. A card issuer may describe the reasons for the increase in general terms. For example, the notice of a rate increase triggered by a decrease of 100 points in a consumer's credit score may state that the increase is due to ''a decline in your creditworthiness'' or ''a decline in your credit score.'' Similarly, a notice of a rate increase triggered by a 10% increase in the card issuer's cost of funds may be disclosed as ''a change in market conditions.'' In some circumstances, it may be appropriate for a card issuer to combine the disclosure of several reasons in one statement. However, § 1026.9(c)(2)(iv)(A)(*8*) requires that the notice specifically disclose any violation of the terms of the account on which the rate is being increased, such as a late payment or a returned payment, if such violation of the account terms is one of the four principal reasons for the rate increase.

ii. *Example.* Assume that a consumer made a late payment on the credit card account on which the rate increase is being imposed, made a late payment on a credit card account with another card issuer, and the consumer's credit score decreased, in part due to such late payments. The card issuer may disclose the reasons for the rate increase as a decline in the consumer's credit score and the consumer's late payment on the account subject to the increase. Because the late payment on the credit card account with the other issuer also likely contributed to the decline in the consumer's credit score, it is not required to be separately disclosed. However, the late payment on the credit card account on which the rate increase is being imposed must be specifically disclosed even if that late payment also contributed to the decline in the consumer's credit score.

9(c)(2)(v) Notice not Required

1. *Changes not requiring notice.* The following are examples of changes that do not require a change-in-terms notice:

i. A change in the consumer's credit limit except as otherwise required by § 1026.9(c)(2)(vi).

ii. A change in the name of the credit card or credit card plan.

iii. The substitution of one insurer for another.

iv. A termination or suspension of credit privileges.

v. Changes arising merely by operation of law; for example, if the creditor's security interest in a consumer's car automatically extends to the proceeds when the consumer sells the car.

2. *Skip features.* i. *Skipped or reduced payments.* If a credit program allows consumers to skip or reduce one or more payments during the year, no notice of the change in terms is required either prior to the reduction in payments or upon resumption of the higher payments if these features are explained on the account-opening disclosure statement (including an explanation of the terms upon resumption). For example, a merchant may allow consumers to skip the December payment to encourage holiday shopping, or a teacher's credit union may not require payments during summer vacation. Otherwise, the creditor must give notice prior to resuming the original payment schedule, even though no notice is required prior to the reduction. The change-in-terms notice may be combined with the notice offering the reduction. For example, the periodic statement reflecting the skip feature may also be used to notify the consumer of the resumption of the original payment schedule, either by stating explicitly when the higher resumes or by indicating the duration of the skip option. Language such as ''You may skip your October payment'' may serve as the change-in-terms notice.

ii. *Temporary reductions in interest rates or fees.* If a credit program involves temporary reductions in an interest rate or fee, no notice of the change in terms is required either prior to the reduction or upon resumption of the original rate or fee if these features are disclosed in advance in accordance with the requirements of § 1026.9(c)(2)(v)(B). Otherwise, the creditor must give notice prior to resuming the original rate or fee, even though no notice is required prior to the reduction. The notice

provided prior to resuming the original rate or fee must comply with the timing requirements of § 1026.9(c)(2)(i) and the content and format requirements of § 1026.9(c)(2)(iv)(A), (B) (if applicable), (C) (if applicable), and (D). *See* comment 55(b)–3 for guidance regarding the application of § 1026.55 in these circumstances.

3. *Changing from a variable rate to a non-variable rate. See* comment 9(c)(2)(iv)–3.

4. *Changing from a non-variable rate to a variable rate. See* comment 9(c)(2)(iv)–4.

5. *Temporary rate or fee reductions offered by telephone.* The timing requirements of § 1026.9(c)(2)(v)(B) are deemed to have been met, and written disclosures required by § 1026.9(c)(2)(v)(B) may be provided as soon as reasonably practicable after the first transaction subject to a rate that will be in effect for a specified period of time (a temporary rate) or the imposition of a fee that will be in effect for a specified period of time (a temporary fee) if:

i. The consumer accepts the offer of the temporary rate or temporary fee by telephone;

ii. The creditor permits the consumer to reject the temporary rate or temporary fee offer and have the rate or rates or fee that previously applied to the consumer's balances reinstated for 45 days after the creditor mails or delivers the written disclosures required by § 1026.9(c)(2)(v)(B), except that the creditor need not permit the consumer to reject a temporary rate or temporary fee offer if the rate or rates or fee that will apply following expiration of the temporary rate do not exceed the rate or rates or fee that applied immediately prior to commencement of the temporary rate or temporary fee; and

iii. The disclosures required by § 1026.9(c)(2)(v)(B) and the consumer's right to reject the temporary rate or temporary fee offer and have the rate or rates or fee that previously applied to the consumer's account reinstated, if applicable, are disclosed to the consumer as part of the temporary rate or temporary fee offer.

6. *First listing.* The disclosures required by § 1026.9(c)(2)(v)(B)(*1*) are only required to be provided in close proximity and in equal prominence to the first listing of the temporary rate or fee in the disclosure provided to the consumer. For purposes of § 1026.9(c)(2)(v)(B), the first statement of the temporary rate or fee is the most prominent listing on the front side of the first page of the disclosure. If the temporary rate or fee does not appear on the front side of the first page of the disclosure, then the first listing of the temporary rate or fee is the most prominent listing of the temporary rate on the subsequent pages of the disclosure. For advertising requirements for promotional rates, see § 1026.16(g).

7. *Close proximity—point of sale.* Creditors providing the disclosures required by § 1026.9(c)(2)(v)(B) of this section in person in connection with financing the purchase of goods or services may, at the creditor's option, disclose the annual percentage rate or fee that would apply after expiration of the period on a separate page or document from the temporary rate or fee and the length of the period, provided that the disclosure of the annual percentage rate or fee that would apply after the expiration of the period is equally prominent to, and is provided at the same time as, the disclosure of the temporary rate or fee and length of the period.

8. *Disclosure of annual percentage rates.* If a rate disclosed pursuant to § 1026.9(c)(2)(v)(B) or (D) is a variable rate, the creditor must disclose the fact that the rate may vary and how the rate is determined. For example, a creditor could state ''After October 1, 2009, your APR will be 14.99%. This APR will vary with the market based on the Prime Rate.''

9. *Deferred interest or similar programs.* If the applicable conditions are met, the exception in § 1026.9(c)(2)(v)(B) applies to deferred interest or similar promotional programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. For purposes of this comment and § 1026.9(c)(2)(v)(B), ''deferred interest'' has the same meaning as in § 1026.16(h)(2) and associated commentary. For such programs, a creditor must disclose pursuant to § 1026.9(c)(2)(v)(B)(*1*) the length of the deferred interest period and the rate that will apply to the balance subject to the deferred interest program if that balance is not paid in full prior to expiration of the deferred interest period. Examples of language that a creditor may use to make the required disclosures under § 1026.9(c)(2)(v)(B)(*1*) include:

i. ''No interest if paid in full in 6 months. If the balance is not paid in full in 6 months, interest will be imposed from the date of purchase at a rate of 15.99%.''

ii. ''No interest if paid in full by December 31, 2010. If the balance is not paid in full by that date, interest will be imposed from the transaction date at a rate of 15%.''

10. *Relationship between §§ 1026.9(c)(2)(v)(B) and 1026.6(b).* A disclosure of the information described in § 1026.9(c)(2)(v)(B)(*1*) provided in the account-opening table in accordance with § 1026.6(b) complies with the requirements of § 1026.9(c)(2)(v)(B)(*2*), if the listing of the introductory rate in such tabular disclosure also is the first listing as described in comment 9(c)(2)(v)–6.

11. *Disclosure of the terms of a workout or temporary hardship arrangement.* In order for the exception in § 1026.9(c)(2)(v)(D) to apply, the disclosure provided to the consumer pursuant to § 1026.9(c)(2)(v)(D)(*2*) must set forth:

i. The annual percentage rate that will apply to balances subject to the workout or temporary hardship arrangement;

ii. The annual percentage rate that will apply to such balances if the consumer completes or fails to comply with the terms of, the workout or temporary hardship arrangement;

iii. Any reduced fee or charge of a type required to be disclosed under § 1026.6(b)(2)(ii), (iii), (viii), (ix), (xi), or (xii) that will apply to balances subject to the workout or temporary hardship arrangement, as well as the fee or charge that will apply if the consumer completes or fails to comply with the terms of the workout or temporary hardship arrangement;

iv. Any reduced minimum periodic payment that will apply to balances subject to the workout or temporary hardship arrangement, as well as the minimum periodic payment that will apply if the consumer completes or fails to comply with the terms of the workout or temporary hardship arrangement; and

v. If applicable, that the consumer must make timely minimum payments in order to remain eligible for the workout or temporary hardship arrangement.

12. *Index not under creditor's control. See* comment 55(b)(2)–2 for guidance on when an index is deemed to be under a creditor's control.

13. *Temporary rates—relationship to § 1026.59.* i. *General.* Section 1026.59 requires a card issuer to review rate increases imposed due to the revocation of a temporary rate. In some circumstances, § 1026.59 may require an issuer to reinstate a reduced temporary rate based on that review. If, based on a review required by § 1026.59, a creditor reinstates a temporary rate that had been revoked, the card issuer is not required to provide an additional notice to the consumer when the reinstated temporary rate expires, if the card issuer provided the disclosures required by § 1026.9(c)(2)(v)(B) prior to the original commencement of the temporary rate. *See* § 1026.55 and the associated commentary for guidance on the permissibility and applicability of rate increases.

i. *Example.* A consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan on January 1, 2011. The annual percentage rate applicable to purchases is 18%. The card issuer offers the consumer a 15% rate on purchases made between January 1, 2012 and January 1, 2014. Prior to January 1, 2012, the card issuer discloses, in accordance with § 1026.9(c)(2)(v)(B), that the rate on purchases made during that period will increase to the standard 18% rate on January 1, 2014. In March 2012, the consumer makes a payment that is ten days late. The card issuer, upon providing 45 days' advance notice of the change under § 1026.9(g), increases the rate on new purchases to 18% effective as of June 1, 2012. On December 1, 2012, the issuer performs a review of the consumer's account in accordance with § 1026.59. Based on that review, the card issuer is required to reduce the rate to the original 15% temporary rate as of January 15, 2013. On January 1, 2014, the card issuer may increase the rate on purchases to 18%, as previously disclosed prior to January 1, 2012, without providing an additional notice to the consumer.

14. *Replacing LIBOR.* The exception in § 1026.9(c)(2)(v)(A) under which a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(2) when the change involves a reduction of any component of a finance or other charge does not apply on or after October 1, 2022, to margin reductions when a LIBOR index is replaced as permitted by § 1026.55(b)(7)(i) or (ii). For change-in-terms notices provided under § 1026.9(c)(2) on or after October 1, 2022, covering changes permitted by § 1026.55(b)(7)(i) or (ii), a creditor must provide a change-in-terms

notice under § 1026.9(c)(2) disclosing the replacement index for a LIBOR index and any adjusted margin that is permitted under § 1026.55(b)(7)(i) or (ii), even if the margin is reduced. From April 1, 2022, through September 30, 2022, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by § 1026.55(b)(7)(i) or (ii).

* * * * *

Section 1026.20—Disclosure Requirements Regarding Post-Consummation Events

20(a) Refinancings

1. *Definition.* A refinancing is a new transaction requiring a complete new set of disclosures. Whether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the parties' contract and applicable law. The refinancing may involve the consolidation of several existing obligations, disbursement of new money to the consumer or on the consumer's behalf, or the rescheduling of payments under an existing obligation. In any form, the new obligation must completely replace the prior one.

i. Changes in the terms of an existing obligation, such as the deferral of individual installments, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation.

ii. A substitution of agreements that meets the refinancing definition will require new disclosures, even if the substitution does not substantially alter the prior credit terms.

2. *Exceptions.* A transaction is subject to § 1026.20(a) only if it meets the general definition of a refinancing. Section 1026.20(a)(1) through (5) lists 5 events that are not treated as refinancings, even if they are accomplished by cancellation of the old obligation and substitution of a new one.

3. *Variable-rate.* i. If a variable-rate feature was properly disclosed under the regulation, a rate change in accord with those disclosures is not a refinancing. For example, no new disclosures are required when the variable-rate feature is invoked on a renewable balloon-payment mortgage that was previously disclosed as a variable-rate transaction.

ii. Even if it is not accomplished by the cancellation of the old obligation and substitution of a new one, a new transaction subject to new disclosures results if the creditor either:

A. Increases the rate based on a variable-rate feature that was not previously disclosed; or

B. Adds a variable-rate feature to the obligation. A creditor does not add a variable-rate feature by changing the index of a variable-rate transaction to a comparable index, whether the change replaces the existing index or substitutes an index for one that no longer exists. For example, a creditor does not add a variable-rate feature by changing the index of a variable-rate transaction from the 1-month, 3-month, or 6-month U.S. Dollar LIBOR index to the spread-adjusted index based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR index respectively because the replacement index is a comparable index to the corresponding U.S. Dollar LIBOR index. *See* comment 20(a)–3.iv for factors to be used in determining whether a replacement index is comparable to a particular LIBOR index.

iii. If either of the events in paragraph 20(a)–3.ii.A or ii.B occurs in a transaction secured by a principal dwelling with a term longer than one year, the disclosures required under § 1026.19(b) also must be given at that time.

iv. The relevant factors to be considered in determining whether a replacement index is comparable to a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as whether the replacement index is a backward-looking rate (*e.g.,* historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. The types of relevant factors to establish if a replacement index could meet the ''comparable'' standard with respect to a particular LIBOR index using historical data or future expectations, include but are not limited to, whether: {1} the movements over time are comparable; {2} the consumers' payments using the replacement index compared to payments using the LIBOR index are comparable if there is sufficient data for this analysis; {3} the index levels are comparable; {4} the replacement index is publicly available; and {5} the replacement index is outside the control of the creditor.

4. *Unearned finance charge.* In a transaction involving precomputed finance charges, the creditor must include in the finance charge on the refinanced obligation any unearned portion of the original finance charge that is not rebated to the consumer or credited against the underlying obligation. For example, in a transaction with an add-on finance charge, a creditor advances new money to a consumer in a fashion that extinguishes the original obligation and replaces it with a new one. The creditor neither refunds the unearned finance charge on the original obligation to the consumer nor credits it to the remaining balance on the old obligation. Under these circumstances, the unearned finance charge must be included in the finance charge on the new obligation and reflected in the annual percentage rate disclosed on refinancing. Accrued but unpaid finance charges are included in the amount financed in the new obligation.

5. *Coverage.* Section 1026.20(a) applies only to refinancings undertaken by the original creditor or a holder or servicer of the original obligation. A ''refinancing'' by any other person is a new transaction under the regulation, not a refinancing under this section.

Paragraph 20(a)(1)

1. *Renewal.* This exception applies both to obligations with a single payment of principal and interest and to obligations with periodic payments of interest and a final payment of principal. In determining whether a new obligation replacing an old one is a renewal of the original terms or a refinancing, the creditor may consider it a renewal even if:

i. Accrued unpaid interest is added to the principal balance.

ii. Changes are made in the terms of renewal resulting from the factors listed in § 1026.17(c)(3).

iii. The principal at renewal is reduced by a curtailment of the obligation.

Paragraph 20(a)(2)

1. Annual *percentage rate reduction.* A reduction in the annual percentage rate with a corresponding change in the payment schedule is not a refinancing. If the annual percentage rate is subsequently increased (even though it remains below its original level) and the increase is effected in such a way that the old obligation is satisfied and replaced, new disclosures must then be made.

2. *Corresponding change.* A corresponding change in the payment schedule to implement a lower annual percentage rate would be a shortening of the maturity, or a reduction in the payment amount or the number of payments of an obligation. The exception in § 1026.20(a)(2) does not apply if the maturity is lengthened, or if the payment amount or number of payments is increased beyond that remaining on the existing transaction.

Paragraph 20(a)(3)

1. *Court agreements.* This exception includes, for example, agreements such as reaffirmations of debts discharged in bankruptcy, settlement agreements, and post-judgment agreements. (See the commentary to § 1026.2(a)(14) for a discussion of court-approved agreements that are not considered ''credit.'')

Paragraph 20(a)(4)

1. *Workout agreements.* A workout agreement is not a refinancing unless the annual percentage rate is increased or additional credit is advanced beyond amounts already accrued plus insurance premiums.

Paragraph 20(a)(5)

1. *Insurance renewal.* The renewal of optional insurance added to an existing credit transaction is not a refinancing, assuming that appropriate Truth in Lending disclosures were provided for the initial purchase of the insurance.

* * * * *

Section 1026.37—Content of Disclosures for Certain Mortgage Transactions (Loan Estimate)

* * * * *

37(j)(1) Index and Margin

1. *Index and margin.* The index disclosed pursuant to § 1026.37(j)(1) must be stated such that a consumer reasonably can identify

it. A common abbreviation or acronym of the name of the index may be disclosed in place of the proper name of the index, if it is a commonly used public method of identifying the index. For example, ''SOFR'' may be disclosed instead of Secured Overnight Financing Rate. The margin should be disclosed as a percentage. For example, if the contract determines the interest rate by adding 4.25 percentage points to the index, the margin should be disclosed as ''4.25%.''

* * * * *

Section 1026.40—Requirements for Home-Equity Plans

* * * * *

Paragraph 40(f)(3)(ii)

1. Replacing LIBOR. A creditor may use either the provision in § 1026.40(f)(3)(ii)(A) or (f)(3)(ii)(B) to replace a LIBOR index used under a plan so long as the applicable conditions are met for the provision used. Neither provision, however, excuses the creditor from noncompliance with contractual provisions. The following examples illustrate when a creditor may use the provisions in § 1026.40(f)(3)(ii)(A) or (B) to replace the LIBOR index used under a plan.

i. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a creditor may not replace an index unilaterally under a plan unless the original index becomes unavailable and provides that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the creditor may use § 1026.40(f)(3)(ii)(A) to replace the LIBOR index used under the plan so long as the conditions of that provision are met. Section 1026.40(f)(3)(ii)(B) provides that a creditor may replace the LIBOR index if, among other conditions, the replacement index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the spread-adjusted index based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. In this example, however, the creditor would be contractually prohibited from replacing the LIBOR index used under the plan unless the replacement index and replacement margin also will produce an annual percentage rate substantially similar to a rate that is in effect when the LIBOR index becomes unavailable.

ii. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a creditor may not replace an index unilaterally under a plan unless the original index becomes unavailable but does not require that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the creditor would be contractually prohibited from unilaterally replacing a LIBOR index used under the plan until it becomes unavailable. At that time, the creditor has the option of using § 1026.40(f)(3)(ii)(A) or (B) to replace the LIBOR index if the conditions of the applicable provision are met.

iii. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a creditor may change the terms of the contract (including the index) as permitted by law. In this case, if the creditor replaces a LIBOR index under a plan on or after April 1, 2022, but does not wait until the LIBOR index becomes unavailable to do so, the creditor may only use § 1026.40(f)(3)(ii)(B) to replace the LIBOR index if the conditions of that provision are met. In this case, the creditor may not use § 1026.40(f)(3)(ii)(A). If the creditor waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index, the creditor has the option of using § 1026.40(f)(3)(ii)(A) or (B) to replace the LIBOR index if the conditions of the applicable provision are met.

Paragraph 40(f)(3)(ii)(A)

1. *Substitution of index.* A creditor may change the index and margin used under the plan if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce a rate substantially similar to the rate in effect when the original index became unavailable.

2. *Replacing LIBOR.* For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

i. The Bureau has determined that effective April 1, 2022, the prime rate published in the Wall Street Journal has historical fluctuations that are substantially similar to those of the 1-month and 3-month U.S. Dollar LIBOR indices. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(A) that the prime rate and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the LIBOR index became unavailable. *See also* comment 40(f)(3)(ii)(A)–3.

ii. The Bureau has determined that effective April 1, 2022, the spread-adjusted indices based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month U.S. Dollar LIBOR indices respectively. In order to use this SOFR-based spread-adjusted index for consumer products as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(A) that the SOFR-based spread-adjusted index for consumer products and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the LIBOR index became unavailable. *See also* comment 40(f)(3)(ii)(A)–3.

iii. The relevant factors to be considered in determining whether a replacement index has historical fluctuations substantially similar to those of a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as whether the replacement index is a backward-looking rate (*e.g.,* historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. The types of relevant factors to establish if a replacement index would meet the ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index using historical data, include but are not limited to, whether: {1} The movements over time are substantially similar; and {2} the consumers' payments using the replacement index compared to payments using the LIBOR index are substantially similar if there is sufficient historical data for this analysis.

3. *Substantially similar rate when LIBOR becomes unavailable.* Under § 1026.40(f)(3)(ii)(A), the replacement index and replacement margin must produce an annual percentage rate substantially similar to the rate that was in effect based on the LIBOR index used under the plan when the LIBOR index became unavailable. For this comparison of the rates, a creditor generally must use the value of the replacement index and the LIBOR index on the day that LIBOR becomes unavailable. If the replacement index is not published on the day that the

LIBOR index becomes unavailable, the creditor generally must use the previous calendar day that both indices are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the spread-adjusted index based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The replacement index and replacement margin are not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. For purposes of § 1026.40(f)(3)(ii)(A), if a creditor uses the SOFR-based spread-adjusted index recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the condition in § 1026.40(f)(3)(ii)(A) that the replacement index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the LIBOR index became unavailable. The following example illustrates this comment.

i. Assume that the 1-month U.S. Dollar LIBOR index used under a plan becomes unavailable on June 30, 2023, and on that day the LIBOR index value is 2%, the margin is 10%, and the annual percentage rate is 12%. Also, assume that a creditor has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on June 30, 2023. The creditor would satisfy the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12% on June 30, 2023.) Thus, if the creditor provides a change-in-terms notice under § 1026.9(c)(1) on July 1, 2023, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on July 17, 2023, the creditor satisfies the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable. This is true even if the prime index value changes after June 30, 2023, and the annual percentage rate calculated using the prime index value and 7% margin on July 17, 2022, is not substantially similar to the rate calculated using the LIBOR index value on June 30, 2023.

Paragraph 40(f)(3)(ii)(B)

1. *Replacing LIBOR.* For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through the relevant date. If the Bureau has made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the date indicated in that determination. If the Bureau has not made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the later of April 1, 2022, or the date no more than 30 days before the creditor makes a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar.

i. The Bureau has determined that effective April 1, 2022, the prime rate published in the Wall Street Journal has historical fluctuations that are substantially similar to those of the 1-month and 3-month U.S. Dollar LIBOR indices. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(B) that the prime rate index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. *See also* comments 40(f)(3)(ii)(B)–2 and –3.

ii. The Bureau has determined that effective April 1, 2022, the spread-adjusted indices based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month U.S. Dollar LIBOR indices respectively. In order to use this SOFR-based spread-adjusted index for consumer products as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(B) that the SOFR-based spread-adjusted index for consumer products and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Because of the exception in § 1026.40(f)(3)(ii)(B), the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. *See also* comments 40(f)(3)(ii)(B)–2 and –3.

iii. The relevant factors to be considered in determining whether a replacement index has historical fluctuations substantial similar to those of a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as whether the replacement index is a backward-looking rate (*e.g.,* historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. The types of relevant factors to establish if a replacement index would meet the ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index using historical data, include but are not limited to, whether: {1} The movements over time are substantially similar; and {2} the consumers' payments using the replacement index compared to payments using the LIBOR index are substantially similar if there is sufficient historical data for this analysis.

2. *Using index values on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.* Under § 1026.40(f)(3)(ii)(B), if the replacement index was published on October 18, 2021, the replacement index value in effect on October 18, 2021, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the creditor provides the change-in-terms notice disclosing the replacement index for the variable rate. The following example illustrates this comment.

i. Assume a variable rate used under the plan that is based on the 1-month U.S. Dollar LIBOR index and assume that LIBOR becomes unavailable after June 30, 2023. On October 18, 2021, the LIBOR index value is 2%, the margin on that day is 10% and the annual percentage rate using that index value and margin is 12%. Assume on January 1, 2022, a creditor provides a change-in-terms notice under § 1026.9(c)(1) disclosing a new margin of 12% for the variable rate pursuant to a written agreement under § 1026.40(f)(3)(iii), and this change in the margin becomes effective on January 1, 2022, pursuant to § 1026.9(c)(1). Assume that there are no more changes in the margin that is used in calculating the variable rate prior to April 1, 2022, the date on which the creditor provides a change-in-terms notice under § 1026.9(c)(1), disclosing the replacement

index and replacement margin for the variable rate that will be effective on April 17, 2022. In this case, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is 12%. Assume that the creditor has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on October 18, 2021. A replacement margin of 9% is permissible under § 1026.40(f)(3)(ii)(B) because that replacement margin combined with the prime index value of 5% on October 18, 2021, will produce an annual percentage rate of 14%, which is substantially similar to the 14% annual percentage rate calculated using the LIBOR index value in effect on October 18, 2021, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan (which is 12%).

3. *Substantially similar rates using index values on October 18, 2021.* Under § 1026.40(f)(3)(ii)(B), if the replacement index was published on October 18, 2021, the replacement index value in effect on October 18, 2021, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The replacement index and replacement margin are not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. For purposes of § 1026.40(f)(3)(ii)(B), if a creditor uses the SOFR-based spread-adjusted index recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the condition in § 1026.40(f)(3)(ii)(B) that the replacement index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate calculated using the LIBOR index. The following example illustrates this comment.

i. Assume that the 1-month U.S. Dollar LIBOR index used under the plan has a value of 2% on October 18, 2021, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is 10%, and the annual percentage rate based on that LIBOR index value and that margin is 12%. Also, assume that the creditor has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on October 18, 2021. A creditor would satisfy the requirement to use a replacement index value in effect on October 18, 2021, and replacement margin that will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12%.) Thus, if the creditor provides a change-in-terms notice under § 1026.9(c)(1) on April 1, 2022, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on April 17, 2022, the creditor satisfies the requirement to use a replacement index value in effect on October 18, 2021, and replacement margin that will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This is true even if the prime index value or the LIBOR index value changes after October 18, 2021, and the annual percentage rate calculated using the prime index value and 7% margin on April 17, 2022, is not substantially similar to the rate calculated using the LIBOR index value on October 18, 2021, or substantially similar to the rate calculated using the LIBOR index value on April 17, 2022.

* * * * *

Section 1026.55—Limitations on Increasing Annual Percentage Rates, Fees, and Charges

* * * * *

55(b)(2) Variable Rate Exception

1. *Increases due to increase in index.* Section 1026.55(b)(2) provides that an annual percentage rate that varies according to an index that is not under the card issuer's control and is available to the general public may be increased due to an increase in the index. This section does not permit a card issuer to increase the rate by changing the method used to determine a rate that varies with an index (such as by increasing the margin), even if that change will not result in an immediate increase. However, from time to time, a card issuer may change the day on which index values are measured to determine changes to the rate.

2. *Index not under card issuer's control.* A card issuer may increase a variable annual percentage rate pursuant to § 1026.55(b)(2) only if the increase is based on an index or indices outside the card issuer's control. For purposes of § 1026.55(b)(2), an index is under the card issuer's control if:

i. The index is the card issuer's own prime rate or cost of funds. A card issuer is permitted, however, to use a published prime rate, such as that in the Wall Street Journal, even if the card issuer's own prime rate is one of several rates used to establish the published rate.

ii. The variable rate is subject to a fixed minimum rate or similar requirement that does not permit the variable rate to decrease consistent with reductions in the index. A card issuer is permitted, however, to establish a fixed maximum rate that does not permit the variable rate to increase consistent with increases in an index. For example, assume that, under the terms of an account, a variable rate will be adjusted monthly by adding a margin of 5 percentage points to a publicly-available index. When the account is opened, the index is 10% and therefore the variable rate is 15%. If the terms of the account provide that the variable rate will not decrease below 15% even if the index decreases below 10%, the card issuer cannot increase that rate pursuant to § 1026.55(b)(2). However, § 1026.55(b)(2) does not prohibit the card issuer from providing in the terms of the account that the variable rate will not increase above a certain amount (such as 20%).

iii. The variable rate can be calculated based on any index value during a period of time (such as the 90 days preceding the last day of a billing cycle). A card issuer is permitted, however, to provide in the terms of the account that the variable rate will be calculated based on the average index value during a specified period. In the alternative, the card issuer is permitted to provide in the terms of the account that the variable rate will be calculated based on the index value on a specific day (such as the last day of a billing cycle). For example, assume that the terms of an account provide that a variable rate will be adjusted at the beginning of each quarter by adding a margin of 7 percentage points to a publicly-available index. At account opening at the beginning of the first quarter, the variable rate is 17% (based on an index value of 10%). During the first quarter, the index varies between 9.8% and 10.5% with an average value of 10.1%. On the last day of the first quarter, the index value is 10.2%. At the beginning of the second quarter, § 1026.55(b)(2) does not permit the card issuer to increase the variable rate to 17.5% based on the first quarter's maximum index value of 10.5%. However, if the terms of the account provide that the variable rate will be calculated based on the average index value during the prior quarter, § 1026.55(b)(2) permits the card issuer to increase the variable rate to 17.1% (based on the average index value of 10.1% during the first quarter). In the alternative, if the terms of the account provide that the variable rate will be calculated based on the index value on the last day of the prior quarter, § 1026.55(b)(2) permits the card issuer to increase the variable rate to 17.2% (based on the index value of 10.2% on the last day of the first quarter).

3. *Publicly available.* The index or indices must be available to the public. A publicly-available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify the annual percentage rate applied to the account.

4. *Changing a non-variable rate to a variable rate.* Section 1026.55 generally prohibits a card issuer from changing a non-variable annual percentage rate to a variable annual percentage rate because such a change can result in an increase. However, a card issuer may change a non-variable rate to a variable rate to the extent permitted by one of the exceptions in § 1026.55(b). For example, § 1026.55(b)(1) permits a card issuer to change a non-variable rate to a variable rate upon expiration of a specified period of time. Similarly, following the first year after the account is opened,

§ 1026.55(b)(3) permits a card issuer to change a non-variable rate to a variable rate with respect to new transactions (after complying with the notice requirements in § 1026.9(b), (c), or (g)).

5. *Changing a variable rate to a non-variable rate.* Nothing in § 1026.55 prohibits a card issuer from changing a variable annual percentage rate to an equal or lower non-variable rate. Whether the non-variable rate is equal to or lower than the variable rate is determined at the time the card issuer provides the notice required by § 1026.9(c). For example, assume that on March 1 a variable annual percentage rate that is currently 15% applies to a balance of $2,000 and the card issuer sends a notice pursuant to § 1026.9(c) informing the consumer that the variable rate will be converted to a non-variable rate of 14% effective April 15. On April 15, the card issuer may apply the 14% non-variable rate to the $2,000 balance and to new transactions even if the variable rate on March 2 or a later date was less than 14%.

* * * * *

55(b)(7) Index Replacement and Margin Change Exception

1. *Replacing LIBOR.* A card issuer may use either the provision in § 1026.55(b)(7)(i) or (ii) to replace a LIBOR index used under the plan so long as the applicable conditions are met for the provision used. Neither provision, however, excuses the card issuer from noncompliance with contractual provisions. The following examples illustrate when a card issuer may use the provisions in § 1026.55(b)(7)(i) or (ii) to replace a LIBOR index on the plan.

i. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a card issuer may not replace an index unilaterally under a plan unless the original index becomes unavailable and provides that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. The card issuer may use § 1026.55(b)(7)(i) to replace the LIBOR index used under the plan so long as the conditions of that provision are met. Section 1026.55(b)(7)(ii) provides that a card issuer may replace the LIBOR index if, among other conditions, the replacement index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the spread-adjusted index based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. In this example, however, the card issuer would be contractually prohibited from replacing the LIBOR index used under the plan unless the replacement index and replacement margin also will produce an annual percentage rate substantially similar to a rate that is in effect when the LIBOR index becomes unavailable.

ii. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a card issuer may not replace an index unilaterally under a plan unless the original index becomes unavailable but does not require that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the card issuer would be contractually prohibited from unilaterally replacing the LIBOR index used under the plan until it becomes unavailable. At that time, the card issuer has the option of using § 1026.55(b)(7)(i) or (ii) to replace the LIBOR index used under the plan if the conditions of the applicable provision are met.

iii. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a card issuer may change the terms of the contract (including the index) as permitted by law. In this case, if the card issuer replaces the LIBOR index used under the plan on or after April 1, 2022, but does not wait until the LIBOR index becomes unavailable to do so, the card issuer may only use § 1026.55(b)(7)(ii) to replace the LIBOR index if the conditions of that provision are met. In that case, the card issuer may not use § 1026.55(b)(7)(i). If the card issuer waits until the LIBOR index used under the plan becomes unavailable to replace LIBOR, the card issuer has the option of using § 1026.55(b)(7)(i) or (ii) to replace the LIBOR index if the conditions of the applicable provisions are met.

Paragraph 55(b)(7)(i)

1. *Replacing LIBOR.* For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

i. The Bureau has determined that effective April 1, 2022, the prime rate published in the Wall Street Journal has historical fluctuations that are substantially similar to those of the 1-month and 3-month U.S. Dollar LIBOR indices. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(i) that the prime rate and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the LIBOR index became unavailable. *See also* comment 55(b)(7)(i)–2.

ii. The Bureau has determined that effective April 1, 2022, the spread-adjusted indices based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month U.S. Dollar LIBOR indices respectively. In order to use this SOFR-based spread-adjusted index for consumer products as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(i) that the SOFR-based spread-adjusted index for consumer products replacement margin will produce a rate substantially similar to the rate that was in effect at the time the LIBOR index became unavailable. *See also* comment 55(b)(7)(i)–2.

iii. The relevant factors to be considered in determining whether a replacement index has historical fluctuations substantial similar to those of a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as whether the replacement index is a backward-looking rate (*e.g.,* historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. The types of relevant factors to establish if a replacement index would meet the ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index using historical data, include but are not limited to, whether: {1} The movements over time are substantially similar; and {2} the consumers' payments using the replacement index compared to payments using the LIBOR index are substantially similar if there is sufficient historical data for this analysis.

2. *Substantially similar rate when LIBOR becomes unavailable.* Under § 1026.55(b)(7)(i), the replacement index and replacement margin must produce an annual percentage rate substantially similar to the rate that was in effect at the time the LIBOR index used under the plan became unavailable. For this comparison of the rates, a card issuer generally must use the value of the replacement index and the LIBOR index on the day that LIBOR becomes unavailable. If the replacement index is not published on the day that the LIBOR index becomes unavailable, the card issuer generally must use the previous calendar day that both indices are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that, if the replacement index is the SOFR-based spread-adjusted index recommended by the Alternative Reference

Rates Committee for consumer products to replace the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The replacement index and replacement margin are not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. For purposes of § 1026.55(b)(7)(i), if a card issuer uses the SOFR-based spread-adjusted index recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan the card issuer will be deemed to be in compliance with the condition in § 1026.55(b)(7)(i) that the replacement index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the LIBOR index became unavailable. The following example illustrates this comment.

i. Assume that the 1-month U.S. Dollar LIBOR index used under the plan becomes unavailable on June 30, 2023, and on that day the LIBOR value is 2%, the margin is 10%, and the annual percentage rate is 12%. Also, assume that a card issuer has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on June 30, 2023. The card issuer would satisfy the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12% on June 30, 2023.) Thus, if the card issuer provides a change-in-terms notice under § 1026.9(c)(2) on July 1, 2023, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on August 16, 2023, the card issuer satisfies the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable. This is true even if the prime index value changes after June 30, 2023, and the annual percentage rate calculated using the prime index value and 7% margin on August 16, 2023, is not substantially similar to the rate calculated using the LIBOR index value on June 30, 2023.

Paragraph 55(b)(7)(ii)

1. *Replacing LIBOR.* For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through the relevant date. If the Bureau has made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the date indicated in that determination. If the Bureau has not made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the later of April 1, 2022, or the date no more than 30 days before the card issuer makes a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar.

i. The Bureau has determined that effective April 1, 2022, the prime rate published in the Wall Street Journal has historical fluctuations that are substantially similar to those of the 1-month and 3-month U.S. Dollar LIBOR indices. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(ii) that the prime rate index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. *See also* comments 55(b)(7)(ii)–2 and –3.

ii. The Bureau has determined that effective April 1, 2022, the spread-adjusted indices based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month U.S. Dollar LIBOR indices respectively. In order to use this SOFR-based spread-adjusted index for consumer products as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(ii) that the SOFR-based spread-adjusted index for consumer products and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Because of the exception in § 1026.55(b)(7)(ii), the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the SOFR-based spread-adjusted index for consumer products, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. *See also* comments 55(b)(7)(ii)–2 and –3.

iii. The relevant factors to be considered in determining whether a replacement index has historical fluctuations substantial similar to those of a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as whether the replacement index is a backward-looking rate (*e.g.,* historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. The types of relevant factors to establish if a replacement index would meet the ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index using historical data, include but are not limited to, whether: {1} The movements over time are substantially similar; and {2} the consumers' payments using the replacement index compared to payments using the LIBOR index are substantially similar if there is sufficient historical data for this analysis.

2. *Using index values on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.* Under § 1026.55(b)(7)(ii), if the replacement index was published on October 18, 2021, the replacement index value in effect on October 18, 2021, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the card issuer provides the change-in-terms notice disclosing the replacement index for the variable rate. The following examples illustrate how to determine the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

i. Assume a variable rate used under the plan that is based on the 1-month U.S. Dollar LIBOR index, and assume that LIBOR becomes unavailable after June 30, 2023. On October 18, 2021, the LIBOR index value is 2%, the margin on that day is 10% and the annual percentage rate using that index value and margin is 12%. Assume that on November 16, 2021, pursuant to § 1026.55(b)(3), a card issuer provides a change-in-terms notice under § 1026.9(c)(2) disclosing a new margin of 12% for the variable rate that will apply to new transactions after November 30, 2021, and this change in the margin becomes effective on January 1, 2022. The margin for the variable rate applicable to the transactions that occurred on or prior to November 30, 2021, remains at 10%. Assume that there are no more changes in the margin used on the variable rate that applied to transactions that occurred after November 30, 2021, or to the margin used on the variable rate that applied to transactions that occurred on or prior to November 30, 2021, prior to when the card issuer provides a change-in-terms notice on April 1, 2022, disclosing the replacement

index and replacement margins for both variable rates that will be effective on May 17, 2022. In this case, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for transactions that occurred on or prior to November 30, 2021, is 10%. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for transactions that occurred after November 30, 2021, is 12%. Assume that the card issuer has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on October 18, 2021. A replacement margin of 7% is permissible under § 1026.55(b)(7)(ii) for transactions that occurred on or prior to November 30, 2021, because that replacement margin combined with the prime index value of 5% on October 18, 2021, will produce an annual percentage rate of 12%, which is substantially similar to the 12% annual percentage rate calculated using the LIBOR index value in effect on October 18, 2021, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for that balance (which is 10%). A replacement margin of 9% is permissible under § 1026.55(b)(7)(ii) for transactions that occurred after November 30, 2021, because that replacement margin combined with the prime index value of 5% on October 18, 2021, will produce an annual percentage rate of 14%, which is substantially similar to the 14% annual percentage rate calculated using the LIBOR index value in effect on October 18, 2021, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for transactions that occurred after November 30, 2021, (which is 12%).

ii. Assume a variable rate used under the plan that is based on the 1-month U.S. Dollar LIBOR index, and assume that LIBOR becomes unavailable after June 30, 2023. On October 18, 2021, the LIBOR index value is 2%, the margin on that day is 10% and the annual percentage rate using that index value and margin is 12%. Assume that on November 16, 2021, pursuant to § 1026.55(b)(4), a card issuer provides a penalty rate notice under § 1026.9(g) increasing the margin for the variable rate to 20% that will apply to both outstanding balances and new transactions effective January 1, 2022, because the consumer was more than 60 days late in making a minimum payment. Assume that there are no more changes in the margin used on the variable rate for either the outstanding balance or new transactions prior to April 1, 2022, the date on which the card issuer provides a change-in-terms notice under § 1026.9(c)(2) disclosing the replacement index and replacement margin for the variable rate that will be effective on May 17, 2022. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for the outstanding balance and new transactions is 12%. Assume that the card issuer has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on October 18, 2021. A replacement margin of 17% is permissible under § 1026.55(b)(7)(ii) for the outstanding balance and new transactions because that replacement margin combined with the prime index value of 5% on October 18, 2021, will produce an annual percentage rate of 22%, which is substantially similar to the 22% annual percentage rate calculated using the LIBOR index value in effect on October 18, 2021, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for the outstanding balance and new transactions (which is 20%).

3. *Substantially similar rate using index values on October 18, 2021.* Under § 1026.55(b)(7)(ii), if the replacement index was published on October 18, 2021, the replacement index value in effect on October 18, 2021, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. A card issuer is not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. For purposes of § 1026.55(b)(7)(ii), if a card issuer uses the SOFR-based spread-adjusted index recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the card issuer will be deemed to be in compliance with the condition in § 1026.55(b)(7)(ii) that the replacement index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate calculated using the LIBOR index. The following example illustrates this comment.

i. Assume that the 1-month U.S. Dollar LIBOR index used under the plan has a value of 2% on October 18, 2021, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is 10%, and the annual percentage rate based on that LIBOR index value and that margin is 12%. Also, assume that the card issuer has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on October 18, 2021. A card issuer would satisfy the requirement to use a replacement index value in effect on October 18, 2021, and replacement margin that will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12%.) Thus, if the card issuer provides a change-in-terms notice under § 1026.9(c)(2) on April 1, 2022, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on May 17, 2022, the card issuer satisfies the requirement to use a replacement index value in effect on October 18, 2021, and replacement margin that will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This is true even if the prime index value or the LIBOR value change after October 18, 2021, and the annual percentage rate calculated using the prime index value and 7% margin on May 17, 2022, is not substantially similar to the rate calculated using the LIBOR index value on October 18, 2021, or substantially similar to the rate calculated using the LIBOR index value on May 17, 2022.

* * * * *

Section 1026.59—Reevaluation of Rate Increases

* * * * *

59(d) Factors

1. *Change in factors.* A creditor that complies with § 1026.59(a) by reviewing the factors it currently considers in determining the annual percentage rates applicable to similar new credit card accounts may change those factors from time to time. When a creditor changes the factors it considers in determining the annual percentage rates applicable to similar new credit card accounts from time to time, it may comply with § 1026.59(a) by reviewing the set of factors it considered immediately prior to the change in factors for a brief transition period, or may consider the new factors. For example, a creditor changes the factors it uses to determine the rates applicable to similar new credit card accounts on January 1, 2012. The creditor reviews the rates applicable to its existing accounts that have been subject to a rate increase pursuant to § 1026.59(a) on January 25, 2012. The creditor complies with § 1026.59(a) by reviewing, at its option, either the factors that it considered on December 31, 2011 when determining the rates applicable to similar new credit card accounts or the factors that it considers as of January 25, 2012. For purposes of compliance with § 1026.59(d), a transition period of 60 days from the change of factors constitutes a brief transition period.

2. *Comparison of existing account to factors used for similar new accounts.* Under § 1026.59(a), if a card issuer evaluates an existing account using the same factors that it considers in determining the rates applicable to similar new accounts, the review of factors need not result in existing accounts being subject to exactly the same rates and rate structure as a card issuer imposes on similar new accounts. For example, a card issuer may offer variable rates on similar new accounts that are computed by adding a margin that depends on various factors to the value of a SOFR index. The account that the card issuer is required to review pursuant to § 1026.59(a)

may have variable rates that were determined by adding a different margin, depending on different factors, to a published prime index. In performing the review required by § 1026.59(a), the card issuer may review the factors it uses to determine the rates applicable to similar new accounts. If a rate reduction is required, however, the card issuer need not base the variable rate for the existing account on the SOFR index but may continue to use the published prime index. Section 1026.59(a) requires, however, that the rate on the existing account after the reduction, as determined by adding the published prime index and margin, be comparable to the rate, as determined by adding the margin and the SOFR index, charged on a new account for which the factors are comparable.

3. *Similar new credit card accounts.* A card issuer complying with § 1026.59(d)(1)(ii) is required to consider the factors that the card issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts under an open-end (not home-secured) consumer credit plan. For example, a card issuer may review different factors in determining the annual percentage rate that applies to credit card plans for which the consumer pays an annual fee and receives rewards points than it reviews in determining the rates for credit card plans with no annual fee and no rewards points. Similarly, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards than it reviews in determining the rates applicable to credit cards that can be used at a wider variety of merchants. In addition, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards usable only at Merchant A than it may review for private label credit cards usable only at Merchant B. However, § 1026.59(d)(1)(ii) requires a card issuer to review the factors it considers when determining the rates for new credit card accounts with similar features that are offered for similar purposes.

4. *No similar new credit card accounts.* In some circumstances, a card issuer that complies with § 1026.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may not be able to identify a class of new accounts that are similar to the existing accounts on which a rate increase has been imposed. For example, consumers may have existing credit card accounts under an open-end (not home-secured) consumer credit plan but the card issuer may no longer offer a product to new consumers with similar characteristics, such as the availability of rewards, size of credit line, or other features. Similarly, some consumers' accounts may have been closed and therefore cannot be used for new transactions, while all new accounts can be used for new transactions. In those circumstances, § 1026.59 requires that the card issuer nonetheless perform a review of the rate increase on the existing customers' accounts. A card issuer does not comply with § 1026.59 by maintaining an increased rate without performing such an evaluation. In such circumstances, § 1026.59(d)(1)(ii) requires that the card issuer compare the existing accounts to the most closely comparable new accounts that it offers.

5. *Consideration of consumer's conduct on existing account.* A card issuer that complies with § 1026.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may consider the consumer's payment or other account behavior on the existing account only to the same extent and in the same manner that the issuer considers such information when one of its current cardholders applies for a new account with the card issuer. For example, a card issuer might obtain consumer reports for all of its applicants. The consumer reports contain certain information regarding the applicant's past performance on existing credit card accounts. However, the card issuer may have additional information about an existing cardholder's payment history or account usage that does not appear in the consumer report and that, accordingly, it would not generally have for all new applicants. For example, a consumer may have made a payment that is five days late on his or her account with the card issuer, but this information does not appear on the consumer report. The card issuer may consider this additional information in performing its review under § 1026.59(a), but only to the extent and in the manner that it considers such information if a current cardholder applies for a new account with the issuer.

6. *Multiple rate increases between January 1, 2009 and February 21, 2010.* i. *General.* Section 1026.59(d)(2) applies if an issuer increased the rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan between January 1, 2009 and February 21, 2010, and the increase was not based solely upon factors specific to the consumer. In some cases, a credit card account may have been subject to multiple rate increases during the period from January 1, 2009 to February 21, 2010. Some such rate increases may have been based solely upon factors specific to the consumer, while others may have been based on factors not specific to the consumer, such as the issuer's cost of funds or market conditions. In such circumstances, when conducting the first two reviews required under § 1026.59, the card issuer may separately review: {i} Rate increases imposed based on factors not specific to the consumer, using the factors described in § 1026.59(d)(1)(ii) (as required by § 1026.59(d)(2)); and {ii} rate increases imposed based on consumer-specific factors, using the factors described in § 1026.59(d)(1)(i). If the review of factors described in § 1026.59(d)(1)(i) indicates that it is appropriate to continue to apply a penalty or other increased rate to the account as a result of the consumer's payment history or other factors specific to the consumer, § 1026.59 permits the card issuer to continue to impose the penalty or other increased rate, even if the review of the factors described in § 1026.59(d)(1)(ii) would otherwise require a rate decrease.

i. Example. Assume a credit card account was subject to a rate of 15% on all transactions as of January 1, 2009. On May 1, 2009, the issuer increased the rate on existing balances and new transactions to 18%, based upon market conditions or other factors not specific to the consumer or the consumer's account. Subsequently, on September 1, 2009, based on a payment that was received five days after the due date, the issuer increased the applicable rate on existing balances and new transactions from 18% to a penalty rate of 25%. When conducting the first review required under § 1026.59, the card issuer reviews the rate increase from 15% to 18% using the factors described in § 1026.59(d)(1)(ii) (as required by § 1026.59(d)(2)), and separately but concurrently reviews the rate increase from 18% to 25% using the factors described in paragraph § 1026.59(d)(1)(i). The review of the rate increase from 15% to 18% based upon the factors described in § 1026.59(d)(1)(ii) indicates that a similarly situated new consumer would receive a rate of 17%. The review of the rate increase from 18% to 25% based upon the factors described in § 1026.59(d)(1)(i) indicates that it is appropriate to continue to apply the 25% penalty rate based upon the consumer's late payment. Section 1026.59 permits the rate on the account to remain at 25%.

* * * * *

59(f) Termination of Obligation To Review Factors

1. *Revocation of temporary rates.* i. *In general.* If an annual percentage rate is increased due to revocation of a temporary rate, § 1026.59(a) requires that the card issuer periodically review the increased rate. In contrast, if the rate increase results from the expiration of a temporary rate previously disclosed in accordance with § 1026.9(c)(2)(v)(B), the review requirements in § 1026.59(a) do not apply. If a temporary rate is revoked such that the requirements of § 1026.59(a) apply, § 1026.59(f) permits an issuer to terminate the review of the rate increase if and when the applicable rate is the same as the rate that would have applied if the increase had not occurred.

ii. *Examples.* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. The card issuer offers the consumer a 10% rate on purchases made between February 1, 2012, and August 1, 2013, and discloses pursuant to § 1026.9(c)(2)(v)(B) that on August 1, 2013, the rate on purchases will revert to the original 15% rate. The consumer makes a payment that is five days late in July 2012.

A. Upon providing 45 days' advance notice and to the extent permitted under § 1026.55, the card issuer increases the rate applicable to new purchases to 15%, effective on September 1, 2012. The card issuer must review that rate increase under § 1026.59(a) at least once each six months during the period from September 1, 2012, to August 1, 2013, unless and until the card issuer reduces the rate to 10%. The card issuer performs reviews of the rate increase on January 1, 2013, and July 1, 2013. Based on those reviews, the rate applicable to

purchases remains at 15%. Beginning on August 1, 2013, the card issuer is not required to continue periodically reviewing the rate increase, because if the temporary rate had expired in accordance with its previously disclosed terms, the 15% rate would have applied to purchase balances as of August 1, 2013, even if the rate increase had not occurred on September 1, 2012.

B. Same facts as above except that the review conducted on July 1, 2013, indicates that a reduction to the original temporary rate of 10% is appropriate. Section 1026.59(a)(2)(i) requires that the rate be reduced no later than 45 days after completion of the review, or no later than August 15, 2013. Because the temporary rate would have expired prior to the date on which the rate decrease is required to take effect, the card issuer may, at its option, reduce the rate to 10% for any portion of the period from July 1, 2013, to August 1, 2013, or may continue to impose the 15% rate for that entire period. The card issuer is not required to conduct further reviews of the 15% rate on purchases.

C. Same facts as above except that on September 1, 2012, the card issuer increases the rate applicable to new purchases to the penalty rate on the consumer's account, which is 25%. The card issuer conducts reviews of the increased rate in accordance with § 1026.59 on January 1, 2013, and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 25%. The card issuer's obligation to review the rate increase continues to apply after August 1, 2013, because the 25% penalty rate exceeds the 15% rate that would have applied if the temporary rate expired in accordance with its previously disclosed terms. The card issuer's obligation to review the rate terminates if and when the annual percentage rate applicable to purchases is reduced to the 15% rate.

2. *Example—relationship to § 1026.59(a).* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. Upon providing 45 days' advance notice and to the extent permitted under § 1026.55, the card issuer increases the rate applicable to new purchases to 18%, effective on September 1, 2012. The card issuer conducts reviews of the increased rate in accordance with § 1026.59 on January 1, 2013, and July 1, 2013, based on the factors described in § 1026.59(d)(1)(ii). Based on the January 1, 2013, review, the rate applicable to purchases remains at 18%. In the review conducted on July 1, 2013, the card issuer determines that, based on the relevant factors, the rate it would offer on a comparable new account would be 14%. Consistent with § 1026.59(f), § 1026.59(a) requires that the card issuer reduce the rate on the existing account to the 15% rate that was in effect prior to the September 1, 2012 rate increase.

3. *Transition from LIBOR.* i. *General.* Effective April 1, 2022, in the case where the rate applicable immediately prior to the increase was a variable rate with a formula based on a LIBOR index, a card issuer may terminate the obligation to review if the card issuer reduces the annual percentage rate to a rate determined by a replacement formula that is derived from a replacement index value on October 18, 2021, plus replacement margin that is equal to the annual percentage rate of the LIBOR index value on October 18, 2021, plus the margin used to calculate the rate immediately prior to the increase (previous formula).

ii. *Examples.* A. Assume that on April 1, 2022, the previous formula is the 1-month U.S. Dollar LIBOR index plus a margin of 10% equal to a 12% annual percentage rate. In this case, the LIBOR index value is 2%. The card issuer selects the prime index published in the Wall Street Journal as the replacement index. The replacement formula used to derive the rate at which the card issuer may terminate its obligation to review factors must be set at a replacement index plus replacement margin that equals 12%. If the prime index is 4% on October 18, 2021, the replacement margin must be 8% in the replacement formula. The replacement formula for purposes of determining when the card issuer can terminate the obligation to review factors is the prime index plus 8%.

B. Assume that on April 1, 2022, the account was not subject to § 1026.59 and the annual percentage rate was the 1-month U.S. Dollar LIBOR index plus a margin of 10% equal to 12%. On May 1, 2022, the card issuer raises the annual percentage rate to the 1-month U.S. Dollar LIBOR index plus a margin of 12% equal to 14%. On June 1, 2022, the card issuer transitions the account from the LIBOR index in accordance with § 1026.55(b)(7)(ii). The card issuer selects the prime index published in the Wall Street Journal as the replacement index with a value on October 18, 2021, of 4%. The replacement formula used to derive the rate at which the card issuer may terminate its obligation to review factors must be set at the value of a replacement index on October 18, 2021, plus replacement margin that equals 12%. In this example, the replacement formula is the prime index plus 8%.

4. *Selecting a replacement index.* In selecting a replacement index for purposes of § 1026.59(f)(3), the card issuer must meet the conditions for selecting a replacement index that are described in § 1026.55(b)(7)(ii) and comment 55(b)(7)(ii)-1. For example, a card issuer may select a replacement index that is not newly established for purposes of § 1026.59(f)(3), so long as the replacement index has historical fluctuations that are substantially similar to those of the LIBOR index used in the previous formula, considering the historical fluctuations up through the relevant date. If the Bureau has made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the date indicated in that determination. If the Bureau has not made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the later of April 1, 2022, or the date no more than 30 days before the card issuer makes a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar. The Bureau has determined that effective April 1, 2022, the prime rate published in the Wall Street Journal has historical fluctuations that are substantially similar to those of the 1-month and 3-month U.S. Dollar LIBOR indices. The Bureau also has determined that effective April 1, 2022, the spread-adjusted indices based on SOFR recommended by the Alternative Reference Rates Committee for consumer products to replace the 1-month, 3-month, or 6-month U.S. Dollar LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, or 6-month U.S. Dollar LIBOR indices respectively. *See* comment 55(b)(7)(ii)-1. Also, for purposes of § 1026.59(f)(3), a card issuer may select a replacement index that is newly established as described in § 1026.55(b)(7)(ii).

* * * * *

59(h) Exceptions

1. *Transition from LIBOR.* The exception to the requirements of this section does not apply to rate increases already subject to § 1026.59 prior to the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a different index in setting a variable rate where the change from the use of a LIBOR index to a different index occurred in accordance with § 1026.55(b)(7)(i) or (ii).

* * * * *

Rohit Chopra,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2021–25825 Filed 12–7–21; 8:45 am]

BILLING CODE 4810–AM–P

FEDERAL REGISTER

Vol. 86 Wednesday,
No. 233 December 8, 2021

Part III

Securities and Exchange Commission

17 CFR Part 240
Reporting of Securities Loans; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–93613; File No. S7–18–21]

RIN 3235–AN01

Reporting of Securities Loans

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is proposing a rule to increase the transparency and efficiency of the securities lending market by requiring any person that loans a security on behalf of itself or another person to report the material terms of those securities lending transactions and related information regarding the securities the person has on loan and available to loan to a registered national securities association (''RNSA''). The proposed rule would also require that the RNSA make available to the public certain information concerning each transaction and aggregate information on securities on loan and available to loan.

DATES: Comments should be received on or before January 7, 2022.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*https://www.sec.gov/regulatory-actions/how-to-submit-comments*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number S7–18–21 on the subject line.

Paper Comments

• Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–18–21. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Theresa Hajost, Special Counsel, Samuel Litz, Special Counsel, John Guidroz, Branch Chief, Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, at (202) 551–5777.

SUPPLEMENTARY INFORMATION: The Commission is proposing for public comment 17 CFR 240.10c–1 (''proposed Rule 10c–1'' or ''proposed Rule''), under the Securities Exchange Act of 1934 (''Exchange Act'') [15 U.S.C. 78a *et seq.*].

Proposed Rule 10c–1 would apply to any person that loans a security (''securities lending transactions'') on behalf of itself or another person. It would require such persons to report the specified material terms for each securities lending transaction and related information to an RNSA. Proposed Rule 10c–1 would also require that the RNSA disseminate certain information concerning each securities lending transaction to the public and certain aggregate loan information.

Table of Contents

I. Executive Summary
A. Introduction
1. Market Background
2. Intended Objectives
II. Background
A. Market Structure
B. Transaction Reporting
1. Data Available From Private Vendors
III. Discussion of Proposed Rule
A. Reporting
1. Obligation To Provide Information to an RNSA
(a) Obligation of Lender To Provide 10c–1 Information
(b) Providing Information to an RNSA
2. Persons Responsible for Providing Information to an RNSA
(a) Lending Agent Provides Information to an RNSA
(b) Reporting Agent Provides Information to an RNSA
(c) Beneficial Owner Provides Information to an RNSA
(d) Examples of Who Is Responsible for Providing Information to an RNSA
B. Information To Be Provided to an RNSA
1. Data Elements Provided to an RNSA
(a) Initial Loan-Level Data Elements
(b) Loan Modification Data
(c) Material Transaction Data That Would Not Be Made Public
(d) Total Amount of Securities Available to Loan and Total Amount of Securities on Loan
C. RNSA Rules To Administer the Collection of Information
D. Data Retention and Availability
E. Report and Dissemination Fees
IV. General Request for Comment
V. Paperwork Reduction Act Analysis
A. Background
B. Proposed Use of Information
C. Information Collections
D. Information Collections Applicable to Lenders
1. Lending Agents
(a) Providing Lending Agents
(i) Initial Burden
(ii) Ongoing annual burden
(b) Non-Providing Lending Agents
(i) Systems Development and Monitoring
(ii) Entering into Written Agreement With Reporting Agent
2. Reporting Agents
(a) Systems Development and Monitoring
(i) Initial Burden
(ii) Ongoing Annual Burden
(b) Entering Into Written Agreements With Persons on Whose Behalf the Reporting Agent Would be Providing Information
(c) Entering Into Written Agreement with RNSA
(d) Recordkeeping Requirement
3. Lenders That Would Not Employ a Lending Agent
(a) Self-Providing Lenders
(i) Initial Burden
(ii) Ongoing Annual Burden
(b) Lenders That Would Directly Employ a Reporting Agent
(i) Systems Development and Monitoring
(ii) Entering Into a Written Agreement with a Reporting Agent
E. Information Collection Applicable to RNSAs
1. RNSA Collection of Information From Lenders and Providing Information to the Public and the Commission
(a) Initial Burden
(b) Ongoing Annual Burden
2. RNSA Retention of Collected Information
F. Collection of Information is Mandatory
G. Confidentiality
H. Retention Period of Recordkeeping Requirement
I. Request for Comment
VI. Economic Analysis
A. Introduction and Market Failure
1. Introduction
2. Market Failures
B. Baseline
1. Securities Lending
2. Current State of Transparency in Securities Lending

3. Characteristics of the Securities Lending Market
4. Structure of the Securities Lending Market
(a) Market for Borrowing and Borrowing Services
(b) Market for Lending Services
5. Market for Securities Lending Data and Analytics
C. Economic Effects of the Proposed Rule
1. Effects of Increased Transparency in the Lending Market
(a) Reduction in Information Asymmetry
(b) Improved Information for Participants in the Securities Lending Market
(c) Improved Market Function Through Effects on Short Selling
(d) Improved Financial Management for Financial Institutions
2. Regulatory Benefits
(a) Surveillance and Enforcement Uses
(b) Market Reconstruction Uses
(c) Market Research Uses
3. Direct Compliance Costs
4. Indirect Costs
5. Risk of Circumvention Through Repurchase Agreements
D. Impact on Efficiency, Competition, and Capital Formation
1. Efficiency
2. Competition
3. Capital Formation
E. Alternatives
1. Broker-Dealer Reporting
2. Publicly Releasing the Information in 10c–1(d)
3. Additional Information in the Reported or Disseminated Information
4. Alternative Timeframes for Reporting or Dissemination
5. Allow an RNSA to Charge Fees to Distribute the Data
6. Longer Holding Period Requirement
7. Report to the Commission Rather Than to an RNSA
8. Report Through an NMS Plan
F. Request for Comment
VII. Regulatory Flexibility Act Certification
VIII. Consideration of Impact on the Economy
IX. Statutory Authority
List of Subjects in 17 CFR parts 240

I. Executive Summary

A. Introduction

1. Market Background

The securities lending market is opaque.[1] Section 984 of the Dodd-Frank Act provides the Commission with the authority to increase transparency, among other things, with respect to the loan or borrowing of securities.[2] It also mandates that the Commission promulgate rules designed to increase the transparency of information available to brokers, dealers, and investors.[3] Although various market participants, such as registered investment companies (''investment companies''), are required to make specified disclosures regarding their securities lending activities,[4] parties to securities lending transactions are not currently required to report the material terms of those transactions.[5] The value of securities on loan in the United States as of September 30, 2020, was estimated at almost $1.5 trillion.[6] Yet, despite its size, the securities lending market in the United States has a general lack of information available to its market participants, the public and regulators.[7] Based on the lack of transparency and statutory objective[8] to increase transparency in securities lending transactions, the Commission is proposing Rule 10c–1 under the Exchange Act, which would require any person who loans a security on behalf of itself or another person (a ''Lender'')[9] to provide the specified material terms of their securities lending transactions to an RNSA, as discussed more fully below.

Private data vendors have attempted to address the opacity in the securities lending market by developing systems that provide data to clients who both subscribe to those systems and provide their transaction data to the data vendor. Only subscribers can use those systems to receive information regarding securities lending transactions.[10] Moreover, as the private systems capture data only from their subscribers, the available data is not complete, nor is the transaction data captured by these private vendors available to the general public without a subscription, or available in one centralized location.

Industry observers and market participants have suggested that the Commission consider measures to provide additional transparency in the securities lending market.[11] Furthermore, there have been other calls for additional transparency, including in testimony during a hearing before the House Financial Services Committee on March 17, 2021. Such testimony supported the creation of a ''consolidated tape'' or a public data feed of securities lending transactions.[12]

The lack of public information and data gaps creates inefficiencies in the securities lending market. The gaps in securities lending data render it difficult for borrowers and lenders alike to ascertain market conditions and to know whether the terms that they receive are consistent with market conditions.[13] These gaps also impact the

[1] *See infra* Part II.B. The corporate bond and municipal securities markets are now more transparent and efficient markets. The regulatory concerns that led to these transformations included the lack of publicly available pricing information, which is similar to the concerns that would be addressed by proposed Rule 10c–1. The changes to these markets have provided investors with greater pricing transparency, lower search costs and greater price competition. *See, e.g.,* Louis Loss, Joel Seligman & Troy Paredes, *Chapter 7.A.2—Bond Trading, in* Fundamentals of Securities Regulation (6th ed. Supp. 2021). *See also* Interim Report of the Financial Stability Board Workstream on Securities Lending and Repos, *Securities Lending and Repos: Market Overview and Financial Stability Issues,* at 14 (Apr. 27, 2012), *available at https://www.fsb.org/wp-content/uploads/r_120427.pdf.*

[2] Public Law 111–203, 984(b), 124 Stat. 1376 (2010). Section 984(a) of the Dodd-Frank Act (''DFA''), now Section 10(c)(1) of the Exchange Act, makes it ''unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or of any facility of any national securities exchange . . . to effect, accept or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.'' Section 984 of the DFA focuses on the loan or borrowing of securities; therefore, the Commission is not proposing to include repurchase agreements within the scope of the rule.

[3] *Id.* Section 984(b) of the DFA directs the SEC to ''promulgate rules that are designed to increase the transparency of information available to brokers, dealers, and investors with respect to loan or borrowing securities.''

[4] Investment companies are required to disclose certain information about their securities lending activities. *See, e.g.,* Form N–CEN, Item C.6 (requiring disclosures relating to an investment company's securities lending activities) and Form N–PORT, Items B.4 and C.12 (requiring disclosure by investment companies of certain information on borrowers of loaned securities and collateral received for loaned securities). *See also* 81 FR 81870 (Nov. 18, 2016) (discussing requirements for securities lending disclosures by investment companies).

[5] *See infra* Part II.B.

[6] *See* Financial Stability Oversight Council (FSOC), 2020 Annual Report, figure 3.4.2.8, at 41, available at *https://home.treasury.gov/system/files/261/FSOC2020AnnualReport.pdf.* (''FSOC 2020 Annual Report''). *See infra* note 14.

[7] *See infra* Part VI.A.2.

[8] *See supra* note 3.

[9] Lender, when used in this release, refers to any persons that loans a security on behalf of itself or another person, including persons that own the securities being loaned (''beneficial owners''), as well as third party intermediaries, including banks, clearing agencies, or broker-dealers that intermediate the loan of securities on behalf of beneficial owners (''lending agent''). The term Lender does not extend to the borrower of securities in a securities lending transaction or any third party the intermediates the borrowing of securities on behalf of the borrower.

[10] *See infra* Part II.B.1.

[11] During a March 17, 2021, hearing before the House Financial Services Committee, Dennis Kelleher, CEO of Better Markets, former SEC Commissioner Michael Piwowar, now Executive Director of the Milken Institute Center for Financial Markets, and Michael Blaugrund, COO of the NYSE, each testified that additional transparency in the securities lending market is warranted. *See* Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part II: Hearing Before the H. Comm. on Fin. Serv., 117th Cong. (2021). As Michael Blaugrund stated during the hearing, ''[a] system that anonymously published the material terms for each stock loan would provide the necessary data to understand shifts in short-selling activity while protecting the intellectual property of individual market participants.''

[12] *Id.*

[13] *See infra* Part VI.A.2.

ability of the Commission, RNSAs and other self-regulatory organizations (''SROs''), and other Federal financial regulators (collectively ''regulators'') to oversee transactions that are vital to fair, orderly, and efficient markets.[14] Indeed, the size of the U.S. securities lending market can only be estimated as the data currently ''available on . . . securities lending transactions are spotty and incomplete.'' [15] Furthermore, the FSOC 2020 Annual Report noted data gaps in ''certain important financial markets including transaction data . . . for securities lending arrangements. . .'' [16]

2. Intended Objectives

To supplement the publicly available information involving securities lending, close the data gaps in this market, and minimize information asymmetries between market participants, proposed Rule 10c–1 is designed to provide investors and other market participants with access to pricing and other material information regarding securities lending transactions in a timely manner. For example, the Commission preliminarily believes that the data collected and made available by the proposed Rule would improve price discovery in the securities lending market and lead to a reduction of the information asymmetry faced by end borrowers and beneficial owners in the securities lending market. The Commission preliminarily believes the proposed Rule would close securities lending data gaps, would also increase market efficiency, and lead to increased competition among providers of securities lending analytics services and to reduced administrative costs for broker-dealers and lending programs.[17]

The data elements provided to an RNSA under proposed Rule 10c–1 are also designed to provide the RNSA with data that could be used for important regulatory functions, including facilitating and improving its in-depth monitoring of member activity and surveillance of securities markets. Further, the data elements are designed to provide regulators with information to understand: Whether market participants are building up risk; the strategies that broker-dealers use to source securities that are lent to their customers; and the loans that broker-dealers provide to their customers with fail to deliver positions. Enhancing the transparency of data on securities lending transactions should provide more information to help illuminate investor behavior in the securities lending market and the broader securities market more generally. It will also provide beneficial owners and borrowers with better tools to ascertain current market conditions for securities loans and allow them to determine whether the terms that they receive for their loans are consistent with market conditions.

The Commission preliminarily believes that public disclosure of specified material information regarding securities lending transactions could improve efficiency in the securities lending market and the securities market in general by reducing frictions that can exist where pricing information is not publicly available.[18] In particular, providing access to timely, granular information about certain material terms of securities lending transactions would allow investors, including borrowers and lenders, to evaluate not only the rates for such transactions, but also any signals that rates provide, *e.g.,* that changes in supply and demand for a particular security may indicate an increase in short sales of that security.[19] In addition, increasing the accessibility of data could lower barriers to entry for would-be participants in the securities lending market as well as the securities markets more broadly because all market participants, not just counterparties to a trade or those that subscribe to certain services, would be able to view and analyze transactions that are taking place in the securities lending market. As a result, the disclosure of the specified material terms of securities lending transactions might improve the efficiency and resiliency of the securities market by reducing frictions in the cost of borrowing securities, which may also have positive effects on the markets for the securities themselves. Additional benefits from increased transparency could include increased savings and profits for investors, improved terms for beneficial owners participating in lending programs, and improved competitiveness in the lending agent and broker-dealer businesses. The proposal might also reduce the cost of short selling and lead to an increase in fundamental research, which contributes to more efficient prices.[20] Finally, access to additional data can contribute to more informed portfolio management and lending decisions.[21]

II. Background

A. Market Structure

Securities lending is the market practice by which securities are transferred temporarily from one party, a securities lender, to another, a securities borrower, for a fee.[22] A securities loan is typically a fully collateralized transaction. Securities lenders, referred to as ''beneficial owners,'' are generally large institutional investors including investment companies, central banks, sovereign wealth funds, pension funds, endowments, and insurance companies.[23]

Beneficial owners of large, static, unleveraged portfolios, mainly pension funds, increasingly cite securities lending as an important income-enhancing strategy with minimal, or at least controlled, risk.[24] This incremental income not only helps defined-benefit pension funds to generate income, but also provides investment company investors with additional returns.[25]

[14] In its 2020 Annual Report, FSOC describes securities lending as ''support[ing] the orderly operation of capital markets, principally by enabling the establishment of short positions and thereby facilitating price discovery and hedging . . . it is estimated that at the end of September 2020 the global securities lending volume outstanding was $2.5 trillion, with around 57 percent of it attributed to the U.S.'' Financial Stability Oversight Council (FSOC), *2020 Annual Report,* at 45, *available at https://home.treasury.gov/system/files/261/FSOC2020AnnualReport.pdf. See also* Viktoria Baklanova, Adam Copeland & Rebecca McCaughrin, *Reference Guide to U.S. Repo and Securities Lending Markets* (Off. of Fin. Research, Working Paper No. 15–17, 2015) at 5, *available at https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf* (''OFR Reference Guide'').

[15] OFR Reference Guide, *supra* note 14, at 5.

[16] FSOC 2020 Annual Report, *supra* note 14, at 187.

[17] *See infra* Part VI.A.1.

[18] Frictions in trading costs and price can stem from general lack of information on current market conditions, which can lead to inefficient prices for securities loans. *See infra* Part VI.A.2.

[19] Subject to certain exceptions, Rule 203 of Regulation SHO requires a broker-dealer to identify shares of a security that are available for borrowing prior to initiating a short sale in that security. *See* 17 CFR 242.203(b). Rule 204 of Regulation SHO requires a participant of a registered clearing agency to ''close out'' open short sale positions within specified timeframes by either purchasing or borrowing shares in order to make delivery. 17 CFR 242.204. As a result, heightened demand for borrowing shares of a security is frequently associated with an increased level of short selling activity in that security.

[20] Fundamental research typically involves analyzing and interpreting publicly-available company information to determine whether a stock is under- or overvalued. *See, e.g.,* Zvi Bodie, Alex Kane & Alan J. Marcus, Investments 363 (2008).

[21] *See infra* Part VI.C.1.b).

[22] *See, e.g.,* OFR Reference Guide, *supra* note 14, at 24.

[23] *Id.* at 29.

[24] *See* Lipson, Sabel & Keane, *infra* note 37, at 1; OFR Reference Guide, *supra* note 14, at 29; *A Pilot Survey of Agent Securities Lending Activity* (Off. of Fin. Research, Working Paper No. 16–08, 2016) at 4. *https://www.financialresearch.gov/working-papers/2016/08/23/pilot-survey-of-agent-securities-lending-activity/* (''*OFR Pilot Survey*'').

[25] OFR Reference Guide, *supra* note 14, at 29. *See also* Zoltan Pozsar, *Shadow Banking: The Money*

Broker-dealers are the primary borrowers of securities; they borrow for their market making activities or on behalf of their customers.[26] Broker-dealers who borrow securities typically re-lend those securities or use the securities to cover fails to deliver or short sales [27] arising from proprietary or customer transactions.[28] While the identities of the ultimate securities borrowers are usually unknown, anecdotally, hedge funds rank among the largest securities borrowers and access the lending market mainly through their prime brokers.[29] Brokers and dealers may also lend securities that are owned by the broker or dealer, customer securities that have not been fully paid for (*i.e.,* have been purchased with a margin loan from the broker-dealer), and the securities of customers who have agreed to participate in a fully paid securities lending program offered by their broker-dealer.[30]

Securities lending transactions are usually facilitated by a third party. Custodian banks have traditionally been the primary lending agent or intermediary and lend securities on behalf of their custodial clients for a fee.[31] Advances in technology and operational efficiency have made it easier to separate securities lending services from custody services. Such developments have given rise to specialist third-party agent lenders, who have established themselves as an alternative to custodial banks.[32] Agent lenders provide potential borrowers with the inventory of securities available for lending on a daily basis.[33]

In addition to agent intermediaries, [34] there are also principal intermediaries, such as prime brokers, securities dealers, and specialist intermediaries. The role of the principal intermediary is to provide credit transformation for lending clients who are not willing to assume exposure to certain types of borrowers. For example, a prime broker assumes credit exposure to the borrower.[35] In short, agent intermediaries aggregate supply on lendable assets, while principal intermediaries aggregate demand for lendable assets.[36] Some large investment companies and their fund managers have created their own securities lending programs and use their own employees to staff the program rather than using the services of a custodial bank lending desk or third-party agent lender.[37]

Traditionally, securities lending and borrowing transactions have been conducted on a bilateral basis.[38] Generally, when an end investor wishes to borrow securities, and its broker-dealer does not have those securities available in its own inventory or through customer margin accounts to loan, the broker-dealer will borrow the securities from a lending agent with whom it has a relationship. The broker-dealer will then re-lend the securities to its customer. Loans from lending programs to broker-dealers occur in what is referred to as the ''Wholesale Market'', while loans from a broker-dealer to the end borrower occur in what is referred to as the ''Retail Market''. Obtaining a securities loan often involves an extensive search for counterparties by broker-dealers.[39]

There are also digital platforms for secured financing transactions, including securities lending, which provide electronic trading in the securities lending market.[40] Another approach to securities lending is based on a competitive blind auction to determine the optimal lending strategy for beneficial owners who opt to use the auction route. The auction process is intended to improve price transparency for borrowers who pay for access to lendable assets.[41] There are also efforts to develop and expand peer-to-peer lending platforms involving multiple beneficial owners and borrowers, where securities lending transactions take place without the use of traditional intermediaries.[42]

Additionally, the Options Clearing Corporation (''OCC'') has two stock loan

View (Off. of Fin. Research, Working Paper No. 14–04, 2014), *available at https://www.financialresearch.gov/working-papers/files/OFRwp2014-04_Pozsar_ShadowBankingTheMoneyView.pdf.* The majority of passive and exchange traded funds (ETFs) also engage in securities lending. In each case, securities lending has been an important revenue source that can compound each year to offset fees and transaction costs, protect an asset manager's profit margins, and improve fund investor returns. *See, e.g.,* Tomasz Miziołek, Ewa Feder-Sempach & Adam Zaremba, *The Basics of Exchange-Traded Funds, in International Equity Exchange-Traded Funds,* at 97–98 (1st ed. 2020).

[26] Dealers, which often act as market makers, borrow securities to settle buy orders from customers. *See* OFR Reference Guide, *supra* note 14, at 33. *See also Comptroller's Handbook: Custody Services/Asset Management,* Off. of the Comptroller of the Currency, at 28 (Jan. 2002), *https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/custody-services/index-custody-services.html* (''*Comptroller's Handbook*''); *OFR Pilot Survey, supra* note 24, at 2–3.

[27] Regulation SHO requires, among other things, that fails to deliver be closed out by purchasing securities of like kind and quantity by no later than the settlement day after settlement is due, or no later than two settlement days after settlement is due for short sales resulting from long sales or from bona fide market making activity. As previously emphasized by the Commission, the determination of whether a short sale qualifies for the bona fide market making is based on a variety of facts and circumstances surrounding a transaction, and must be made on a trade-by-trade basis. *See* Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690 (Oct. 17, 2008), *available at http://www.sec.gov/rules/final/2008/34-58775fr.pdf.*

[28] Brokers' and dealers' securities lending and borrowing activities are governed by a number of regulations including 17 CFR 240.15c3–3 (''Exchange Act Rule 15c3–3''; commonly referred to as the ''Customer Protection Rule''), 17 CFR 240.15c3–1 (''Exchange Act Rule 15c3–1; commonly referred to as the ''Net Capital Rule''), 17 CFR 240.8c–1 and 17 CFR 240.15c2–1 (''Exchange Act Rules 8c–1 and 15c2–1 commonly referred to as the ''hypothecation rules''). *See also Comptroller's Handbook, supra* note 26, at 28.

[29] OFR Reference Guide, *supra* note 14, at 33. Many trading strategies rely on the ability of the trader to borrow securities. For example, traders often borrow securities to establish a short position in one security to hedge a long position in another security. *Id.*

[30] *See* Exchange Act Rule 15c3–3.

[31] *See infra* Part VI. *See, e.g., Comptroller's Handbook, supra* note 26, at 27. Beneficial owners typically share a portion of their total compensation with the agent and it is common for the beneficial owner to retain most of it. *See, e.g., OFR Pilot Survey, supra* note 26, at 2.

[32] OFR Reference Guide, *supra* note 14, at 31.

[33] *Id.* at 34.

[34] Agent intermediaries include custodian banks, agent lenders and other third parties, such as asset managers or specialized consultants. *Id.* at 30–31.

[35] *Id.* at 32.

[36] *Id.*

[37] As a low-margin business, beneficial owners' portfolios need to be of a sufficient size for a securities lending program to be economically feasible. *See* OFR Reference Guide, *supra* note 14, at 29. *See also* Anthony A. Nazzaro, *Chapter 4—Evaluating Lending Options, in* Securities Finance, at 83–84 (Frank J. Fabozzi & Steven V. Mann ed. 2005). *See also* Fidelity, *Fidelity Agency Lending, available at https://capitalmarkets.fidelity.com/fidelity-agency-lending;* Fidelity, *Q&A: New Securities Lending Agent for the Fidelity Funds* (July 8, 2020), *available at https://institutional.fidelity.com/app/proxy/content?literatureURL=/9899781.PDF.* Also a few large pension and endowment funds lend directly. *See* Paul C. Lipson, Bradley K. Sabel & Frank M. Keane, *Securities Lending,* Federal Reserve Bank of New York Staff Report no. 555, at 2 (Mar. 2012), *available at www.newyorkfed.org/research/staff_reports/sr555.pdf.*

[38] *See, e.g., id.* at 36. Typically, the parties enter into a written contract that sets out their legal rights and obligations. *See* OFR Reference Guide, supra note 14, at 36. While there are some differences in the contract provisions used, usually the general terms are the same. *See* Lipson, Sabel & Keane, *supra* note 37, at 44–45. In the United States, a Master Securities Loan Agreement (MSLA) is normally used to set out the legal rights and obligations of the parties in securities lending transactions. *See* OFR Reference Guide, *supra* note 14, at 36. A copy of the Master Securities Lending Agreement (''MSLA'') published by SIFMA is *available at https://www.sifma.org/resources/general/mra-gmra-msla-and-msftas/.*

[39] *See, e.g.,* Adam C. Kolasinski, Adam V. Reed & Matthew C. Ringgenberg, *A Multiple Lender Approach to Understanding Supply and Search in the Equity Lending Market,* 68 J. Fin. 559–95 (2013).

[40] *See, e.g.,* Equilend, *Next-Generation Trading (NGT), https://www.equilend.com/services/ngt/.*

[41] *See, e.g.,* eSecLending, *The eSecLending Difference, https://www.eseclending.com/why-eseclending/. See also* OFR Reference Guide, *supra* note 14, at 32.

[42] *See, e.g.,* The Global Peer Financing Association, *available at https://globalpeerfinancingassociation.org.*

programs: The Stock Loan Program (formerly ''Hedge'') and the Market Loan program.[43] The Stock Loan Program allows OCC clearing members to use borrowed and loaned securities to reduce OCC margin requirements, which OCC considers as reflecting the real risks of their intermarket hedged positions. In this program OCC serves as a principal counterparty, by becoming the lender to the borrower and the borrower to the lender for each transaction. In its Market Loan program OCC processes and maintains stock loan positions that have originated through a Loan Market.[44] OCC acts as central counterparty to these matched loans and provides clearing and settlement services to the market and OCC clearing members.[45]

Securities loans may be either for a specific term or open-ended with no fixed maturity date. The typical market practice is for securities loans to be open-ended, allowing the security on loan to be recalled by the beneficial owner. The open recall feature of a securities loan is driven by the assumption that participation in securities lending should not impact the investment strategy of the lender.[46] For example, a security may be recalled when its beneficial owner would like to sell it or exercise its voting rights.[47] Loans that provide the borrower with certainty regarding the length of the loan can be more valuable to the borrower.[48]

Normally, the beneficial owner has specific guidelines regarding which counterparties can borrow its securities and the type of collateral it accepts. Lenders who are able and willing to be flexible on the type of collateral they will accept to secure the loan are more attractive to some borrowers.[49] Beneficial owners may have different approaches to securities lending and associated risks.[50] For example, some beneficial owners may prefer ''volume lending,'' in which large volumes of easier to lend securities are lent and returns can be enhanced with varying risk, such as the type of collateral accepted or investment of cash collateral in higher-yielding and riskier vehicles. Other beneficial owners may take a ''value lending'' approach where they lend in-demand securities, which generate higher borrower fees, and take a more conservative approach to the type of collateral accepted or the reinvestment of cash collateral.[51] Different types of beneficial owners also operate under different laws and regulatory frameworks, which may or may not include regulations or regulatory guidance on securities lending activities. For example, investment companies are registered with the SEC under the Investment Company Act of 1940 and rules thereunder.[52] Defined benefit plans are subject to the Employee Retirement Security Act (''ERISA''), as administered by the U.S. Department of Labor. Insurance companies are regulated at the state level.

In the United States, the most common form of collateral for equity security loans is cash. The borrower of the security typically deposits 102% or 105% of the current value of the asset being loaned as collateral.[53] The Lender then reinvests this collateral, usually in low-risk interest-bearing securities, then rebates a portion of the interest earned back to the borrower. The difference between the interest earned and what is rebated to the borrower is the lending fee earned by the Lender. The portion of the interest earned on the reinvested collateral that is returned to the borrower is called the rebate rate, and is a guaranteed amount set forth in the terms of the loan. It is possible for the Lender to lose money on the loan if the interest earned on the reinvestment of the collateral does not exceed the rebate rate. If the security is in high demand in the borrowing market, the rebate rate may be negative, indicating that the borrower does not receive any rebate and must also provide additional compensation to the Lender.

When collateral for a security loan is in the form of other securities, the borrower pays the Lender a set fee. The fee depends on the availability of the security being borrowed; securities in high demand command a higher fee.[54]

While a security is on loan the borrower receives any dividends, interest payments, and, in the case of equity security loans, holds the voting rights associated with the shares.[55] Usually the terms of the loan stipulate that dividends and interest payments must be passed back to the beneficial owner in the form of substitute payments.

B. Transaction Reporting

As discussed above, certain institutional investors, including pension funds (which provide retirement benefits) and mutual funds (which retail and institutional investors rely on to meet financial needs) lend out their securities to earn incremental income, help pension funds generate income, and provide additional returns for their long-term savers.[56] As discussed below, the existing data are not comprehensive or centralized, and there are significant information asymmetries between market participants.[57] The transaction information that would be provided to an RNSA under proposed Rule 10c–1 would include securities lending transaction information from all Lenders, and most of the information would be made publicly available. The Commission preliminarily believes the proposed Rule would provide material, granular, and timely data regarding the terms of securities lending transactions thereby allowing market participants, the public, and regulators access to key market information.

1. Data Available From Private Vendors

Currently, the predominant sources of pricing information for securities loans are private vendors who offer a variety of systems for borrowers and lenders of securities to provide and receive information regarding securities lending transactions. Some, if not all, of the

[43] *See* The Options Clearing Corporation, *Stock Loan Programs, https://www.theocc.com/Clearance-and-Settlement/Stock-Loan-Programs; see also* The Options Clearing Corporation, *Market Loan Program FAQs, https://www.theocc.com/Clearance-and-Settlement/Stock-Loan-Programs/OCC-Market-Loan-Program-FAQs.*

[44] OCC currently clears securities lending transactions for Automated Equity Finance Markets, Inc., a wholly owned subsidiary of EquiLend Clearing LLC. *See* The Options Clearing Corporation, *Market Loan Program FAQs, https://www.theocc.com/Clearance-and-Settlement/Stock-Loan-Programs/OCC-Market-Loan-Program-FAQs.*

[45] The Depository Trust & Clearing Corporation (DTCC), through its equities clearing subsidiary, National Securities Clearing Corporation (NSCC), has proposed a rule change for regulatory approval to centrally clear securities financing transactions, which would include securities loans. *See* SEC, Notice of Filing of Proposed Rule Change to Establish the Securities Financing Transaction Clearing Service and Make Other Changes, SR–NSCC–2021–010 (Aug. 5, 2021), *available at https://www.sec.gov/rules/sro/nscc.htm#SR-NSCC-2021-010.*

[46] OFR Reference Guide, *supra* note 14, at 34.

[47] OFR Reference Guide, *supra* note 14, at 29.

[48] *See, e.g.,* Mark C. Faulkner, *Chapter 1—An Introduction to Securities Lending, in* Securities Finance, at 8 (Frank J. Fabozzi & Steven V. Mann ed. 2005). A relatively static portfolio with low securities turnover is more attractive to securities borrowers because it minimizes recalls of loaned securities. *See also* OFR Reference Guide, *supra* note 14, at 29.

[49] Faulkner, *supra* note 48, at 6.

[50] *See* OFR Reference Guide, *supra* note 14, at 30.

[51] *See* Miziołek, et al., *supra* note 25, at 12.

[52] *See supra* note 4.

[53] *OFR Pilot Survey, supra* note 26, at 12. ''Margins on securities loans are negotiable. The variation around the standard margins of 102 percent and 105 percent can be attributed to firm-specific differences in margining policies and the quality and type of the collateral security.''

[54] *OFR Pilot Survey, supra* note 26, at 2.

[55] *See, e.g.,* OFR Reference Guide, *supra* note *14,* at 36.

[56] *See supra* Part II.A. *See also* OFR Reference Guide, *supra* note 14, at 30.

[57] *See, e.g., infra* Part VI.A.2.

private vendors operate their systems on a ''give-to-get'' model, which effectively precludes access to their systems unless the would-be subscriber has securities lending transaction information to provide. Some private securities lending data vendors provide an intraday data feed or end of day information on securities lending transactions by various market participants as well as analytic services involving such data. The data are collected from securities lending transaction participants, including beneficial owners, broker-dealers, agent lenders and custodians.

Commonly collected data elements include CUSIP identifiers for securities on loan, quantity, borrowing cost, utilization of available supply, owner domicile, and type of collateral held.[58]

However, the available data are incomplete, as private vendors do not have access to pricing information that reflects all transactions. This in part, reflects the voluntary submission of transaction information by subscribers to vendors and is compounded by the unknown comparability of data due to, among other things, the variability of the transaction terms disseminated, as well as how those terms are defined. As no single vendor has information for all securities lending transactions that take place, some persons pay to subscribe to multiple vendors' systems in order to capture as much of the currently available data as they determine to purchase, which can be expensive.[59]

III. Discussion of Proposed Rule

A. Reporting

1. Obligation To Provide Information to an RNSA

The Commission is proposing Rule 10c–1(a), which would require any person that loans a security[60] on behalf of itself or another person to provide to an RNSA the information required by paragraphs (b) through (e) of proposed Rule 10c–1 (''10c–1 information'') as discussed below[61] in the format and manner required by the rules of the RNSA.

(a) Obligation of Lender to Provide 10c–1 Information

Proposed Rule 10c–1 would apply to all Lenders. Section 10(c)(1) of the Exchange Act makes it unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange to effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[62] The term ''person,'' for purposes of the Exchange Act, means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.[63] Accordingly, Section 10(c)(1) of the Exchange Act provides the Commission with broad authority to implement rules regarding securities lending transactions involving any person, including banks, insurance companies, and pension plans, so long as the rules involving the loan or borrowing of securities prescribed by the Commission are necessary or appropriate in the public interest or for the protection of investors. The Commission preliminarily believes that the proposed Rule is necessary or appropriate in the public interest or for the protection of investors. As discussed further in Part VI, the securities lending market lacks public information regarding securities lending transactions, which creates inefficiencies in the securities lending market. The proposed Rule is designed to address these inefficiencies in the securities lending market by making more comprehensive information regarding securities lending transactions publicly available, which could better protect investors by eliminating certain information asymmetries that currently exist in the securities lending market. The removal of such information asymmetries may improve market efficiencies in the securities market and enhance fair, orderly, and efficient markets for borrowing of the securities and the market for such underlying securities. Additionally, as discussed in greater detail in Part VI.C.2, proposed Rule 10c–1 would provide a number of regulatory benefits related to surveillance and enforcement, reconstruction of market events, and research.

Proposed Rule 10c–1(a) would require Lenders to provide certain terms of securities lending transactions to an RNSA.[64] The Commission preliminarily believes that any person that loans a security on behalf of itself or another person,[65] which would include banks, insurance companies, and pension plans, should be required to provide the material terms of lending transactions to ensure that proposed Rule 10c–1 is appropriately ''designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities.''[66] Although the majority of securities lending transactions involve broker-dealers, over which the Commission has direct regulatory oversight,[67] a significant percentage of securities lending transactions occur away from broker-dealers.[68] The Commission preliminarily believes that any person that loans a security on behalf of itself or another person should be required to provide the specified terms of a securities lending transaction because excluding certain persons—such as banks, insurance companies, and pension plans—would lead to incomplete information regarding securities lending transactions, which might reduce the benefits of the public availability of 10c–1 information and potentially lead to competitive advantages for those Lenders that are not required to provide 10c–1 information to an RNSA.

The Commission proposes to limit the obligation to provide the specified material terms to an RNSA only to the Lender to avoid the potential double counting of transactions that could arise if the Rule required both sides of the securities lending transaction to provide the material terms. Furthermore, the Commission preliminarily believes that the Lender is in the better position to provide the material terms of the securities lending transactions. Lenders are more likely to have access to all of the 10c–1 information. For example, a borrower will not be privy to information required to be provided to the RNSA under paragraph (e) of proposed Rule 10c–1, such as the number of securities available to loan. Additionally, entities such as investment companies, broker-dealers, and banks, which engage in securities lending transactions, typically tend to be larger institutions because of the

[58] *See* OFR Reference Guide, *supra* note *14,* at 63.

[59] *See, e.g., Beneficial Owners Demand Independent Benchmarking,* Global Inv., 2017 WLNR 5380098 (Feb. 2, 2017).

[60] *See* Section 3(a)(10) of the Exchange Act, which defines the term ''security.'' 15 U.S.C. 78c(a)(10).

[61] *See infra* Part III.B.

[62] 15 U.S.C. 78j(c).

[63] 15 U.S.C. 78c(a)(9).

[64] *See infra* Part III.A.2 (Discussion of which Lenders are required to provide the 10c–1 information to the RNSA).

[65] *See infra* Part III.A.2 (Discussion of the hierarchy regarding who is required to provide information to the RNSA).

[66] Public Law 111–203, 984(b), 124 Stat. 1376 (2010).

[67] *See* 15 U.S.C. 78o.

[68] While the Commission preliminarily believes that the majority of transactions involve broker-dealers the precise percentage is currently unknown. Based on 2015 survey data the Commission estimates that broker-dealers facilitate between 60% and 90% of transactions in the equity lending market. *See OFR Pilot Survey, supra* note 26, at 7–8.

scale necessary to make the lending of securities cost-effective.[69] To the extent that smaller entities engage in securities lending, they generally employ lending agents, which as discussed below in Part III.A.2.a), would relieve these smaller lending entities from having to provide the 10c–1 information to the RNSA. Accordingly, the Commission preliminarily believes that requiring only the Lender to provide the 10c–1 information will alleviate the potential for the double counting of transactions and limit the burdens of proposed Rule 10c–1 to larger institutions.

Proposed Rule 10c–1 would apply to all securities.[70] The Commission preliminarily believes that proposed Rule 10c–1 should apply to all securities to ensure that a complete picture of transactions involving the loan of securities is provided to the RNSA. According to the OFR Pilot Survey, nearly half of the dollar value of assets on loan in 2015 were debt instruments.[71] If the Commission were to limit the scope of the proposed Rule (*e.g.,* to only equity securities) then a significant number of securities lending transactions would be excluded and the market efficiencies and reduction of information asymmetry that the Commission anticipates will result from proposed Rule 10c–1 would not accrue to non-equity securities.[72] Accordingly, the proposed Rule includes 10c–1 information for all securities lending transactions and is not limited to loans of equity securities.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

1. Should persons required to provide information regarding securities lending transactions to an RNSA under proposed Rule 10c–1 be limited to only persons registered with the Commission, such as brokers-dealers, investment companies, investment advisers, and clearing agencies? If so, why? What would be the impact or limitations on the information made available to the public and regulators if proposed Rule 10c–1 limited the requirement to provide information to an RNSA to persons registered with the Commission? Please identify any relevant data, such as the number of securities lending transactions that would not be provided to an RNSA if the rule were limited to registered persons and the dollar value of such transactions, which would be useful for the Commission in considering the effects of the proposed Rule.

2. What, if any, are the broader impacts of requiring that certain information be provided to an RNSA, for example to help borrowers and lenders evaluate rates and signals, such as whether a security is hard to borrow or heavily shorted? Would such a requirement bring more efficiency to the market? Please explain.

3. Are there certain types or categories of Lenders that should be excluded from the requirements under proposed Rule 10c–1 to provide 10c–1 information to an RNSA? If so, please identify such Lender or Lenders, and explain why they should be excluded from the requirements under proposed Rule 10c–1. For example, should clearing agencies be excluded from the requirements under proposed Rule 10c–1 to provide Rule 10c–1 information to an RNSA? If so, why? How would such an exclusion impact the information available to the public and regulators? Should a broker-dealer that is borrowing securities from a Lender that is not a broker-dealer have a requirement to provide 10c–1 information to an RNSA rather than the non-broker-dealer Lender? If so, why?

4. Should borrowers be required to provide 10c–1 information instead of, or in addition to, Lenders providing such information? Would such a requirement increase the overall costs and burden of the requirement to provide 10c–1 information to an RNSA? Is there information that a borrower of securities is in a better position to provide? Do commenters agree that the requirement to provide 10c–1 information to an RNSA is appropriately placed on Lenders? If not, why not?

5. Does the proposed Rule not cover any transactions that commenters believe should be covered? Does the scope of the proposed Rule create opportunities for gaming or evasion of the reporting requirements, whether through other economically equivalent instruments or otherwise? If so, please explain.

6. The Commission is proposing to include all securities in the scope of the Rule. Is this appropriate, or should certain types of securities be excluded from the Rule? If so, which types of securities should be excluded, and why? Are certain types of securities not lent?

7. Should the proposed Rule include an exception or exemption for certain securities, such as government securities, from the requirement to provide 10c–1 information to an RNSA in proposed Rule 10c–1? If so, please identify the type of security and the rationale for excluding such security from the requirement to provide 10c–1 information to an RNSA in proposed Rule 10c–1.

8. Should the Commission define what it means to ''loan a security''? Should such a definition be included in the Rule? What further information is needed?

9. Is the discussion and overview of the securities lending market included in this release accurate? If not, what is inaccurate regarding the discussion of the securities lending market? Are there differences in the securities lending market depending on the type of security loaned, including whether the terms and structures of loans are the same or different depending on security type.

10. As drafted, would the proposed Rule cover all securities lending transactions? If not, what transactions would not be covered by the proposed Rule? How might a Lender structure a securities lending transaction to avoid providing information to an RNSA?

(b) Providing Information to an RNSA

The Commission preliminarily believes that Lenders should be required to provide the material terms of securities lending transactions to an RNSA. Currently, FINRA is the only RNSA and has experience establishing and maintaining systems that are designed to capture transaction reporting, such as the system in proposed Rule 10c–1. For example, FINRA has established and operates several systems for the reporting of transactions in equity and fixed income securities.[73] Indeed, the majority of securities lending transactions are through broker-dealers that are members of FINRA.[74] Most broker-dealers already have connectivity to FINRA's systems to report trades in equity and fixed income

---

[69] *See, e.g.,* Faulkner, *supra* note 48, at 6 (the economies of scale offered by agents that pool together the securities of different clients enable smaller owners of assets to participate in the market. The costs associated with running an efficient securities lending operation are beyond many smaller funds).

[70] *See* Exchange Act Section 3(a)(10), *supra* note 60.

[71] *See OFR Pilot Survey, supra* note 26, at 8.

[72] Additionally, Congress did not limit or specify the classes of securities in Section 984 of the DFA.

[73] FINRA operates a number of transparency reporting systems including the Alternative Display Facility (displaying quotations, reporting trades, and comparing trades); OTC Transparency (over-the-counter (OTC) trading information on a delayed basis for each alternative trading system (ATS) and member firm with a trade reporting obligation under FINRA rules); OTC Reporting Facility (ORF) (reporting of trades in OTC Equity Securities executed other than on or through an exchange and for trades in restricted equity securities effected under Rule 144A under the Securities Act of 1933 and dissemination of last sale reports); Trade Reporting and Compliance Engine (TRACE) (facilitates the mandatory reporting of over-the-counter transactions in eligible fixed income securities); and Trade Reporting Facility (TRF) (reporting of transactions effected otherwise than on an exchange).

[74] *See supra* note 68.

securities. Accordingly, this requirement might help reduce the cost of providing information to an RNSA because most FINRA members will already have established connectivity to FINRA's systems. Furthermore, as discussed below,[75] the proposal would allow Lenders, including lending agents, who are not members of FINRA to contract with reporting agents that have connectivity to FINRA. The Commission preliminarily believes that this could reduce the costs for a non-FINRA-member Lender because rather than incur the costs associated with directly reporting 10c–1 information, including the costs of establishing connectivity with FINRA, it will have the option to use a third party with existing connectivity to provide the Lender's 10c–1 information to FINRA. In addition, requiring 10c–1 information be provided to FINRA could assist FINRA with its surveillance of FINRA Rules 4314 (Securities Loans and Borrowings), 4320 (Short Sale Delivery Requirements), and 4330 (Customer Protection—Permissible Use of Customers' Securities) regarding securities lending and short selling.

Under Section 10 of the Exchange Act, the Commission has the authority to require persons that are not members of an RNSA to provide information to an RNSA, and has previously exercised this authority. Exchange Act Rule 10b–17 requires any issuer of a class of securities publicly traded by the use of any means or instrumentality of interstate commerce or of the mails to provide certain information to an RNSA within a prescribed period of time to give notice to the market regarding certain corporate events, such as the payment of dividends, stock splits, or rights offerings.[76] The Commission approved FINRA rules and fees to support its administration of Exchange Act Rule 10b–17, which provided for oversight of non-FINRA members' compliance with Rule 10b–17.[77]

The Commission could take an alternative approach to providing 10c–1 information to an RNSA. For example, as discussed in Part VI below, the Commission could require that Lenders provide 10c–1 information directly to the Commission. The Commission does not currently have the systems designed to facilitate trade-by-trade reporting and disclosure as contemplated by the proposed Rule. As noted above, FINRA has established and maintained systems similar to what is contemplated in the proposed Rule. As such, the Commission preliminarily believes that requiring Lenders to provide 10c–1 information to FINRA rather than to the Commission, will effectively accomplish the policy objectives of the Rule. As discussed throughout this release, the Commission preliminarily believes that FINRA is well-positioned to accommodate the trade-by-trade reporting of securities lending transactions.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

11. Are there methods for the Commission to improve transparency in the securities lending market other than requiring Lenders to provide the material terms of a securities lending transaction to an RNSA? If so, how would the commenter suggest improving transparency in the securities lending market?

12. Would Lenders use a reporting agent to provide 10c–1 information to an RNSA? Why might a Lender choose not to use a reporting agent? Would Lenders be unwilling to use reporting agents due to concerns regarding maintaining the confidentiality of the information that the reporting agent would be required to provide an RNSA?

13. Should proposed Rule 10c–1 require that Lenders provide material information to an entity other than an RNSA? For example, should proposed Rule 10c–1 require the material terms of a securities lending transaction be provided directly to the Commission, a clearing agency, or some other entity? If so, should the proposed Rule require that such entity be registered with the Commission? If the commenter believes the entity does not need to be registered with the Commission please explain how the Commission would oversee the repository of the information?

14. Do commenters believe that FINRA, as the only current RNSA, is the appropriate organization to receive, store, and disseminate the 10c–1 information? What concerns do commenters have, if any, about requiring Lenders that are not FINRA members to either provide information to FINRA themselves, or contract with a reporting agent to provide the information to FINRA on their behalf? Do commenters believe the proposed approach of establishing RNSAs as the exclusive recipients and disseminators of 10c–1 information has implications for data quality, compared to alternative approaches? If so, are there alternative approaches commenters believe would address or mitigate those implications?

2. Persons Responsible for Providing Information to an RNSA

To reduce the potential for double counting of securities lending transactions and limit the burden on Lenders, proposed Rule 10c–1 would specify who is responsible for providing information to an RNSA in certain factual circumstances. First, although the proposed Rule places an obligation on any person that loans a security on behalf of itself or another person, if such Lender is using an intermediary such as a bank, clearing agency,[78] or broker-dealer for the loan of securities, such lending agent shall have the obligation to provide the 10c–1 information to an RNSA on behalf of the Lender.[79] Second, persons with a reporting obligation, including a lending agent, could enter into a written agreement with a broker-dealer that agrees to provide the 10c–1 information to the RNSA on its behalf (''reporting agent''). Finally, Lenders are required to directly provide the RNSA with the 10c–1 information if the Lender is not using a lending agent or not employing a reporting agent to provide the 10c–1 information to an RNSA.

(a) Lending Agent Provides Information to an RNSA

The Commission preliminarily believes it is appropriate to require lending agents to provide 10c–1 information to the RNSA on behalf of beneficial owners that employ lending agents, because lending agents are in the best position to know when securities have been loaned from the portfolios that the lending agent represents. Indeed, a beneficial owner might not know that the lending agent has lent securities from the portfolio until after the time prescribed by proposed Rule 10c–1 to provide 10c–1 information to the RNSA. Furthermore, by requiring the lending agent to provide 10c–1 information to the RNSA, the proposed

[75] *See infra* Part III.A.2.

[76] 17 CFR 240.10b–17.

[77] *See* FINRA Rule 6490; *See also* Exchange Act Release 62434 (July 1, 2010); 75 FR 39603 (July 9, 2010) (approving FINRA Rule 6490).

[78] The Commission understands that certain clearing agencies currently are offering to act as an intermediary on behalf of beneficial owners to lend the beneficial owners' securities. In this circumstance, a clearing agency would be acting as a lending agent and would be required to provide 10c–1 information to an RNSA. Specifically, it is the clearing agency's action as an intermediary on behalf of a beneficial owner to loan the beneficial owner's securities that triggers the requirement to provide the proposed 10c–1 information to an RNSA and not the clearance of the securities lending transaction by itself.

[79] As discussed in *supra* Part II.A, certain digital platforms provide electronic trading in the securities lending market. These platforms, to the extent they serve as lending agents on behalf of beneficial owners, would be required to provide the 10c–1 information to an RNSA. If a platform is not serving as a lending agent, the beneficial owner would be required to provide the 10c–1 information to an RNSA.

Rule would require the party intermediating the loan (*i.e.,* the lending agent) to also be responsible for providing the material terms of the loan to the RNSA. Specifically, lending agents are directly involved with the loan of securities on behalf of a beneficial owner. In such a circumstance, the beneficial owner is passive. For purposes of proposed Rule 10c–1, a beneficial owner that makes available the securities in its portfolio for a lending agent to lend on its behalf is not directly involved with the lending of its securities. Rather, it is the active steps taken by the lending agent that directly results in a loan of securities. For example, a customer of a broker-dealer that participates in their broker-dealer's fully paid lending program might lack the ability to provide 10c–1 information to the RNSA.[80] Additionally, the beneficial owner may lack access to some of the 10c–1 information, such as the identifying information of the borrower. Similarly, an institutional investor that uses a lending agent to manage its securities lending program might not know within 15 minutes that the lending agent has loaned securities from the institutional investor's portfolio, or details on the specific borrower, negotiated fees, or rebate rates.[81]

Accordingly, under proposed Rule 10c–1(a)(1)(i)(B) the beneficial owner would not be required to provide the 10c–1 information to an RNSA for any loan of securities intermediated by a lending agent. The Commission preliminarily believes that responsibility for failing to provide 10c–1 information to an RNSA should be on the lending agent and not the beneficial owners because the lending agent is directly responsible for the loan of securities. Furthermore, placing responsibility on beneficial owners who do not have access to all the necessary information to provide information to the RNSA might have a chilling effect on persons being willing to loan securities, which could negatively impact the securities market generally.

(b) Reporting Agent Provides Information to an RNSA

The Commission preliminarily believes it is appropriate that a Lender, including a lending agent, be able to enter into a written agreement with a broker-dealer acting as a reporting agent to permit the reporting agent to provide the 10c–1 information to an RNSA on behalf of the Lender because such an arrangement will ease burdens on Lenders, including lending agents, that do not have or do not want to establish connectivity to the RNSA. In order to employ a reporting agent to report the 10c–1 information to the RNSA on behalf of the Lender, proposed Rule 10c–1 would require the Lender and reporting agent to enter into a written agreement. Such written agreements under proposed Rule 10c–1(a)(1)(ii)(A) would memorialize and provide proof of the contractual obligations for the reporting agent to provide the 10c–1 information to an RNSA. Proposed Rule 10c–1(a)(1)(ii)(B) would require the reporting agent to provide the 10c–1 information to an RNSA if the reporting agent has entered into a written agreement to provide the 10c–1 information to an RNSA pursuant to Rule 10c–1(a)(1)(ii)(A) and such reporting agent is provided timely access to such 10c–1 information. The Commission preliminarily believes that it is appropriate for a reporting agent to be responsible for providing information to the RNSA if it contractually agrees to provide such information to the RNSA and it has timely access to such information. In such an instance, the person who enters into the written agreement with the reporting agent is not required to provide the 10c–1 information to the RNSA. If, however, the reporting agent is unable to provide 10c–1 information to the RNSA because it lacks timely access to it, the person who enters into the written agreement with the reporting agent is responsible for providing such information to the RNSA.[82] For purposes of proposed Rule 10c–1 ''timely access'' would mean that the reporting agent has access to the 10c–1 information with sufficient time to provide such information to the RNSA within the fifteen minutes after the securities loan is effected or the terms of the loan are modified. This paragraph of proposed Rule 10c–1 is designed to ensure that persons provide the 10c–1 information to a reporting agent so that the reporting agent can provide the information to an RNSA within the required timeframe. The Commission preliminarily believes that clearly delineating who is responsible for providing the 10c–1 information to the RNSA would aid in compliance with proposed Rule 10c–1 because each party will have a clear understanding of its obligations when it enters into a reporting agreement. Namely, the person or lending agent would have an obligation to provide access to the 10c–1 information to the reporting agent in a timely manner; and the reporting agent would have an obligation to provide the 10c–1 information to the RNSA.

Furthermore, proposed Rule 10c–1(a)(2)(ii) would require that the reporting agent enter into a written agreement with the RNSA. Such written agreement must explicitly permit the reporting agent to provide 10c–1 information on behalf of Lenders. Additionally, proposed Rule 10c–1(a)(2)(iii) would require the reporting agent to provide the RNSA with a list of each beneficial owner or lending agent on whose behalf the reporting agent is providing 10c–1 information and to update the list by the end of the day when the list changes. By requiring a written agreement between the reporting agents and the RNSA, the proposed Rule would require that the parties create documentation regarding the agreement to provide 10c–1 information, which would further provide evidence of the commitment by the reporting agent to provide 10c–1 information to the RNSA. Additionally, requiring the reporting agent to provide the identities of each person and lending agent on whose behalf the reporting agent is providing 10c–1 information to the RNSA provides the Commission with the ability to obtain the identities of such Lenders and broker-dealers (as discussed below) from the RNSA, which would aid the Commission with its oversight of the Lenders that have entered into agreements with reporting agents, including with their compliance with the proposed Rule.

Under the proposed Rule, only a broker-dealer could serve as a reporting agent. The Commission preliminarily believes that limiting who can act as a reporting agent to broker-dealers, which are regulated directly by the Commission, is in the public interest and would protect investors because it would aid the Commission in overseeing compliance with proposed Rule 10c–1. Specifically, by limiting reporting agents to broker-dealers the Commission could directly oversee the reporting agent's compliance with the requirement to provide 10c–1

[80] *See* Exchange Act Rule 15c3–3(b)(3). 17 CFR 240.15c3–3(b)(3).

[81] For additional discussion of how lending agents manage the portfolios of the beneficial owners that they lend shares on behalf of, *see infra* Part VI.B.4.b) (discussing how lending programs generally pool shares across accounts with which they have lending agreements to create a common pool of shares available to lend).

[82] For example, if a reporting agent establishes an automated system that pulls 10c–1 information directly from the records management system of a beneficial owner but the beneficial owner disables the connectivity to the automated system for any reason, the reporting agent would not have access to the 10c–1 information. As a result, the beneficial owner would be required to provide 10c–1 information to an RNSA under paragraph (a)(1)(ii)(C) of proposed Rule 10c–1.

information to the RNSA. Additionally, requiring that reporting agents be broker-dealers provides the RNSA, as well as other self-regulatory organizations (''SROs''), with the ability to oversee the activity of its members that perform a reporting agent function. If reporting agents were to include other entities the Commission might lack an efficient way to oversee how the entity is complying with its responsibility to provide 10c–1 information to an RNSA under proposed Rule 10c–1.

Proposed Rule 10c–1(a)(2)(i) would require any reporting agent that enters into a written agreement to provide information on behalf of another person to establish, maintain, and enforce reasonably designed written policies and procedures to provide 10c–1 information to an RNSA in the manner, format, and time consistent with Rule 10c–1. Accordingly, a broker-dealer could not act as a reporting agent unless the broker-dealer establishes, maintains, and enforces such written policies and procedures. The requirement for a reporting agent to have such written policies and procedures would provide regulators with a means to examine and enforce a reporting agent's compliance with proposed Rule 10c–1.

Proposed Rule 10c–1(a)(2)(iv) would also require that the reporting agent maintain certain information for a period of three years, the first two years in an easily accessible place. The information required to be maintained would include the 10c–1 information provided by the beneficial owner or the lending agent to the reporting agent, including the time of receipt, as well as the 10c–1 information that the reporting agent sent to the RNSA, and time of transmission. Additionally, the reporting agent would have to retain the written agreements between the reporting agents and beneficial owners, lending agents, and the RNSA. The recordkeeping requirements are designed to help facilitate the Commission's oversight of reporting agents and review the reporting agents' compliance with the requirement to provide the 10c–1 information to the RNSA.

(c) Beneficial Owner Provides Information to an RNSA

As discussed above, proposed Rule 10c–1(a)(1)(i)(B) and (a)(1)(ii)(C) provide that if a lending agent or reporting agent is responsible for providing information required by Rule 10c–1 to an RNSA pursuant to paragraphs (a)(1)(i) or (ii), the beneficial owner is not required to provide the 10c–1 information to the RNSA. Accordingly, if a beneficial owner does not employ a lending agent or enter into a written agreement with a reporting agent, the beneficial owner would be responsible for complying with the requirements of proposed Rule 10c–1(a) to provide 10c–1 information to the RNSA. The Commission preliminarily believes that only large beneficial owners run their own lending programs without the assistance of a lending agent because securities lending is a low-margin business and portfolios need to be of a sufficient size for a securities lending program to be economically feasible.[83] Furthermore, to the extent a beneficial owner is not using a lending agent, the Commission preliminarily believes that it would likely enter into a written agreement with a reporting agent.

(d) Examples of Who Is Responsible for Providing Information to an RNSA

To provide clarity regarding who is responsible for providing 10c–1 information to an RNSA the Commission offers the following examples:

A. Beneficial Owner and Lending Agent: A beneficial owner is represented by a lending agent that is a bank. The lending agent intermediates the loan of securities to a broker-dealer (the borrower) on behalf of the beneficial owner. In this scenario, the lending agent would be responsible for providing the 10c–1 information to the RNSA. If, however, the beneficial owner uses a person to intermediate the securities lending transaction that is not a bank, clearing agency, or broker-dealer the beneficial owner would be responsible for providing the 10c–1 information to the RNSA.

B. Beneficial Owner and Clearing Agency: As noted above, some clearing agencies have established programs to intermediate the loan of securities on behalf of beneficial owners. In such a scenario, the clearing agency would be a lending agent and, similar to example A, would be responsible for providing the 10c–1 information to the RNSA. A clearing agency not acting as a lending agent would not have a responsibility to provide 10c–1 information to an RNSA. For example, if the clearing agent cleared a securities lending transaction but did not act as an intermediary on behalf of a beneficial owner for the loan of securities, the clearing agency would not be responsible for providing the 10c–1 information to an RNSA.

C. Lending Agent and Reporting Agent: Same scenario as example A, however, this time the lending agent has entered into a written agreement with a reporting agent, which happens to be the same broker-dealer that borrowed the shares in example A. In this scenario, the reporting agent– even though it is the broker-dealer that borrowed the securities—would be responsible for providing the 10c–1 information to the RNSA.

D. Onward Lending: Same scenario as example A, however, the broker-dealer that borrowed the securities in example A loans the borrowed securities to a hedge fund. In this scenario, the broker-dealer would be responsible for providing the 10c–1 information to the RNSA regarding the securities lending transaction between the broker-dealer and the hedge fund because the broker-dealer is lending the securities that it borrowed. In this instance, the broker-dealer is loaning the securities on behalf of itself. The obligations to provide information as described in example A for the first lending transaction would remain unchanged.

E. No Lending Agent or Reporting Agent: If a beneficial owner does not employ a lending agent or reporting agent, and loans its securities, the beneficial owner would be responsible for providing the 10c–1 information to the RNSA.

F. Reporting Agent Fails to Provide 10c–1 Information to the RNSA on Behalf of a Person or Lending Agent: A lending agent enters into a written agreement with a reporting agent to provide 10c–1 information to an RNSA. The lending agent provides the reporting agent with timely access to the 10c–1 information, but the reporting agent fails to provide such information to the RNSA. The reporting agent would have violated proposed Rule 10c–1 because it would have been responsible for providing 10c–1 information to the RNSA. However, if the reporting agent was not provided with timely access to the 10c–1 information by the lending agent, the lending agent would have been responsible for providing the 10c–1 information to the RNSA.

G. Fully Paid Securities Lending Program: If a broker-dealer lends a customer's securities that are fully paid, the broker-dealer would be responsible for providing the 10c–1 information to the RNSA. In this instance, the broker-dealer, acting as the lending agent, is loaning the securities on behalf of its customer.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

15. Should proposed Rule 10c–1 permit reporting agents to be entities other than broker-dealers? If yes, what other persons should be added to the list of persons with whom a Lender can

[83] *See supra* note 37.

enter into a written agreement to provide the 10c–1 information to an RNSA and why?

16. Should lending agents include other entities in addition to banks, clearing agencies, and broker-dealers? If yes, what other entities should be added to the list of persons with whom a Lender can enter into a written agreement to provide the 10c–1 information to an RNSA and why?

17. The proposed Rule requires a reporting agent that provides 10c–1 information to an RNSA on behalf of another person to establish, maintain, and enforce written policies and procedures that are reasonably designed to ensure compliance with the proposed Rule by the reporting agent. Is such a requirement necessary or should it be modified? Please explain why or why not. The proposed Rule also requires that a reporting agent retain records of 10c–1 information provided to the RNSA for three years. Is such a requirement necessary or should it be modified? Please explain. Are there other records or supporting records that should be retained? If yes, what is the length of time that a reporting agent should retain such records and why?

18. What impact, if any, would the recordkeeping requirements in paragraph (a)(2)(iv) have on liquidity in the lending market or the cash market for securities that are subject to the requirement to provide 10c–1 information?

19. Should the proposed Rule require that a person who enters into a written contract whereby a reporting agent agrees to provide 10c–1 information to an RNSA, pursuant to paragraphs (a)(1)(ii) of the proposed Rule, make a determination that it is reasonable to rely on the reporting agent to provide 10c–1 information? Please discuss. Should the reporting agent be required to provide regular notice to its principal of compliance by the reporting agent with its 10c–1 reporting responsibilities (*e.g.,* if the reporting agent fails to timely provide the 10c–1 information to an RNSA)? Please discuss. Should the reporting agent be required to provide notice to its principal and/or the RNSA if it is unable to timely access the Lender's 10c–1 information? Please discuss.

20. Should the Rule identify specific contractual terms that must be included in the written agreement between the reporting agent and the person with the requirement to provide 10c–1 information to the RNSA? If so, what specific contractual terms should the Rule include, *e.g.,* notice when 10c–1 information is provided to the RNSA, notice that information was provided late?

B. Information To Be Provided to an RNSA

As discussed throughout this release, to increase the transparency of information available to market participants with respect to the loan or borrowing of securities, proposed Rule 10c–1 contains data elements consisting of the specified material terms of securities lending transactions that Lenders must provide to an RNSA. The Commission preliminarily believes that the data elements that would be provided to an RNSA, and the subsequent public disclosure of certain of these data elements, would vastly increase the transparency of information available. Unlike the data that is currently available through private vendors, the data that an RNSA would make public under proposed Rule 10c–1 would be available to all without charge or usage restrictions, would have consistently applied definitions and requirements, and would capture all loans of securities. Proposed Rule 10c–1 may, therefore, provide a more complete and timely picture of trading, including interest in short selling and price discovery for securities lending. The data elements provided to an RNSA under proposed Rule 10c–1 are also designed to provide RNSAs with data that might be used for in-depth monitoring and surveillance.

Paragraphs (b) through (d) contain loan-level data elements. These data elements would be required to be provided to an RNSA within 15 minutes after each loan is effected or modified, as applicable.[84] Paragraph (e) contains additional data elements related to the total amount of each security available to loan and total amount of each security on loan that Lenders must provide to the RNSA by the end of each business day that such person was required to provide information to an RNSA under paragraph (a) or had an open securities loan about which it was required provide information to an RNSA under paragraph (a). Proposed Rule 10c–1 also requires RNSAs to make the data elements provided under paragraphs (b), (c), and (e)[85] publicly available as soon as practicable, and in the case of paragraph (e) data, not later than the next business day. For the purposes of proposed Rule 10c–1, a loan would be effected when it is agreed to by the parties. Similarly, a loan would be modified when the modification is agreed to by the parties.

As discussed in Part VI, the Commission preliminarily believes that the requirement to provide to an RNSA the loan-level data elements in proposed Rule 10c–1(b) through (d) within 15 minutes after each loan is effected (or, for modifications, within 15 minutes after a loan is modified) and the subsequent disclosure of certain of these data elements by the RNSA as soon as practicable would increase the transparency of information available to market participants by allowing for the evaluation of the terms of recently effected loans and any signals that these terms provide. Also, in a fast-moving market, market participants would benefit from visibility into recent transactions when considering whether to accept proposed terms for new loans or accept requests to modify existing loans.

Further, as discussed in Part VI, the Commission also preliminarily believes that the requirement to provide to an RNSA the data elements concerning the total amount of securities available to lend and the total amount of securities on loan in proposed Rule 10c–1(e) at the end of each day will provide market participants with an understanding of the available supply of securities and a simple, centralized daily snapshot of the number of securities on loan.[86] The total amount of securities on loan varies over the course of the day, but the Commission preliminarily believes that the intraday information would not be necessary in light of other 10c–1 information that will be made public intraday by the RNSA. For example, market participants can use the intraday loan-level data made public by the RNSA under paragraphs (b) and (c) and the most recent daily information made public by the RNSA under paragraph (e) together to estimate intraday information.

Regardless of whether the data element is required to be provided to an RNSA intraday or daily, proposed Rule 10c–1 would require the RNSA to make certain data elements public as soon as practicable. The Commission

[84] As discussed in detail below, paragraph (c) would only require that information about a modification be provided to an RNSA in certain circumstances. *See* Part III.B.1.b); *see also* proposed Rule 10c–1(c).

[85] As discussed below, proposed Rule 10c–1(d) requires the provision of certain data to an RNSA that will not be made public by the RNSA. These data elements are important for regulatory purposes but public release of the data would identify market participants or could reveal information about the internal operations of a market participant.

[86] As discussed below, the Commission is not specifying the parameters of ''the amount of the security'' to allow an RNSA flexibility with respect to any proposed rules. For example, an RNSA could propose rules that identify for different types of securities the information that constitutes the ''amount of the security.'' *See infra* Part III.B.1.a).

preliminarily believes that not mandating a specific timeframe will provide the RNSA with flexibility to structure its systems, policies, and procedures but anticipates that the RNSA would make the data publicly available on a rolling basis very shortly after receipt. With respect to information under paragraph (e), such information would be required to be made publicly available as soon as practicable but not later than the next business day. Because the RNSA would be required to perform calculations to aggregate by security the data elements provided under paragraph (e), the Commission preliminarily believes that specifying this timeframe would provide RNSAs with the time needed to perform these calculations while also requiring that the information be made publicly available in a timely manner.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

21. Does the reporting of loan-level information within 15 minutes after each loan is effected or modified, as applicable, provide sufficient transparency? Please explain why or why not. If it would not, please provide an alternative and explain why the alternative would be preferable. For example, would end of day reporting for loan-level information provide sufficient transparency—why or why not?

22. For the data elements provided to an RNSA under paragraphs (a) through (c), should the Commission specify how quickly an RNSA should make the information publicly available? If so, which information and how long should an RNSA be given? Would limiting an RNSA's flexibility to structure its systems, policies, and procedures by specifying a timeframe create operational problems for the RNSA?

23. Should the Commission specify a different or more specific timeframe than ''not later than the next business day'' for the RNSA to make information provided under paragraph (e) publicly available? Does the ''no later than the next business day'' timeframe provide RNSAs with the time needed to perform these calculations while also requiring that the information be made publicly available in a timely manner?

1. Data Elements Provided to an RNSA

As discussed, to facilitate transparency in the securities lending market, proposed Rule 10c–1(b) through (e) would require Lenders to report specified data elements to an RNSA and for the RNSA to make certain data elements publicly available. As a preliminary matter, because the RNSA would be required to implement rules regarding the format and manner to administer the collection of information,[87] proposed Rule 10c–1 lists the data elements that persons would be required to provide to an RNSA, but does not specify granular instructions for data elements or the formatting required for submission to the RNSA.

(a) Initial Loan-Level Data Elements

Proposed Rule 10c–1(b) contains loan-level data elements that would be required to be provided to an RNSA within 15 minutes after a loan is effected and would be made public by an RNSA as soon as practicable. Proposed Rule 10c–1(b) also requires an RNSA to assign each loan a unique transaction identification identifier.[88] The specific data elements in paragraph (b) generally fall into one of two categories: (1) Data elements that identify each loan of securities and (2) data elements that reflect the negotiated terms for each loan of securities.

The data elements in paragraphs (b)(1) through (b)(5) contain material terms that are not negotiated between the parties. These data elements would provide important information that would allow market participants and regulators to track, understand, and perform analyses on the negotiated material terms that are discussed below. These data elements would also provide an RNSA with enough information to create a unique transaction identifier as required by proposed Rule 10c–1(b). Absent these data elements, market participants would not be able to track the time or date that loans are made or the platform where the loan was executed, or to identify which security was involved.

These data elements are (1) the legal name of the security issuer, and the Legal Entity Identifier (''LEI'') of the issuer, if the issuer has an active LEI; (2) the ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier; (3) the date the loan was effected; (4) the time the loan was effected; and (5) for a loan executed on a platform or venue, the name of the platform or venue where executed.

First, paragraphs (1) and (2) of proposed Rule 10c–1 identify the particular security being lent. Paragraph (1) is designed to provide information on the issuer, and paragraph (2) is designed to provide information on the particular security. These paragraphs are designed to be flexible and comprehensive so that every security that can be loaned is able to be identified. In particular, with respect to paragraph (b)(1), the Commission preliminarily believes that an issuer that lacks an LEI would have a legal name. With respect to paragraph (b)(2), the Commission preliminarily believes that securities usually would have at least one of the items listed assigned to it. If not, the RNSA could require an ''other identifier'' for further flexibility under paragraph (2).

Next, both paragraphs containing the data elements concerning time and date required to be provided to the RNSA, (b)(3) and (b)(4), require that information be reported about the time and date that the transaction was effected. Because the loan-level data elements in paragraph (b) are designed for market participants to be able to evaluate the terms of recently effected loans and any signals that these terms provide, the Commission preliminarily believes that the time and date the transaction was effected will be more useful to market participants than other times and dates because market participants will be able to have a clear picture of the signals that the parties to that transaction were considering when entering into the loan.[89]

For a loan effected on a platform or venue, paragraph (b)(5) would require the name of the platform or venue where effected. The Commission preliminarily believes that requiring the identity of a platform or venue where transactions are taking place could increase efficiency in the market by alerting investors to potential sources of securities to borrow.[90] As discussed in Part II.A, there are currently digital platforms for securities lending, which provide electronic trading in the securities lending market. There are also efforts to develop and expand peer-to-

[87] Proposed Rule 10c–1(f). For a further discussion of this provision of proposed Rule 10c–1, *see infra* Part III.C.

[88] This unique reference identifier would be necessary to provide an RNSA with modified loan terms under proposed Rule 10c–1(c).

[89] For example, the Commission could have chosen the time and date that a transaction settles. Since settlement may take a period of time to occur after agreement, however, there may be changes to market dynamics in the time period between agreement and settlement. In such a case, the information made publicly available by the RNSA may not be as useful because the conditions of the market at the time the loan was agreed to would not be known.

[90] Making information that would be provided to an RNSA under paragraph (d) about the identity of the parties lending securities publicly available would also alert investors to potential sources of securities to borrow. As stated *infra* in Part III.B.1.c), however, the Commission preliminarily believes that making this information available to the public would be detrimental because it would reveal a specific market participant's investment decisions.

peer lending platforms involving multiple beneficial owners and borrowers, where securities lending transactions take place without the use of traditional intermediaries. The Commission is not defining ''platform or venue'' in proposed Rule 10c–1 to provide an RNSA with the discretion to structure its rules so that different structures of platforms or venues could be accommodated.

Based on the market conventions that are discussed in Part II.A, the Commission preliminarily believes that the data elements in paragraphs (b)(6) through (b)(12) reflect the material terms that borrowers and Lenders negotiate when arranging loans of securities. Because these terms are negotiated, increasing the transparency of information will provide market participants with meaningful data that could be used when structuring, pricing, or evaluating loans of securities. Increasing transparency would also allow market participants to analyze signals obtained from the securities lending market when considering investment or trading decisions for a security. Further, increasing transparency would also permit the RNSA to perform in-depth monitoring and surveillance of securities lending transactions to identify trends and any anomalous market patterns.

These data elements are: (6) The amount of the security loaned; (7) for a loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges; (8) the type of collateral used to secure the loan of securities; (9) for a loan collateralized by cash, the rebate rate or any other fee or charges; (10) the percentage of collateral to value of loaned securities required to secure such loan; (11) the termination date of the loan, if applicable; and (12) whether the borrower is a broker or dealer, a customer (if the person lending securities is a broker or dealer), a clearing agency, a bank, a custodian, or other person.

With respect to the data element in paragraph (b)(6), the amount of the security loaned or borrowed, the Commission is not specifying the parameters of ''the amount of the security'' to allow an RNSA flexibility to propose rules that identify for different types of securities what information constitutes the ''amount of the security.'' For example, an RNSA could propose rules that require the number of shares be provided for equity securities and the par value of debt securities to accommodate differences in the markets for these securities. This data element would give market participants the ability to infer an estimate of the total amount of each security available to lend or on loan intraday by cross-referencing data made public the prior day by the RNSA pursuant to paragraph (e).[91] It would also give market participants the ability to observe how the size of loans affects other terms of loans.

As discussed in Part II.A, loans of securities can be collateralized in different ways and the structure of the payments depends on the type of collateral used. The data elements in proposed Rule paragraphs (b)(7) through (b)(10) would capture compensation arrangements regardless of the collateral used.[92] Accordingly, to provide context, paragraph (b)(8) would require information about the type of collateral used to secure the loan to be provided to the RNSA. For this data element, the asset class of the collateral would be provided, but the Commission is not including a list of asset classes in order to provide the RNSA with the discretion to determine a thorough list.[93] To facilitate a deeper understanding of the collateral posted, paragraph (b)(10) would require that the percentage of collateral to value of loaned securities required to secure such loan be provided to the RNSA. Paragraph (b)(7) would require that, for a loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges be provided to the RNSA. In contrast, for loans that are collateralized by cash, paragraph (b)(9) would require that the rebate rate or any other fees or charges be provided to the RNSA.

Paragraph (b)(11) would require that the termination date of the loan be provided to the RNSA, if applicable. As discussed above in Part II.A, it is typical market practice for securities loans to be open-ended, and, therefore, the securities may be recalled upon notice given by the Lender. In contrast, some loans are for a specific term. The Commission preliminarily believes that this information will provide market participants with an understanding of the potential future demand and supply of securities.[94]

Finally, paragraph (b)(12) requires that the borrower type for each transaction be provided. The Commission preliminarily believes that this data element will be useful to provide context for evaluating the other data elements. For example, borrowers of securities that are broker-dealers may determine that loans of securities to other broker-dealers are a more appropriate benchmark than all loans of securities. This data element, therefore, may enhance the transparency provided by the other data elements.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

24. What other data elements, if any, should be included to increase the transparency of securities lending?

25. Would any of the listed data elements not be informative to the public or to regulators? If not, why not? Should any of the data elements be removed or modified? If so, why?

26. Should all of the data elements in paragraph (b) be made public at the loan-level as proposed? As an alternative, should some be made public in the aggregate or only made available to regulators? Would providing aggregates of 10c–1 information provide the same or greater benefits than loan-level information as proposed? Please discuss how your response relates to the statutory objective of increasing transparency.

27. Are there sufficient data elements to allow for the identification of loans of securities and permit the creation of a unique transaction identifier by the RNSA or should additional or different data elements be required for this purpose?

28. Other than LEI, are there other issuer identifiers such as the EDGAR Central Index Key (commonly abbreviated as ''CIK'') that could be provided should the issuer have one? If yes, should the other identifier be required in addition to LEI or in the alternative?

29. Are any of the data elements redundant such that an RNSA can determine the information without being provided that particular data element?

---

[91] For a discussion of the data elements in paragraph (e), *see infra* Part III.B.1.d).

[92] Certain of these data elements may not apply to every loan. For example, a Lender would not be able to provide data pursuant to paragraph (b)(9) if the loan is not collateralized by cash. The Commission is proposing to include each of these data elements in proposed Rule 10c–1 to capture pricing and collateral information for every loan, but the RNSA may provide Lenders with instructions about how to provide information when a data element is not applicable to a specific loan.

[93] For example, an RNSA could look to the 9 categories of collateral from the OFR Pilot Survey. These 9 categories were: (1) U.S. Treasury Securities; (2) U.S. Government Agency Securities; (3) Municipal Debt Securities; (4) Non-U.S. Sovereign or Multinational Agency Debt Securities; (5) Corporate Bonds; (6) Private Structured Debt Securities; (7) Equity Securities; (8) Cash as securities; and (9) Others. *See* Off. of Fin. Research, *Securities Lending Pilot Data Collection,* at 12 (Sep. 2015), *available at https://www.financialresearch.gov/data/files/SecLending_Data_Collection_Instructions.pdf* (''Securities Lending Pilot Data Collection'').

[94] For further discussion about how proposed Rule 10c–1 may affect the supply and demand of securities, *see infra* Part VI.

30. Are the data elements in paragraphs (b)(7), (b)(8), and (b)(9) sufficient to capture the pricing terms of all loans? If not, how should the data elements be revised to capture the pricing terms of all loans?

31. Would each data element proposed to be included help to achieve the goals of proposed Rule 10c–1 that are discussed above in Part I.A.2? If so, please explain why. If not, please explain why not. If any elements are not necessary please explain the benefits and costs of excluding those data elements.

(b) Loan Modification Data

Subject to terms agreed to by the parties, loans of securities may be modified after they are made. To ensure that the transaction data reported and made public pursuant to proposed Rule 10c–1(b) reflects currently outstanding loans of securities and to prevent evasion, proposed Rule 10c–1(c) would require Lenders to provide data elements concerning modifications to loans of securities to an RNSA within 15 minutes after each loan is modified. Proposed Rule 10c–1(c) would also require an RNSA to make such information available to the public as soon as practicable. Under paragraphs (c)(1) through (c)(3), Lenders would be required to provide the date and time of the modification and the unique transaction identifier of the original loan to the RNSA. The Commission preliminarily believes that this information is necessary to allow the RNSA to identify which loan is being modified, categorize the type of modification, and make information about the modification publicly available.

Under paragraph (c), the requirement to provide information about a modification to an RNSA would be contingent on the modification resulting in a change to information required to be provided to an RNSA under paragraph (b). In these instances, Lenders would be required to provide the date and time of the modification, a description of the modification [95] and the unique transaction identifier assigned to the original loan, if any. For example, termination of a loan would be a modification for which information would need to be provided to an RNSA under paragraph (c) because the termination would result in a reduction of the quantity of the securities initially provided to an RNSA for that loan under paragraph (b)(6). Another example would be where a loan that is collateralized by cash is modified so that the borrower pays a one-time fee to the lender without changing the rebate rate since a one-time fee would be an ''other fee or charge'' under paragraph (b)(9).[96]

32. Are the circumstances that would trigger an obligation to provide information to an RNSA about a modification under the proposed Rule clear? If not, please provide specific examples of circumstances where the proposed requirement to do so is unclear and explain why.

33. Are there any modifications to information provided to an RNSA pursuant to proposed Rule 10c–1(b) that should not be required to be provided to an RNSA? Why or why not? Please explain how excluding such a term from reporting would not make the data already made public by an RNSA potentially misleading.

34. Should additional data elements about modifications be provided to an RNSA? If yes, please explain why and how these data elements would increase transparency.

35. Should the Commission require a data element that would list which party initiated the termination of the loan (*e.g.,* whether shares were recalled by the Lender or whether the borrower returned the shares without a request from the Lender)? If yes, please explain the benefits of requiring that this information be provided and how it would be used.

(c) Material Transaction Data That Would Not Be Made Public

As discussed, proposed Rule 10c–1 is designed to increase the transparency of information available to market participants with respect to the loan or borrowing of securities. Proposed Rule 10c–1 is also designed to provide regulators with data that could be used to better understand securities trading, including interest in short selling and price discovery for securities lending.[97] The data elements in proposed Rule 10c–1(e) are necessary for these regulatory functions but the Commission preliminarily believes that making this information available to the public would identify market participants or reveal information about the internal operations of market participants. Accordingly, although proposed Rule 10c–1(d) requires certain data elements be provided to an RNSA within 15 minutes after each loan is effected, the RNSA shall keep such information confidential, subject to the provisions of applicable law.

First, paragraph (d)(1) requires the Lender to provide ''[t]he legal name of each party to the transaction, CRD or IARD Number, if the party has a CRD or IARD Number, MPID, if the party has an MPID, and the LEI of each party to the transaction, if the party has an active LEI, and whether such person is the lender, the borrower, or an intermediary between the lender and the borrower.'' [98] The Commission preliminarily believes that the provision of this data element to the RNSA will allow regulators to understand buildups in risk at market participants.[99] Further, this data element will provide the RNSA with information that would be required to administer the collection of all data elements provided to it under paragraphs (b) through (d) of proposed Rule 10c–1, such as ensuring the completeness of submissions, contacting persons that have errors in their provided data, and troubleshooting person-specific technical issues. While this information is important for regulatory purposes, the Commission preliminarily believes that making this information available to the public would be detrimental because it may reveal a specific market participant's investment decisions.

If the Lender is a broker-dealer, proposed Rule 10c–1(d)(2) would require information about ''[w]hether the security is loaned from a broker's or dealer's securities inventory to a customer of such broker or dealer'' to be provided to an RNSA. The Commission

[95] The Commission is not specifying the parameters of the term ''description of the modification'' to allow an RNSA flexibility to propose rules about the descriptions that could be needed for different types of modifications and how such information would be reflected in the updated information made public and stored in a machine readable format as required by paragraph (g)(1).

[96] An example of a modification that would not trigger the requirement in paragraph (c) would be when a borrower posts additional collateral in response to an increase in value of the loaned securities. Information about this change would not need to be provided under paragraph (c) because, while paragraph (b)(10) requires the Lender to provide the percentage of collateral to value of loaned securities required to secure such loan, it does not require information about the value of collateral posted in dollar terms.

[97] Under paragraph (g)(2), an RNSA would make the information collected pursuant to paragraphs (b) through (f) available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need.

[98] Unlike borrowers who may not know the identity of the principal that has loaned them securities if a lending agent administers the lender's program, the Commission preliminarily believes that all lenders (or their lending agent) should have access to the identity of the borrower because lenders must track the parties to whom they have lent securities.

[99] To facilitate this understanding, paragraph (g)(2) would require RNSAs to make the information collected pursuant to paragraphs (b) through (e) of this section available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need.

preliminarily believes that this information would provide regulators with information on the strategies that broker-dealers use to source securities that are lent to their customers. This data element would not apply to Lenders that are not broker-dealers. The Commission preliminarily believes that making this information available to the public would be detrimental because it may reveal confidential information about the internal operations of a broker-dealer.

If a person that provides 10c–1 information knows [100] that a loan is being used to close out a fail to deliver as required by Rule 204 of Regulation SHO,[101] to close out a fail to deliver outside of Regulation SHO, proposed Rule 10c–1(d)(3) requires such information be provided to an RNSA. The Commission preliminarily believes that these data elements will provide regulators with information about short sales and the loans that broker-dealers provide to their customers with fail to deliver positions.

In particular, Regulation SHO requires brokers-dealers that are participants of a registered clearing agency to take action to close out fail to deliver positions.[102] One option for closing out a fail to deliver position is to borrow securities of like kind and quantity. Accordingly, broker-dealers may lend securities to their customers to close out the failure to deliver, which may constrain the supply of securities available to lend. Rule 204's close-out requirement is only applicable to equity securities and broker-dealers may also arrange for the borrowing of securities to cover a fail to deliver outside of Regulation SHO for all other types of securities.[103] Paragraph (d)(3) would require the provision of this information, if known, to provide regulators with insight into loans to cover fails of non-equity securities. The Commission preliminarily believes that making these data elements available to the public would be detrimental because it may reveal information about the internal operations of market participants.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

36. Would the disclosure of the data element in paragraph (d)(1) (the identities of the parties) be helpful to investors, for example, to understand proxy voting issues?

37. Should one or both of the data elements in paragraph (d)(2) or (d)(3) be made available to the public? If yes, please explain why and whether it should be at loan-level or in the aggregate.

38. Are Lenders already collecting the information required by paragraph (d)(1)? In particular, are Lenders collecting a borrower's CRD, IARD, MPID, or LEI, if applicable? If not, should proposed Rule 10c–1 only require Lenders to provide this information if the borrower makes it known to the Lender? Why or why not? Would Lenders be required to modify any existing agreements to provide this information to an RNSA?

39. Should any of the data elements in paragraph (d) be modified or removed? If so, which ones and why?

40. Should data elements be added to paragraph (d). If yes, please explain.

41. Given the confidential 10c–1 information that the Lender and reporting agent would provide to an RNSA should there be requirements placed on the RNSA and/or the reporting agent to protect confidential 10c–1 information?

42. Should Lenders be required to provide all of the identifying data elements listed in d(1) for every loan of securities or should only one of those data elements be required? For example, would just providing a CRD be sufficient to allow the RNSA to identify the parties to a transaction? What are the costs and benefits of either approach? Further, would the lack of an LEI make it more challenging to identify entities across different data sets? Should borrowers be required to obtain an LEI if they do not already have one?

(d) Total Amount of Securities Available to Loan and Total Amount of Securities on Loan

Paragraph (e) of proposed Rule 10c–1 would require data elements concerning securities available to loan and securities on loan be provided to an RNSA. These data elements would need to be provided by the end of each business day that a person included in paragraphs (e)(1) or (e)(2) of proposed Rule 10c–1 either was required to provide information to an RNSA under paragraph (a) or had an open securities loan about which it was required provide information to an RNSA under paragraph (a).[104] For each security about which the RNSA receives information under paragraph (e), paragraph (e)(3) would require the RNSA to make available to the public only aggregated information for that security, as well as the information required by (e)(1)(i) and (ii) and (e)(2)(i) and (ii) as soon as practicable, but not later than the next business day.[105] The Commission preliminarily believes that requiring the RNSA to make available to the public the information required by paragraph (e)(1)(i) and (e)(2)(i) (the legal name of the security issuer, and the LEI of the issuer, if the issuer has an active LEI) and (e)(1)(ii) and (e)(2)(ii) (the ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier) will provide identifying information for each security for which aggregate information would be made public. The data elements in proposed Rule 10c–1(d) are necessary for these regulatory functions but the Commission preliminarily believes that making this information available to the public would identify market participants or reveal information about the internal operations of market participants. Accordingly, under paragraph (e)(3), all identifying information about lending agents, reporting agents, and other persons using reporting agents, would not be made publicly available, and the RNSA would be required to keep such information confidential, subject to the provisions of applicable law.

To specify the information that would be required to be provided to an RNSA under paragraph (e) and to ensure that all relevant securities available to loan or on loan are included, the data elements of paragraph (e) are separated between lending agents, who would provide the data elements in paragraph (e)(1), and persons who do not employ a lending agent, who would provide the data elements in paragraph (e)(2). As fully discussed below, despite their

[100] Because Lenders of securities may not be aware of the borrowers' motivations for a transaction, the data elements in paragraph (d)(3) would only need to be provided to an RNSA if known.

[101] 17 CFR 242.204.

[102] A fail to deliver occurs when a participant of a registered clearing agency fails to deliver securities to a registered clearing agency on the settlement date. *See* 17 CFR 242.204(a).

[103] *See* 17 CFR 240.15c6–1 (Commission rule containing the standard settlement cycle for most securities transactions; *See also* Securities Transaction Settlement Cycle, Exchange Act Release No. 80295, 82 FR 15564, at 7–10 (Mar. 22, 2017), *available at https://www.sec.gov/rules/final/2017/34-80295.pdf* (portion of release adopting changes to the settlement cycle discussing overview of settlement requirements).

[104] The Commission is not specifying exactly what time would be considered the ''end of each business day'' or what holidays should not be considered a ''business day'' to give the RNSA the discretion to structure its systems and processes as it sees fit and propose rules accordingly.

[105] Releasing data as provided would identify market participants. Consistent with the reasoning for not making the information required to be provided by paragraph (d) publicly available, the Commission preliminarily believes that this information should not be made public by an RNSA. Further, as described below, the Commission preliminarily believes that the information in paragraph (e) will be used by market participants to determine a utilization rate. Information aggregated by security is the input for that calculation.

different locations in the text of paragraph (e), however, the first two elements listed in paragraphs (e)(1) and (e)(2) are the same for all persons. In addition, the last two data elements require the same general information, but would provide certainty about the positions that should be included in the information that is provided to an RNSA. Further, both paragraphs would require that reporting agents provide the identity of the person on whose behalf it is providing the information to the RNSA. Identifying the person on whose behalf the information is being provided would facilitate regulatory oversight regarding compliance with the requirements of paragraph (e).

As a preliminary matter, as more thoroughly discussed in Part VI, the Commission has designed the data elements provided to the RNSA under paragraph (e) to allow for the calculation of a ''utilization rate'' for each particular security. The utilization rate, which would be calculated by dividing the total number of shares on loan by the total number of shares available for loan, could be used by market participants to evaluate whether the security will be difficult or costly to borrow.

The first two data elements that would be required to be provided to the RNSA by all persons under paragraph (e) would be the legal name of the security issuer; and the LEI of the issuer, if the issuer has an active LEI; and the ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier.[106] These data elements are necessary to calculate the utilization rate from the total amount of each security on loan and available to loan.

Next, all persons would be required to provide information about the total amount of each security that is available to lend and is on loan. The language ''total amount of each security'' would provide RNSAs with flexibility to accommodate market conventions of different types of securities. For example, if it chooses to do so, this language would give an RNSA the discretion to make rules that require the number of shares be provided for equity securities and par value of debt securities.[107] Further, the language is designed to require that security-specific information is provided to market participants so that a security-specific utilization rate would be able to be calculated.

All persons would be required to provide the total amount of each security that is available to lend under either paragraph (e)(1)(iii) or (e)(2)(iii). Per paragraph (e)(1)(iii), a security that is not subject to legal restrictions that would prevent it from being lent would be ''available to lend.'' [108] For example, a lending agent that provides information on behalf of a beneficial owner should exclude any securities that the beneficial owner has specifically restricted from the lending program. Some programs may be subject to overall portfolio restrictions [109] (*e.g.,* no more than 20% of the portfolio may be lent at any time),[110] and/or specific counterparty restrictions (*e.g.,* counterparty rating). However, because those restrictions apply to the overall portfolio but not the specific securities held in those portfolios, those securities would be available to lend unless the securities are themselves subject to restrictions that prevent them from being lent. The Commission preliminarily believes that this approach would provide market participants with useful information because all securities that generally would be available to lend would be included.

Next, all persons would be required to provide the total amount of each security that is on loan under either paragraph (e)(1)(iv) or (e)(2)(iv). Per paragraph (e)(1)(iv), a security would be ''on loan'' if the loan has been contractually booked and settled.[111] Because a loan should be considered effected when it is agreed to by the parties,[112] effected loans that have not been booked and settled would not be included in the total amount of each security on loan that is provided to the RNSA. The Commission preliminarily believes this information will provide information that is more relevant for this purpose of allowing market participants to plan their borrowing activity, since loans that have been booked and settled are truly no longer able to be lent by the Lender providing the information to the RNSA.[113]

To illustrate when Lenders would be required to provide information under paragraph (e) and the securities that would be considered ''available to loan'' and ''on loan'' with an example: Consider a Lender that owns five shares of Issuer A, five shares of Issuer B, and five shares of Issuer C, none of which are subject to legal restrictions that prevent them from being lent. If on a business day this Lender does not have any outstanding securities loans and does not loan any securities, it would not be required to provide information about any of its securities under paragraph (e). In contrast, if on a business day this Lender loans three of its shares of issuer A, the Lender would be required to provide information to an RNSA under paragraph (e) because it would have been required to provide information about this loan to an RNSA under paragraph (a). This Lender would consider two shares of issuer A, five shares of Issuer B, and five shares of Issuer C as ''available to loan'' because none of these shares would be subject to legal or other restrictions that prevent them from being lent. Further, if the loan of three shares of Issuer A clears

[106] Proposed Rule 10c–1(e)(1)(i) and 10c–1(e)(1)(ii) (requirements applicable to lending agents) and Proposed Rule 10c–1(e)(2)(i) and 10c–1(e)(2)(ii) (requirements applicable to all other persons). The data elements in paragraphs (i) and (ii) of proposed Rule 10c–1(e)(1) and (e)(2) mirror the same requirements under paragraph (b)(1) and (b)(2). For an explanation of the flexibility of these requirements, *see supra* Part III.B.1.a).

[107] This example was previously discussed above in reference to paragraph (b)(6). *See supra* Part III.B.1.a).

[108] This definition is consistent with the approach of the OFR's General Instructions for Preparation of the Securities Lending Pilot Data Collection. *See* Securities Lending Pilot Data Collection, *supra* note 93, at 2.

[109] For example, Commission staff guidance forms the basis for investment companies' securities lending practices. *See* Investment Company Derivatives Rule, 85 FR 83228, n. 742. As a result, investment companies typically do not have more than one-third of the value of their portfolio on loan at any given point in time. *See, e.g.,* SEC Staff No-Action Letter, RE: The Brinson Funds, et al., *available at https://www.sec.gov/divisions/investment/noaction/1997/brinsonfunds112597.pdf*) (Nov. 25, 1997) (''One of the guidelines is that a fund may not have on loan at any given time securities representing more than one-third of its total assets.''). This staff statement represents the views of the staff of the Division of Investment Management. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. The staff statement, like all staff statements, has no legal force or effect: It does not alter or amend applicable law, and it creates no new or additional obligations for any person.

[110] For example, a beneficial owner that has program limits permitting the loan of any portfolio security, up to 20% of the portfolio would include 100% of the portfolio as lendable. A beneficial owner that will only lend specified securities, which represent 25% of the portfolio, would list only those specified securities as lendable. Similarly, a beneficial owner that will lend any security in its portfolio but has program limits in place to avoid loaning more than one-third of the value of their portfolio at any time would report 100% of its securities as available to lend.

[111] Like the interpretation of ''available to loan'' discussed in note 108, the interpretation of ''on loan'' is consistent with the approach of the OFR's General Instructions for Preparation of the Securities Lending Pilot Data Collection. *See* Securities Lending Pilot Data Collection, *supra* note 93, at 2.

[112] *See* Part III.B.

[113] Further, while it may be possible to infer a rough estimate of the amount of securities on loan from the information provided under paragraphs (b) and (c) without using any information provided under paragraph (e), the Commission preliminarily believes that the information provided under paragraph (e) should allow market participants to calculate a utilization rate that is likely to be reliable.

and settles on that business day, this Lender would consider the three shares of Issuer A as ''on loan.''

As noted above, to provide clarity about what would be required to be provided to an RNSA under paragraph (e) and to ensure that all relevant securities available to loan or on loan are included, the data elements of paragraph (e) are separated between lending agents, who would provide the data elements in paragraph (e)(1), and persons who do not employ a lending agent, who would provide the data elements in paragraph (e)(2).[114]

With respect to lending agents, paragraph (e)(1) contains different requirements for lending agents that are broker-dealers and lending agents that are not broker dealers. In particular, under paragraph (e)(1)(iii), if a lending agent is a broker or dealer, the lending agent would provide to the RNSA the total amount of each security available to lend by the broker or dealer, including the securities owned by the broker or dealer, the securities owned by its customers who have agreed to participate in a fully paid lending program, and the securities in its margin customers' accounts. If the lending agent is not a broker-dealer, the lending agent would provide to the RNSA the total amount of each security available to the lending agent to lend, including any securities owned by the lending agent in the total amount of each security available to lend provided.

Similarly, under paragraph (e)(1)(iv), if a lending agent is a broker-dealer, the lending agent would provide to the RNSA the amount of each security on loan by the broker or dealer, including the securities owned by the broker or dealer, the securities owned by its customers who have agreed to participate in a fully paid lending program, and the securities that are in its margin customers' accounts in the total amount of each security on loan. If the lending agent is not a broker-dealer, the lending agent would provide to the RNSA the total amount of each security on loan where the lending agent acted as an intermediary on behalf of a beneficial owner and securities owned by the lending agent in the total amount of each security on loan provided to the RNSA.

The Commission preliminarily believes that the requirements for lending agents will provide them with specificity around which positions to include in the information that is provided to an RNSA under paragraph (e). In addition, because some lending agents are broker-dealers, the Commission preliminarily believes that the applicable requirements should ensure that all relevant positions are included.

With respect to all other persons, paragraphs (e)(2)(iii) and (e)(2)(iv) contain the requirements for the positions that should be included in the total amount of each security available to lend and on loan. Unlike paragraph (e)(1), paragraph (e)(2) does not distinguish among different types of persons in paragraph (e)(2) because, due to the definition of lending agent in paragraph (a)(1)(i)(A), persons subject to paragraph (e)(2) would not be loaning securities on behalf of other persons. It is not necessary, therefore, to distinguish between different types of market participants because these entities would, by definition, only be loaning securities that they own. Accordingly, persons subject to paragraph (e)(2)(iii) would provide to the RNSA the total amount of each security that is owned by the person and available to lend.[115] In addition, under paragraph (e)(2)(iv), these persons would provide to the RNSA the total amount of each security on loan owned by the person.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

43. Should the RNSA make the information reported under proposed Rule 10c–1(e) public at the level it is provided (*e.g.,* not aggregating the information by security)? Why or why not?

44. Should Rule 10c–1 require the RNSA to make the information required by paragraph (e) publicly available in a manner that identifies the Lender if that Lender volunteers to make such information public? Why or why not? If so, should only beneficial owners be permitted to volunteer to make such information public and not lending agents? Why or why not?

45. Should paragraph (e) be limited to only require information about certain types of securities, such as only equity securities? If so, please explain which securities should be included and why the excluded securities should not be included.

46. Are the data elements required by paragraphs (e)(1)(i)/(e)(2)(i) (the legal name of the security issuer, and the LEI of the issuer, if the issuer has an active LEI) and (e)(1)(ii)/(e)(2)(ii) (the ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier) both necessary? Would only requiring one of these be sufficient to allow identification of the security about which the information is being provided? Would only requiring one of these reduce the utility of the data in other ways, for example, by making it more challenging to identify entities and/or securities across multiple data sets?

47. As noted above, the language ''total amount of each security'' is intended to provide the RNSA with flexibility to accommodate market conventions of different types of securities. For example, this language is intended to give an RNSA the discretion to make rules, if it chooses to do so, that require the number of shares be provided for equity securities and par value of debt securities. Instead of this approach, should the Commission specify the specific reporting obligations applicable to specific types of securities under paragraph (e) rather than leaving it to the discretion of an RNSA? If yes, please explain why and provide a methodology for determining the total amount of each security available for loan and on loan for various types of securities.

48. The Commission recognizes that the definition of ''available to lend'' may overstate the quantity of securities that could actually be lent because the data would include securities that may become restricted if a limit is reached. Should a different definition be used? Is there another definition that would provide a better or more accurate estimate of securities available for loan than the proposed definition? In particular, please also explain how the alternative approach would operationally work and give market Lenders certainty around the securities it would classify as available to lend.

49. If the number of shares available to lend was not made publicly available, are there alternative data that market participants could use to evaluate whether the security will be difficult or costly to borrow? For example, could a market participant look to the public float of a security instead? Why or why not? Would there be other impacts on the utility of the data?

50. To avoid the provision of information about individual market participants' proprietary portfolios, should the Commission limit the requirement to provide information under paragraph (e) to lending programs that pool the securities of multiple beneficial owners? In addition or as an

[114] Paragraph (a)(1)(i)(A) defines lending agent as a ''bank, clearing agency, broker, or dealer that acts as an intermediary to a loan of securities . . . on behalf of a [beneficial owner].'' Under this definition, a lending agent that is not acting as a lending agent with respect to a particular securities loan would still be a lending agent, and, therefore be subject to paragraph (e)(1) and not (e)(2).

[115] Proposed Rule 10c–1(e)(2)(iii).

alternative, should the Commission remove the requirement that a reporting agent would be required to provide the identity of the person on whose behalf it is providing the information? Would this be consistent with the purpose of the proposed rule, which is to increase transparency in the securities lending market? Why or why not?

51. Do the definitions of ''available to lend'' or ''on loan'' conflict with market practice or other regulatory requirements? If yes, please explain.

52. Do you believe that any of the information in paragraph (e) of the proposed Rule should not be required to be provided or that any of the requirements of paragraph (e) should be modified? Do you believe that any information in addition to the information required to be provided in paragraph (e) of the proposed Rule should be provided? Please explain why.

53. Do you believe that the information provided pursuant to paragraph (e) of the proposed Rule should be provided more frequently or less frequently than each business day? Why or why not?

C. RNSA Rules To Administer the Collection of Information

The Commission is proposing Rule 10c–1(f), which would require the RNSA to implement rules regarding the format and manner to administer the collection of information in proposed paragraphs (b) through (e) of this section and the distribution of such information pursuant to Section 19(b) of the Exchange Act. The Commission preliminarily believes that permitting an RNSA to implement rules regarding the administration of the collection of securities lending transactions would enable the RNSA to maintain and adapt potential technological specifications and any changes that might occur in the future. Under the proposal, and consistent with Exchange Act Section 19(b), the Commission would retain oversight of the RNSA's adoption of rules to administer the collection of information under proposed Rule 10c–1.[116]

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

54. Should proposed Rule 10c–1 specify the format and manner that information should be provided to the RNSA rather than require the RNSA to adopt rules regarding such format and manner? Please discuss. Are there disadvantages to having an RNSA adopt a rule regarding the format and manner that information should be provided to the RNSA pursuant to proposed Rule 10c–1? What advantages would there be if Rule 10c–1 specified the format and manner that information should be submitted to the RNSA?

D. Data Retention and Availability

The Commission is proposing Rule 10c–1(g)(1) to require that an RNSA retain the information collected pursuant to paragraphs (b) through (e) of proposed Rule 10c–1 in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years. The Commission preliminarily believes that requiring the RNSA to retain records for five years is consistent with other retention obligations of records that Exchange Act rules impose on an RNSA. For example, 17 CFR 240.17a–1, Exchange Act Rule 17a–1 requires RNSAs to keep documents for a period of not less than five years. Similarly, 17 CFR 242.613(e)(8), Rule 613(e)(8) of Regulation NMS, on which the retention period for proposed Rule 10c–1 is modeled, requires the central repository to retain information in a convenient and usable standard electronic data format that is directly available and searchable electronically without any manual intervention for a period of not less than five years. Rule 10c–1(g)(1) is using a standard for storage that is similar to Rule 613(e)(8). The standard sets forth the criteria for how information must be stored but does not specify any particular technological means of storing such information, which should provide flexibility to the RNSA to adapt to technological changes that develop in the future. As with Exchange Act Rule 17a–1, the retention period is intended to facilitate implementation of the broad inspection authority given the Commission in Section 17(a) of the Exchange Act.[117] The Commission preliminarily believes that including a retention period that is consistent with other rules applicable to RNSAs reduce the burden for an RNSA to comply with the retention requirements in proposed Rule 10c–1 because the RNSA will have developed experience and controls around administering record retention programs that are similar to the requirements of proposed Rule 10c–1(g)(1).

Furthermore, the Commission is proposing Rule 10c–1(g)(2), which would require the RNSA to make the information collected pursuant to paragraph (a)(2)(iii) and paragraphs (b) through (e) of this section available to the Commission or other persons, such as SROs or other regulators, as the Commission may designate by order upon a demonstrated regulatory need. The Commission preliminarily believes that stating explicitly that it would have access to the information that is being provided to the RNSA is appropriate because in times of market stress or extreme trading conditions, including spikes in volatility, the Commission will be able to quickly access and analyze activity in the market place. In addition to the Commission and the RNSA, other regulators may require access to the confidential information for regulatory purposes, for example to ensure enforcement of the regulatory requirements imposed on the entities that they oversee.

The Commission is also proposing Rule 10c–1(g)(3), which would require the RNSA to provide the information collected under paragraphs (b) and (c) of this section and the aggregate of the information provided pursuant to paragraph (e) of this section available to the public without charge and without use restrictions, for at least a five-year period. The Commission preliminarily believes that requiring the RNSA to provide certain information to the public will further the direction by Congress in Section 984(b) of the DFA for the Commission to promulgate rules that are designed to increase the transparency of information to brokers-dealers and investors, with respect to the loan or borrowing of securities because the information required to be disclosed by the RNSA will include the specified material terms of securities lending transactions.

The Commission preliminarily believes that access to the publicly available 10c–1 information as required by paragraph (g)(3) should be available on the RNSA's website or similar means of electronic distribution in the same manner such information is required to be maintained pursuant to paragraph (g)(1) of this section (specifically, ''a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention''), and be free and without use restrictions. The Commission acknowledges that establishing and maintaining a system to provide public access to certain 10c–1 information is not without cost. The Commission, however, preliminarily believes that such costs should be borne

[116] 15 U.S.C. 78s(b).

[117] *See, e.g.,* Recordkeeping and Destruction of Records, Exchange Act Release 10809 (May 17, 1974), 39 FR 18764 (May 30, 1974); *see also* Recordkeeping and Destruction of Records, Exchange Act Release 10140 (May 10, 1974), 38 FR 12937 (May 17, 1973).

by the RNSA in the first instance and permitted to be recouped by the RNSA from market participants who report securities lending transactions to the RNSA.[118] Furthermore, proposed Rule 10c–1 would require that the publicly available 10c–1 information be made available without use restrictions. The Commission preliminarily believes that any restrictions on how the publicly available 10c–1 information is used will impede the utility of such information because such restrictions may limit the ability of investors, commercial vendors, and other third parties, such as academics, from developing uses and analyses of the information.[119]

The Commission preliminarily believes that five years is the appropriate length of time for the RNSA to make information available to the public, because such a time period will provide broker-dealers and investors with an opportunity to identify trends occurring in the market and in individual securities based on changes to the material terms of securities lending transactions.

The Commission is also proposing Rule 10c–1(g)(4), which would require the RNSA to establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of the confidential information required by paragraphs (d) and (e)(3). As discussed above in Parts III.B.1.c) and d), Rule 10c–1 would require Lenders to provide sensitive and confidential information to the RNSA. Furthermore, paragraphs (d) and (e)(3) would require that the RNSA keep such information confidential. The Commission preliminarily believes that the RNSA needs to protect this information from intentional or inadvertent disclosure to protect investors that provide such information by establishing reasonably designed written policies and procedures because the distribution of such information would identify market participants or could reveal information about the internal operations of market participants, which could be adverse to those providing information to the RNSA. For example, the disclosure of such information could reveal the portfolio holdings, trading strategies, and activity of a Lender, which other market participants might use to disadvantage the Lender.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

55. Is the retention of information collected by the RNSA for a period of five years in proposed paragraph 10c–1(g)(1) appropriate? If not, should the period under proposed paragraph 10c–1(g)(1) to preserve records under proposed paragraph 10c–1(b) through (e) be different—20 years, 10 years, 3 years, or some other period of time and why? Should the proposed Rule require an RNSA to maintain the information indefinitely? What would be the benefits or costs if the proposed Rule required an RNSA to retain information for the life of the RNSA? Would investors, RNSAs, the Commission, or the public benefit from retention period that is longer than five years? Is a recordkeeping requirement in proposed Rule 10c–1(g)(1) necessary, or will an RNSA maintain the records of its own accord or pursuant to other regulatory recordkeeping obligations, such as Rule 17a–1?

56. Is the retention requirement in proposed paragraph 10c–1(g)(1) unduly burdensome on the RNSA or overly costly? If so, in what ways could modifications to the Rule as proposed reduce these burdens and costs?

57. What, if any, impact would the recordkeeping requirements in paragraph (g) have on liquidity in securities that are subject to the requirement to provide 10c–1 information?

58. Is five years the appropriate length of time for the RNSA to make information available to the public? If not, should the period of time be for 20 years, 10 years, 3 years, or some other period of time? Please explain why.

59. Are there other methods of distributing 10c–1 information that Rule 10c–1 should require besides the RNSA's website or similar means of electronic distribution? Please explain. Should Rule 10c–1 not explicitly name any type of technology currently in existence, such as a website? Should Rule 10c–1 require only that information has to be publicly available and let the RNSA determine how to best accomplish providing information to the public?

60. Should the Commission include additional requirements designed to help ensure the confidentiality of information provided to the RNSA? Please explain. Do commenters believe the confidential information is as sensitive as discussed in this release? Please explain.

E. Report and Dissemination Fees

To fund the reporting and dissemination of data provided pursuant to this Rule, the Commission is proposing paragraph 10c–1(h), which would reflect that the RNSA has authority under Exchange Act Section 15A(b)(5) to establish and collect reasonable fees from each person who provides any data in proposed paragraphs (b) through (e) of proposed Rule 10c–1 directly to the RNSA. The Exchange Act allows RNSAs to adopt rules that ''provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls.'' [120] The Commission preliminarily believes that it is appropriate to establish and collect reasonable fees from each person who directly provides the information [121] set forth in the Rule to the RNSA. The Commission acknowledges that this might result in persons that are not members of an RNSA being required to pay fees to the RNSA for the use of the facility or system operated by FINRA, but in the absence of such a fee the RNSA and its members could be subsidizing the free riding of non-member Lenders that would be required to provide 10c–1 information to the RNSA under the proposed Rule. Such an outcome might not result in an equitable allocation of reasonable dues, fees, and other charges among ''members and issuers and other persons'' providing 10c–1 information to a facility or system operated or controlled by the RNSA.

The Commission has previously approved a rule that permits an RNSA to charge fees to non-members that use the RNSA's systems to comply with rules adopted by the Commission. FINRA Rule 6490, which implements notice requirements of issuers for certain corporate actions pursuant to Rule 10b–17, establishes a fee schedule that issuers pay to FINRA for processing these corporate actions. The Commission exercised oversight of the

[118] *See infra* Part III.E.

[119] The requirement to provide the 10c–1 information in the same manner such information is maintained pursuant to paragraph (g)(1) of this section on the RNSA's website without charge and without use restrictions is not intended to preclude the RNSA from creating alternative means to provide information to the public or subscribers. For example, an RNSA might choose to file with the Commission proposed rules to establish data feeds of the Rule 10c–1 information that vendors might subscribe to and repackage for onward distribution.

[120] *See* 15 U.S.C. 78o–3(b)(5) (''The rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls'').

[121] For example, lending agents and reporting agents would be providing proposed Rule 10c–1 information to an RNSA on behalf of beneficial owners and using the facility or system of the RNSA. However, the beneficial owners relying on such lending agent or reporting agent would not be using the facility or system of the RNSA.

fees imposed by FINRA on non-members by noticing FINRA's Rule 6490 for comment, reviewing and considering comments, and approving Rule 6490. Similarly, the Commission would oversee fees that the RNSA proposed to charge by members and non-members to administer proposed Rule 10c–1. Specifically, any such fees would have to be filed with the Commission under Section 19(b) of the Exchange Act. The proposed fees would be published for notice and public comment. Since FINRA is currently the only RNSA, the Commission understands the potential for monopolistic pricing by FINRA on Lenders that are required to provide 10c–1 information to FINRA. To the extent FINRA files a rule to charge fees for Lenders to provide 10c–1 information, the Commission would be analyzing costs to FINRA to establish the system required by proposed Rule 10c–1 consistent with the requirements under Section 15A(b).[122] For example, Section 15A(b)(5) requires an equitable allocation of reasonable fees and other charges among members and issuers and other persons using any facility or system which the association operates or controls. Accordingly, to the extent FINRA fails to meet its burden in a rule filing with the Commission that the fees meet the requirements of the Exchange Act, the fees would not be permissible.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

61. Should proposed Rule 10c–1 explicitly state that an RNSA may collect a fee from persons that provide 10c–1 information to the RNSA? If so, why ?

62. Are there alternative means to fund a system for providing 10c–1 information to the RNSA? If so, please explain.

IV. General Request for Comment

The Commission solicits comment on all aspects of proposed Rule 10c–1 and any other matter that might have an impact on the proposal discussed above. In particular, the Commission asks commenters to consider the following questions:

63. What, if any, impact would proposed Rule 10c–1 have on liquidity in securities that are subject to the requirement to provide 10c–1 information? Please explain.

64. Are there additional or different ways to structure the proposed Rule that would help provide additional transparency in the securities lending market? Please explain.

65. Should the Rule be limited to certain securities? Why or why not? Please explain.

66. How might the proposal positively or negatively affect investor protection, the maintenance of a fair, orderly, and efficient securities lending market, and capital formation?

67. As currently drafted the proposed Rule would require that persons whose loans are processed through any of the lending programs such as those operated by the OCC comply with the requirement to provide 10c–1 information. Please discuss whether loans cleared through OCC, or similar processes, should be exempt from the proposed Rule's requirement to provide 10c–1 information or whether such exemptions should be considered on a case-by-case basis pursuant to paragraph (i) of the proposed Rule.

68. As currently drafted paragraphs (b), (c), and (d) of the proposed Rule require that information be provided to the RNSA within 15 minutes after the loan is effected or modified. Please comment on whether the time period for providing the information in paragraphs (b), (c), and (d) should be shorter, for example within 90 seconds, or longer, for example within 30 minutes, and explain why.

69. As currently drafted paragraphs (b) and (c) of the proposed Rule require that the RNSA make the information provided to it pursuant to those paragraphs available to the public as soon as practicable. Please comment on whether making the information provided pursuant to paragraphs (b) and (c) publicly available as soon as practicable provides sufficient transparency in the securities lending market or whether such information should be published in a shorter or longer time frame and please explain why.

70. As currently drafted the information required to be provided in paragraphs (b) and (c) of the proposed Rule would be made public by the RNSA. Please comment on whether the information provided pursuant to any of those paragraphs should not be made public and explain why. If there are any additional data elements that you believe the Commission should require to be provided, please include a description of such elements that explains why they should be added to the requirement to provide 10c–1 information and whether or not they should be made public. If there are any data elements in paragraphs (b) or (c) of the proposed Rule that should not be required to be provided, or that should be modified, please explain why.

71. Please comment on whether the proposed Rule should include a definition of ownership of securities, which would specify who owns and can lend securities. For example, should the proposed Rule define ownership as meaning that a person, or the person's agent, has title to such security, has not pledged such security, and has custody or control of such security? Please comment.

Comments are of great assistance to the Commission's rulemaking initiative when they are accompanied by supporting data and analysis of the issues addressed in those comments and if they are accompanied by alternative suggestions to the proposal where appropriate.

V. Paperwork Reduction Act Analysis

A. Background

Certain provisions of proposed Rule 10c–1 impose ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[123]

The Commission is submitting proposed Rule 10c–1 to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[124] The title for the new information collection is ''Material Terms of Securities Lending Transactions.'' An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid control number.

As detailed above, to supplement the information available to the public involving securities lending and close the data gaps in this market, proposed Rule 10c–1 is designed to provide, in a timely manner, investors and other market participants with unrestricted and free access to material information regarding securities lending transactions. The data elements provided to an RNSA under proposed Rule 10c–1 are also designed to provide the RNSA with data that might be used for in-depth monitoring and surveillance. Further, the data elements are designed to provide regulators with information to understand: Whether market participants are building up risk; the strategies that broker-dealers use to source securities that are lent to their customers; and the loans that broker-dealers provide to their customers with fail to deliver positions.

Because the Commission has not directly addressed the provision of the

[122] *See NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[123] 44 U.S.C. 3501, *et seq.*

[124] *See* 44 U.S.C. 3507; 5 CFR 1320.11.

material terms of securities lending transactions for purposes of the Federal securities laws, proposed Rule 10c–1 would create new information collections burdens on certain Lenders and RNSAs, as detailed below.

B. Proposed Use of Information

The information collections in Proposed Rule 10c–1 are designed to increase the transparency and efficiency of the securities lending market by requiring any person that loans a security on behalf of itself or another person to provide the material terms of those securities lending transactions to an RNSA. As discussed above, the information available on securities lending transactions is spotty and incomplete.[125] The information collections are necessary to remediate these issues by giving market participants and regulators unrestricted and free access to material information regarding securities lending transactions.

C. Information Collections

As described in detail below, the information collections burdens in proposed Rule 10c–1 are directly related to either (1) Lenders[126] capturing data elements and providing information to an RNSA and (2) an RNSA collecting the information and subsequently making certain data elements publicly available. Given the differences in the information collections applicable to these parties, the burdens applicable to Lenders are separated from those applicable to an RNSA in the analysis below for the sake of organization.

D. Information Collections Applicable to Lenders

Proposed Rule 10c–1 would apply to all Lenders. As defined above,[127] Lenders include any person who loans a security on behalf of itself or another person.[128] Proposed Rule 10c–1 would require that the data elements in paragraphs (b) through (e) within a specified time period be provided to an RNSA. In particular, paragraphs (b) through (d) contain loan-level data elements. These data elements would be required to be provided to an RNSA within 15 minutes after a loan is effected or modified, as applicable. Paragraph (e) contains data elements requiring the enumeration of total amount of each specific security available to loan and on loan. These data elements would be required to be provided to an RNSA at the end of each business day.

To reduce the potential for double counting of securities lending transactions and reduce the burden on Lenders, proposed Rule 10c–1 would provide a hierarchy of who is responsible for providing information to an RNSA. First, although the proposed Rule places an obligation on each person that loans a security on behalf of itself or another person to provide information to an RNSA, if such Lender is using a lending agent, such lending agent shall have the obligation to provide the 10c–1 information to an RNSA on behalf of the lender. Second, persons with a reporting obligation, including a lending agent, may enter into a written agreement[129] with a reporting agent. Finally, Lenders are directly required to provide the RNSA with the 10c–1 information if the Lender is loaning its securities without a lending agent or reporting agent.

In addition, paragraph (a)(2) would require that reporting agents also enter into a written agreement with the RNSA. Such written agreement must include terms that permit the reporting agent to provide 10c–1 information on behalf of another person. Reporting agents would also be required to provide the RNSA with a list of each person and lending agent on whose behalf the reporting agent is providing 10c–1 information to the RNSA.

For the purpose of organizing the below analysis, the Commission has separated Lenders into three categories based on who would actually provide the required data elements to the RNSA.[130] These categories are (1) lending agents; (2) reporting agents, and (3) Lenders that would not employ a lending agent.[131] The Commission preliminarily believes that Lenders that employ a lending agent would not be subject to any burdens because they would not be responsible for providing information to an RNSA.

As a preliminary matter, the opacity of the securities lending market makes estimating the number of respondents difficult. Indeed, the objective of proposed Rule 10c–1 is to close the data gaps in this market.[132] Despite these data gaps the Commission has made estimates of the number of Lenders in each category.

First, the Commission estimates that there would be 37 lending agents. This estimate is based on a review of N–CEN reports filed with the Commission that identify the lending agents used by investment companies. Of these 37 lending agents, the Commission estimates that 3 would provide information directly to an RNSA and 34 would provide information to a reporting agent.[133]

Next, the Commission estimates that there would be 94 reporting agents. This estimate is based on the number of broker-dealers that lent securities in 2020. The Commission estimates that these persons would be reporting agents because they would likely have experience providing RNSAs with information through other trade-reporting requirements and have experience with securities lending.[134]

Finally, the Commission estimates that there would be 278 Lenders that would not employ a lending agent. This estimate is based on the number of investment companies that do not employ a lending agent based on a review of N–CEN reports filed with the

[125] *See supra* Part I.A, (quoting 2020 FSOC Annual Report, *supra* note 14).

[126] The Commission is proposing to limit the obligation to provide 10c–1 information to an RNSA only to the lender to avoid the potential double counting of transactions that could arise if the Rule required both sides of the securities lending transaction to provide the 10c–1 information to an RNSA.

[127] *See supra* note 9.

[128] Because Rule 10c–1 is designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities all persons engaged in the lending of securities are Lenders, including persons that are not registered with or directly regulated by the Commission.

[129] The Commission preliminarily believes it is appropriate to permit a Lender, including a lending agent, to enter into a written agreement with a reporting agent to permit the reporting agent to provide the 10c–1 information to an RNSA because such an arrangement will ease burdens on Lenders that do not have and do not want to establish connectivity to FINRA. Additionally, the written agreements will memorialize and provide proof of the contractual obligations for the reporting agent to provide the 10c–1 information to an RNSA. *See supra* Part III.A.2.b).

[130] While, as more fully discussed below, there would be some variation between Lenders that are in the same category, the Commission is organizing the analysis so that the discussion of Lenders who share commonalities allows for a logical presentation and discussion of burdens.

[131] As an example of variability between Lenders in the same category, the parties within the (1) lending agent category and the (3) lenders that would not employ a lending agent category may choose to employ a reporting agent. As discussed below, this choice will result in information collection burdens being different for Lenders within the same category.

[132] *See supra* Part I.A.2.

[133] Of the 37 lending agents identified, three are broker-dealers. Broker-dealers have experience providing information directly to RNSAs, so the Commission estimates that they would provide information directly to an RNSA. The other 34 lending agents are not broker-dealers, so the Commission estimates that they would provide information to a reporting agent rather than establishing connectivity directly to an RNSA.

[134] It is possible that some of these broker-dealers may choose not to be a reporting agent and that other persons may choose to be a reporting agent. Given uncertainty regarding future reactions to proposed Rule 10c–1 and a lack of granular data about the current market, however, the Commission preliminarily believes that the broker-dealers that lent securities in 2020 is a reasonable estimate of the number of reporting agents.

Commission. Of these 278 Lenders, the Commission estimates that 139 will provide information to an RNSA and 139 will provide information to a reporting agent.

1. Lending Agents

Under proposed Rule 10c–1(a)(1), lending agents would be required to provide 10c–1 information to an RNSA (a ''providing lending agent'') or enter into a written agreement with a reporting agent to provide information to an RNSA (a ''non-providing lending agent''). In both cases, lending agents would face information collection burdens to comply with the rule.

(a) Providing Lending Agents

(i) Initial Burden

Providing lending agents would incur initial burden to develop and reconfigure their current systems to capture the required data elements.[135] Providing lending agents would also be subject to initial burden to establish connections that would allow it to provide the information to a RNSA.[136]

The Commission preliminarily believes that burden for this requirement is similar to that of establishing the appropriate systems and processes required for collection and transmission of the required information under the under 17 CFR 242.613, Exchange Act Rule 613 (commonly referred to as the ''Consolidated Audit Trail'' or the ''CAT'') [137] because of the general similarity between the systems established under that rule and the systems that would be required to be established under proposed Rule 10c–1.[138] While similar enough to use as the basis for the estimate, the Commission preliminarily believes that systems that comply with proposed Rule 10c–1 will be significantly less complex than those required by the CAT because they will need to capture less information overall.[139] Despite this difference, for the purposes of this analysis, out of an abundance of caution, the Commission is using certain specific estimates of internal burden from the CAT Approval Order, as detailed below. Unlike the burden in the CAT Approval Order, however, the Commission preliminarily believes that each party that would face PRA burdens under proposed Rule 10c–1 will have internal staff [140] that can handle this task.[141]

More specifically, the Commission is basing its estimates for systems development and monitoring on the burdens applicable to non-OATS [142] reporters under the CAT.[143] The Commission chose this estimate because of the factors that were considered by the Commission in the CAT Approval Order when it categorized firms and estimated burdens. In particular, non-OATS reporters were estimated to be subject to the smallest burdens under the CAT NMS because of the limited scope of their reportable activity.[144] Based on the overall size of the securities lending market and the number that would be providing information to an RNSA, the Commission preliminarily believes that the volume of securities lending transactions for providing lending agents will be, on average, of a similar scope to the volume of reports estimated by non-OATS reporters under the CAT NMS Plan Release.

The Commission, therefore, estimates that each providing lending agent would incur 3,600 hours of initial burden to develop and reconfigure their current systems to capture the required data elements.[145] Accordingly, the total industry-wide burden for this requirement would be 10,800 hours.[146]

(ii) Ongoing Annual Burden

Once a providing lending agent has established the appropriate systems and processes required for collection and provision of the required information to the RNSA,[147] the Commission preliminarily estimates that proposed Rule 10c–1 would impose ongoing annual burdens associated with, among other things, providing the data to the RNSA, monitoring systems, implementing changes, and troubleshooting errors. The Commission estimates that the ongoing burden will be equivalent to the ongoing burden estimated for non-OATS reporters in the CAT Approval Order for the same reasons discussed with respect to initial burden.

The Commission, therefore, estimates that it would take 1,350 burden hours per year to comply with the rule per providing lending agent,[148] leading to a total industry-wide ongoing annual burden of 4,050 hours.[149]

(b) Non-Providing Lending Agents

Instead of providing information to an RNSA, paragraph (a)(1)(ii) would permit

[135] While providing lending agents are likely already tracking the data elements as a part of the regular course of business, capturing this information would be a new regulatory requirement.

[136] In particular, they would be required to establish connections with the RNSA and the persons on whose behalf they are lending securities.

[137] *See* Joint Industry Plan, Order Approving the National Market System Plan Governing the Consolidated Audit Trail, Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696, 84921 (Nov. 23, 2016) (''CAT Approval Order'').

[138] Both the CAT and proposed Rule 10c–1 would require the provision of trade information to a third-party information repository. The burden estimates in the CAT Approval Order are based on a study of cost estimate calculations. *See id.* at 84857 (describing overview and methodology of the study).

[139] Exchange Act Rule 613(c)(1) requires the CAT NMS Plan to provide for an accurate, time-sequenced record of certain orders beginning with the receipt or origination of an order by a broker-dealer, and further documenting the life of the order through the process of routing, modification, cancellation and execution (in whole or in part) of the order. Proposed Rule 10c–1, on the other hand, does not require order information be provided to an RNSA. Further, more trades that are reportable to CAT are executed than securities lending transactions. The Commission preliminarily estimates that these two differences will result in fewer data items under proposed Rule 10c–1 than the CAT. Accordingly, the systems required to comply with proposed Rule 10c–1 would be substantially less complex than the systems required to comply with the CAT.

[140] In the CAT NMS Plan Release, the Commission estimated that external costs may consist of, for example, the use of service bureaus, technology consulting, and legal services. *See, e.g.,* CAT Approval Order, *supra* note 137, at 84935.

[141] The Commission preliminarily believes that, because of the sophisticated services associated with third-party providers' business, third-party providers would employ internal staff with the expertise required to comply with proposed Rule 10c–1.

[142] The FINRA website states: ''FINRA has established the Order Audit Trail System (OATS), as an integrated audit trail of order, quote, and trade information for all NMS stocks and OTC equity securities. FINRA uses this audit trail system to recreate events in the life cycle of orders and more completely monitor the trading practices of member firms.'' FINRA, Order Audit Trail System (OATS), *available at http://www.finra.org/industry/oats* (listing further information on OATS).

[143] CAT NMS Plan Release at 756 (discussing the burdens applicable to these broker-dealers).

[144] The CAT NMS Plan Release estimated that non-OATS reporters would have fewer than 350,000 reportable events each month. CAT Approval Order, *supra* note 137, at 84928.

[145] In the CAT Approval Order, the Commission estimated that, on average, the initial burden for non-OATS reporters would be two full-time-equivalent (''FTE'') employees working for one year (2 FTEs × 1800 working hours per year = 3600 burden hours). *See* CAT Approval Order, *supra* note 137, at 84938. The Commission is using this estimate because of the similarities between the requirements applicable to providing lending agents under proposed Rule 10c–1 and the requirements applicable to non-OATS reporters under the CAT.

[146] 3,600 hours × 3 providing lending agents = 10,800 hours.

[147] The Commission expects that the process of providing information to an RNSA will be highly automated so it is including the burden for doing so in this category.

[148] In the CAT NMS Plan Release, the Commission estimated that, on average, the ongoing annual burden non-OATS reporters would be .75 FTE employees (.75 FTEs × 1800 working hours per year = 1350 burden hours). *See* CAT Approval Order, *supra* note 137, at 84938. The Commission is using this estimate because of the similarities between the requirements applicable to providing lending agents under proposed Rule 10c–1 and the requirements applicable to non-OATS reporters under the CAT NMS Plan.

[149] 1,350 hours × 3 providing lending agents = 4,050 hours.

non-providing lending agents to enter into a written agreement with a reporting agent that would provide the required information to the RNSA. These non-providing lending agents would be subject to distinct information collection burdens from those applicable to providing lending agents. First, because they would not have to establish connectivity to an RNSA and may have flexibility in the format of the information that it provides the reporting agent, non-providing lending agents would be subject to less initial and ongoing burden for systems development and monitoring. Second, non-providing lending agents would be subject to initial burden to negotiate and execute a written agreement with the reporting agent.

(i) Systems Development and Monitoring

(a) Initial Burden

Like providing lending agents, non-providing lending agents would incur initial burden to develop and reconfigure their current systems to capture the required data elements. The Commission preliminarily believes that non-providing lending agents would be subject to less burden than providing lending agents, however, because they would likely have the flexibility to collaborate with a reporting agent to determine the most efficient means of establishing systems that comply with the proposed Rule. For example, if agreed to by both parties, the non-providing lending agent could have the flexibility to provide information that does not meet the specific format requirements of an RNSA to the reporting agent if the reporting agent is able to reformat the information once received.

Given potential efficiencies, the Commission preliminarily estimates that a non-providing lending agent would be subject to half the initial burden of a providing lending agent to develop and reconfigure their current systems to capture the required data elements as a providing lending agent. The Commission, therefore, estimates that each non-providing lending agent would be subject to an initial burden of 1,800 hours, leading to a total industry-wide initial burden for this requirement of 61,200 hours.[150]

(b) Ongoing Annual Burden

Once a non-providing lending agent has established the appropriate systems and processes required for collection and provision of the required information to the reporting agent, the Commission preliminarily estimates that the proposed Rule would impose ongoing annual burdens associated with, among other things, providing the data to the reporting agent, monitoring systems, implementing changes, and troubleshooting errors. As with initial burden for this requirement, the Commission preliminarily believes that non-providing lending agents would be subject to less burden than providing lending agents because they would likely have the flexibility to collaborate with a reporting agent to determine the most efficient means of establishing systems that comply with the proposed Rule. For example, the reporting agent could design programs that create direct links to a non-providing lending agent's systems to facilitate the gathering of information such that ongoing intervention would not be required by the non-providing lending agent. In addition, non-providing lending agents and reporting agents could negotiate terms that may allow it to avoid providing certain 10c–1 information that can be gleaned from another data element, such as not requiring the provision of a securities issuer's name if a security has a valid CUSIP.

Given the potential efficiencies, the Commission estimates that a non-providing lending agent would be subject to roughly half of the ongoing annual burden of a providing lending agent to develop and reconfigure their current systems to capture the required data elements as a providing lending agent. The Commission, therefore, estimates that each non-providing lending agent would be subject to an annual burden of 675 hours,[151] leading to a total industry-wide annual burden for this requirement of 22,950 hours.[152]

(ii) Entering Into Written Agreement With Reporting Agent

Paragraph (a)(1)(ii) of proposed Rule 10c–1 would require a non-providing lending agent to enter into a written agreement with a reporting agent. This requirement would subject non-providing lending agents to initial burden to draft, negotiate, and execute the agreements required by this paragraph. The Commission preliminarily believes that this requirement would not subject non-providing lending agents to ongoing annual burden once the agreement is signed because there would be no need to modify the written agreement or take additional action after it is executed.

The Commission preliminarily believes that these agreements would likely be standardized across the industry since the data elements would be consistent for all persons. The Commission preliminarily estimates that the only terms that may require negotiation are price and the format of the information that would be required to be provided. To account for negotiation and any administrative tasks that would go into processing and executing agreements, the Commission is estimating non-providing lending agents would spend 30 hours on this task.[153] Accordingly, the Commission estimates that the total industry-wide initial burden attributed to this proposed requirement would be 1,020 hours.[154]

2. Reporting Agents

Three requirements of proposed Rule 10c–1 would subject reporting agents to initial and ongoing annual PRA burdens. The first requirement would be related to the development and monitoring of systems that would facilitate the provision of information to an RNSA. Because reporting agents would provide the same information as a providing lending agent, the Commission preliminarily estimates that the initial and ongoing annual burden for this task would be equivalent to the initial burden attributable to the same task for providing lending agents, as fully described below. The second would be related to the written agreements with the persons who would be providing the reporting agent information. Finally, the third would be related to entering into an agreement with a RNSA to provide 10c–1 information.

(a) Systems Development and Monitoring

(i) Initial Burden

Under paragraph (a), reporting agents would provide 10c–1 information to an RNSA on behalf of another person. The Commission preliminarily believes that a reporting agent would be subject to initial burden to develop and reconfigure their current systems to capture the required data elements because the Commission preliminarily

[150] 1,800 hours × 34 non-providing lending agents = 61,200 hours.

[151] 1,350 hours (ongoing burden applicable to providing agents) × 50% = 675 hours.

[152] 675 hours × 34 non-providing lending agents == 22,950 hours.

[153] The Commission preliminarily believes that each lending agent would execute one such agreement because of the efficiencies gained from only having one reporting agent and the commoditized information that would be provided. Accordingly, the estimate of 30 hours would be the initial burden required for one agreement.

[154] 30 hours × 34 non-providing lending agents = 1,020 hours.

believes that they would need to change internal systems to collect the required information. Additionally, the reporting agent would need to establish, maintain, and enforce reasonably designed written policies and procedures to provide 10c–1 information to an RNSA on behalf of another person in the manner, format, and time consistent with Rule 10c–1.[155]

Reporting agents would provide the same information to the RNSA as a providing lending agent,[156] so the Commission preliminarily believes that the burden estimates should be consistent. The Commission, therefore, estimates that each reporting agent would incur 3,600 hours of initial burden to develop and reconfigure their current systems to capture the required data elements.[157] Accordingly, the industry-wide initial burden would be 338,400 hours.[158]

(ii) Ongoing Annual Burden

Once a reporting agent has established the appropriate systems and processes required for collection and provision of the required information to the RNSA, the proposed Rule 10c–1 would impose ongoing annual burdens associated with providing the data to the RNSA (including an updated list of persons on whose behalf they are providing information, as needed), monitoring systems, implementing changes, and troubleshooting errors.

As with the initial burden for this requirement, reporting agents would provide the same information to the RNSA as a providing lending agent, so the Commission preliminarily believes that the burden estimates should be consistent. The Commission, therefore, estimates that each reporting agent would incur 1,350 hours of ongoing annual burden on this requirement.[159] Accordingly, the industry-wide ongoing annual burden would be 126,900 hours.[160]

(b) Entering Into Written Agreements With Persons on Whose Behalf the Reporting Agent Would Be Providing Information

Paragraph (a)(1)(ii) of proposed Rule 10c–1 would require reporting agents to enter into written agreements with the persons on whose behalf they are providing information to an RNSA. This requirement would subject reporting agents to initial burden to draft, negotiate, and execute these agreements. The Commission preliminarily believes that this requirement would not subject reporting agents to ongoing annual burden once the agreement is signed because there would be no need to modify the written agreement or take additional action after it is executed.

As discussed above, the Commission preliminarily believes that these agreements would likely be standardized across the industry since the data elements would be consistent for all persons.[161] The Commission preliminarily estimates that the only terms that may require negotiation are price and the format of the information that would be required to be provided. As discussed above, however, the Commission preliminarily believes that this process would be highly automated. The Commission, therefore, preliminarily believes that it would take reporting agents the same amount of time to comply with this requirement of time as non-providing lending agents. Accordingly, the Commission estimates that each reporting agent would spend 30 hours on this task. As a result, the total industry-wide initial burden attributed to this proposed requirement would be 2,820 hours.[162]

(c) Entering Into Written Agreement With RNSA

In addition to written agreements with persons on whose behalf they would be providing information, paragraph (a)(2)(ii) of proposed Rule 10c–1 would require reporting agents to enter into written agreements the RNSA. Since all reporting agents would be providing the same information to the RNSA, the Commission preliminarily believes that no terms of these agreements would not be negotiated. Instead, the RNSA would create a form agreement that would be consistent for all reporting agents.

While it is possible that the burden may be very small since these agreements would likely be standardized, the Commission is conservatively estimating one hour of initial burden for each reporting agent to account for any administrative tasks that would go into processing and executing agreements.[163] The Commission preliminarily believes that reporting agents that enter into written agreements with RNSAs would not incur any ongoing annual burden to comply with this requirement once the agreement is signed because there will be no need to modify the written agreement or take additional action because the information will not vary.[164]

Accordingly, the Commission estimates that the industry-wide initial burden for this requirement would be 94 hours.[165]

(d) Recordkeeping Requirement

Paragraph (a)(2)(iv) of proposed Rule 10c–1 would require reporting agents to preserve for a period of not less than three years, the first two years in an easily accessible place, the 10c–1 information that it obtained from any person pursuant to paragraph (a)(1)(ii), including the time of receipt, and the corresponding 10c–1 information provided by the reporting agent to the RNSA, including the time of transmission to the RNSA, and the written agreements that the reporting agent entered into with the persons on whose behalf it was providing information and the RNSA. The Commission preliminarily believes that the initial burden associated with retaining the collected information is associated with reporting agent's burden to develop and reconfigure their current systems to capture the required data elements. Accordingly, the Commission is not assessing an initial burden associated with the recordkeeping of information required by proposed Rule 10c–1(a)(2)(iv).

The Commission preliminarily believes that this recordkeeping requirement will be highly automated. The Commission, therefore, estimates

[155] Proposed Rule 10c–1(a)(2)(i).

[156] While the information provided to the RNSA would be the same, certain aspects of the requirements applicable to reporting agents would be slightly different than those applicable to providing lending agents. For example, unlike providing lending agents, reporting agents would need to design systems to establish connectivity with the persons on whose behalf they are providing information to an RNSA. In addition, unlike providing lending agents, reporting agents would be required to provide to the RNSA the identity of the person on whose behalf it is providing the information under paragraph (e). Further, unlike any type of lending agent, reporting agents would be required to establish, maintain, and enforce reasonably designed written policies and procedures to provide information to an RNSA. Despite these differences, the Commission preliminarily believes that the estimates used in the CAT approval order are an appropriate basis from which to estimate the burdens for reporting agents in addition to providing lending agents because both provide the same information to the RNSA. Accordingly, this burden estimates for reporting agents is not being adjusted incrementally from the estimate for providing lending agents.

[157] *See supra* Part V.D.1.(a)(i).

[158] 3,600 hours × 94 reporting agents = 338,400 hours.

[159] *See supra* Part V.D.1.(a)(ii).

[160] 1,350 hours × 94 reporting agents = 126,900 total hours.

[161] *See supra* Part V.D.1.(b)(ii).

[162] 30 hours × 94 reporting agents = 2,820 hours.

[163] For example, a reporting agent may need to enter the written agreement into a contract management system or scan an executed paper agreement into an electronic format.

[164] The data elements that will need to be reported will not change and will be consistent across the industry. Therefore, there will be no need to modify or update agreements in any way.

[165] 1 hour × 94 reporting agents = 94 hours.

that reporting agents will spend one hour per week on upkeep and testing of records to ensure accuracy to comply with this requirement, for a total of 52 hours per year of annual burden per reporting agent. Accordingly, the estimates that the total ongoing annual burden for this requirement would be 4,888 hours.[166]

3. Lenders That Would Not Employ a Lending Agent

As discussed in Part II.A, some Lenders run their own securities lending program rather than employing a lending agent. Under proposed Rule 10c–1, these persons would be required to either (1) provide 10c–1 information directly to an RNSA (a ''self-providing lender'') or (2) use a reporting agent to provide 10c–1 information to an RNSA (a ''lender that directly employs a reporting agent''). The Commission preliminarily believes that the initial and ongoing annual burden would vary between these two types of lenders.

(a) Self-Providing Lenders

Self-providing lenders would be subject to initial and ongoing annual burden to develop and reconfigure their current systems to capture the required data elements. Because the information that would be provided to an RNSA would be the same information as the information provided by a providing lending agent and a reporting agent, the Commission preliminarily believes that the initial and ongoing annual burden for this task would be equivalent to the initial burden attributable to the same task for providing lending agents and reporting agents, as more fully discussed below.

(i) Initial Burden

Self-providing lenders would be subject to initial burden to develop and reconfigure their current systems to capture the required data elements because the Commission preliminarily believes that they would need to change internal order routing and execution management systems to collect the required information.

Self-providing lenders would provide the same information to the RNSA as a providing lending agent and reporting agent, so the Commission preliminarily believes that the burden estimates should be consistent. The Commission, therefore, estimates that each self-providing lender would incur 3,600 hours of initial burden to develop and reconfigure their current systems to capture the required data elements.[167] Accordingly, the industry-wide initial burden would be 500,400 hours.[168]

(ii) Ongoing Annual Burden

Once a self-providing lender has established the appropriate systems and processes required for collection and provision of the required information to the RNSA, the Commission preliminarily estimates that the proposed Rule 10c–1 would impose ongoing annual burdens associated with, among other things, providing the data to the RNSA, monitoring systems, implementing changes, and troubleshooting errors.

As with the initial burden for this requirement, the Commission estimates that the ongoing annual burden for this task would be the same as providing lending agents and reporting agents because each would be providing the same information to the RNSA so the Commission preliminarily believes that the burden estimates should be consistent. The Commission, therefore, estimates that each reporting agent would incur 1,350 hours of ongoing annual burden on this requirement.[169] Accordingly, the industry-wide ongoing annual burden would be 187,650 hours.[170]

(b) Lenders That Would Directly Employ a Reporting Agent

Lenders that directly employ a reporting agent would be subject to distinct information collection burdens from those applicable to self-providing lenders. First, because they would not have to establish connectivity to an RNSA and may have flexibility in the format of the information that it provides the reporting agent, lenders that directly employ a reporting agent would be subject to less initial and ongoing burden for systems development and monitoring. Second, unlike self-providing lenders, lenders that would directly employ a reporting agent would be subject to initial burden to negotiate and execute a written agreement with the reporting agent as required by paragraph (a)(1)(ii).

(i) Systems Development and Monitoring

(a) Initial Burden

The Commission preliminarily believes that lenders that would directly employ a reporting agent would incur initial burden to develop and reconfigure their current systems to capture the required data elements and provide them to a reporting agent.

Lenders that would directly employ a reporting agent would provide the same information to a reporting agent as a non-providing lending agent, so the Commission preliminarily believes that the burden estimates should be consistent.[171] The Commission, therefore, preliminarily estimates that a lender that directly employs a reporting agent would be subject to an initial burden of 1,800 hours, leading to a total industry-wide initial burden for this requirement of 250,200 hours.[172]

(b) Ongoing Annual Burden

Once a lender that directly employs a reporting agent has established the appropriate systems and processes required for collection and provision of the required information to the reporting agent, the proposed Rule would impose ongoing annual burden associated with, among other things, providing the data to the reporting agent, monitoring systems, implementing changes, and troubleshooting errors.

As with the initial burden for this requirement, the Commission estimates that the ongoing annual burden for this task would be the same as a non-providing lending agent, so the Commission preliminarily believes that the burden estimates should be consistent.[173] The Commission, therefore, estimates that each lender that directly employs a reporting agent would be subject to an ongoing annual burden of 675 hours, leading to a total industry-wide burden for this requirement of 93,825 hours.[174]

(ii) Entering Into a Written Agreement With a Reporting Agent

Paragraph (a)(1)(ii) of proposed Rule 10c–1 would require lenders that directly employ a reporting agent to enter into a written agreement with the reporting agent. This requirement would subject lenders that directly employ a reporting agent to initial burden to draft, negotiate, and execute these agreements. The Commission preliminarily believes that lenders that directly employ a reporting agent would not incur any ongoing burden to comply with this requirement once the agreement is signed because there will be no need to

[166] 52 hours × 94 reporting agents = 4,888 hours.

[167] *See supra* Part V.D.1.(a)(i); *see also supra* Part V.D.2.(a)(i).

[168] 3600 hours × 139 self-providing lenders = 500,400 hours.

[169] *See supra* Part V.D.1.(a)(ii); *see also supra* Part V.D.2.(a)(ii).

[170] 1350 hours × 139 self-providing lenders = 187,650 total hours.

[171] *See supra* Part V.D.1.(b)(i)(a).

[172] 1,800 hours × 139 lenders that directly employ a reporting agent = 250,200 hours.

[173] *See supra* Part V.D.1.(b)(i)(b).

[174] 675 hours × 139 lenders that directly employ a reporting agent = 93,825 hours.

modify the written agreement or take additional action because the information will not vary.[175]

Lenders that directly employ a reporting agent would largely provide the same information to the reporting agent as a non-providing lending agent,[176] so the Commission preliminarily believes that the burden estimates for entering into the agreements should be consistent.[177] The Commission, therefore, estimates that each lender that directly employs a reporting agent would spend 30 hours of initial burden on this task. As a result, the total industry-wide initial burden attributed to this proposed requirement would be 4,170 hours.[178]

PRA TABLE 1—SUMMARY OF ESTIMATED BURDENS FOR LENDERS

Requirement	Type of burden	Number of entities impacted	Total initial industry burden	Total annual industry burden
Providing Lending Agents: Systems Development and Monitoring.	Third-Party Disclosure	3	10,800	4,050
Non-Providing Lending Agents: Systems Development and Monitoring.	Third-Party Disclosure	34	61,200	22,950
Non-Providing Lending Agents: Entering into Agreement with Reporting Agent.	Third-Party Disclosure	34	1,020	0
Reporting Agents: Systems Development and Monitoring	Third-Party Disclosure	94	338,400	126,900
Reporting Agents: Entering into Agreement with Person who Provides 10c–1 Information.	Third-Party Disclosure	94	2,820	0
Reporting Agents: Entering into Agreement with RNSA	Third-Party Disclosure	94	94	0
Reporting Agents: Recordkeeping Requirement	Recordkeeping	94	0	4,888
Self-Providing Lenders: Systems Development and Monitoring.	Third-Party Disclosure	139	500,400	187,650
Lenders that Would Directly Employ a Reporting Agent: Systems Development and Monitoring.	Third-Party Disclosure	139	250,200	93,825
Lenders that Would Directly Employ a Reporting Agent: Entering Into a Written Agreement with a Reporting Agent.	Third-Party Disclosure	139	4,170	0

E. Information Collection Applicable to RNSAs

Proposed Rule 10c–1 places new burdens on RNSAs. Proposed Rule 10c–1(b)–10c–1(e) would require RNSAs to collect the 10c–1 information provided to the RNSA by Lenders and make this information publicly available as soon as practicable. The collection of 10c–1 information might cause an RNSA to exercise authority under proposed Rule 10c–1(f) and implement rules regarding the format and manner to administer the collection of information required by proposed Rule 10c–1.[179] Rule 10c–1(b) also requires the RNSA to create a unique transaction identifier and assign it to each loan reported to the RNSA under 10c–1. Furthermore, for each security about which the RNSA receives information pursuant to 10c–1(e)(1) and (e)(2), the RNSA would be required by Rule 10c–1(e)(3) to make available to the public only aggregated information for that security, including information required by (e)(1)(i) and (ii) and (e)(2)(i) and (ii), as soon as practicable, but not later than the next business day. Additionally, proposed Rule 10c–1(g)(1) would also require RNSAs to retain the information collected pursuant to paragraphs (b) through (e) of proposed Rule 10c–1 in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years; and proposed Rule 10c–1(g)(3) would require the RNSA to provide information collected under paragraphs (b) and (c) and the aggregate of the information provided pursuant to paragraph (e) available to the public, for a least a five-year period. Proposed Rule 10c–1(g)(2) would require the RNSA to make 10c–1 information available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need.

1. RNSA Collection of Information From Lenders and Providing Information to the Public and the Commission

As discussed above, Lenders would be required to provide information to an RNSA pursuant to Rule 10c–1(a) and the RNSA would be required to make certain information publicly available on its website or similar means of electronic distribution, without charge and without use restrictions as soon as practicable. Accordingly, an RNSA would be required to create, implement and maintain the infrastructure to enable Lenders to provide the RNSA with the 10c–1 information, which would include establishing technical requirements and specifications for such infrastructure, creating a system that would generate unique identifiers, meeting with industry participants to gather feedback on the proposed infrastructure, drafting written policies and procedures to protect the confidentiality of certain information, and entering into written agreements with Lenders—including lending agents and reporting agents—for such information to be provided to the RNSA. Additionally, the infrastructure would need to comply with proposed Rule 10c–1(g)(2), which would require the RNSA to make the information collected pursuant to paragraphs (b) through (e) available to the Commission or other persons as the Commission may designate by order upon a demonstrated regulatory need.

The Commission preliminarily believes that the initial burden for the RNSA to create and implement the infrastructure for Lenders to provide the required information to the RNSA and

[175] The data elements that will need to be reported will not change and will be consistent across the industry. Therefore, there will be no need to modify or update agreements in any way.

[176] *See supra* Part V.D.1.(b)(ii).

[177] Further, as with non-providing lending agents, because of the efficiencies gained from only having one reporting agent and the commoditized information that would be provided, each lender that directly employs a reporting agent would enter into an agreement with only one reporting agent.

[178] 30 hours × 139 lenders that directly employ a reporting agent = 4,170 hours.

[179] The burden of filing any proposed rule changes by the RNSA is already included under the collection of information requirements contained in Rule 19b–4 under the Exchange Act. *See* Securities Exchange Act Release No. 50486 (Oct. 5, 2004), 69 FR 60287, 60293 (Oct. 8, 2004) (File No. S7–18–04) (describing the collection of information requirements contained in Rule 19b–4 under the Exchange Act).

for the RNSA to provide such information to the public is similar to the requirement for National Securities Exchanges and RNSAs to establish the appropriate systems and processes required for collection and transmission of the required information under the CAT NMS Plan [180] submitted by SROs under Exchange Act Rule 613. While similar enough to use as the basis for the estimate, the Commission preliminarily believes that systems that comply with proposed Rule 10c–1 will be significantly less complex than those that comply with the CAT because they will need to capture less information overall.[181] Additionally, there is currently only one RNSA, rather than the multiple National Securities Exchanges, that will have the burden to create and implement the infrastructure for Lenders to provide information to the RNSA. Accordingly, the burden hour estimates for this collection of information will be substantially reduced from the CAT estimates, as detailed below. Further, the Commission preliminarily believes that the RNSA will have internal staff that can handle this task, so unlike the tasks under the CAT NMS Plan, the tasks under proposed Rule 10c–1 would not require any outsourcing.

(a) Initial Burden

The Commission estimates that it would take an RNSA approximately 10,924 hours of internal legal, compliance, information technology, and business operations time to develop the infrastructure to enable Lenders to provide the information required by Rule 10c–1 to the RNSA and for the RNSA to provide such information to the public.[182] The Commission preliminarily believes that the RNSA would not incur external costs for the implementation of the infrastructure to enable Lenders to provide the information required by the Rule to the RNSA and make such information publicly available because the sole RNSA, FINRA, has experience implementing systems to collect information from its members.[183] Therefore, the Commission preliminarily estimates that the average one-time initial burden of developing the infrastructure to enable Lenders to provide the information required by proposed Rule 10c–1 would be 10,924 burden hours for the RNSA.

(b) Ongoing Annual Burden

Once the RNSA has developed the infrastructure to enable Lenders to provide the 10c–1 information to the RNSA and for the RNSA to provide such information to the public, the Commission preliminarily estimates that Rule 10c–1 would impose on the RNSA ongoing annual burdens of 7,739.5 hours to ensure that the infrastructure is up to date and remains in compliance with the proposed Rule,[184] for an estimated annual burden of 7,739.5 hours.

2. RNSA Retention of Collected Information

Proposed Rule 10c–1(g)(1) requires that the RNSA retain the information collected pursuant to paragraphs (b) through (e) of this section in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years. The Commission preliminarily believes that the initial burden associated with retaining the collected information is associated with RNSA's burden to implement and maintain the infrastructure for Lenders to report information to the RNSA. Accordingly, the Commission is not assessing an initial burden associated with the retention of information required to be reported under the proposed Rule.

The Commission, however, preliminarily estimates that Rule 10c–1 would impose on the RNSA ongoing annual burdens of 52 hours to retain the collected information required by the proposed Rule,[185] for an estimated annual burden of 52 hours. The Commission preliminarily believes it is appropriate to add burden hours that already exist for 17a–1 because the RNSA will have to retain records involving 10c–1 information for Lenders that are not FINRA members.

[180] *See* CAT Approval Order, *supra* note 137.

[181] *See supra* note 139.

[182] This estimate is based on the Commission's initial burden estimate for national securities exchanges and RNSAs regarding the data collection and reporting for the consolidated audit trail which was approximately 43,696.8 burden hours in total. *See* CAT Approval Order, *supra* note 137, at 84921. Given the size of the overall equity market vs. the size of the securities lending market the Commission preliminarily believes the CAT burden hours would overestimate the burden hours to develop the infrastructure to provide information required by Rule 10c–1 to the RNSA and for the RNSA to provide such information to the public. Accordingly, the Commission preliminarily believes that the initial burden should be calculated based on the size of the securities lending market in comparison to the size of the equities market. The Commission estimates that the average daily dollar value of securities lending transactions is approximately $120 billion dollars compared to the average daily equity trading volume of $475 billion. Accordingly, the size of the securities lending market is approximately 25% of the U.S. equity market. Therefore the Commission estimates that the initial burden to develop and implement the needed systems changes to capture and publish the 10c–1 information is 25% of the burden hours for CAT, which would be 10,924 burden hours.

[183] *See supra* note 73.

[184] This estimate is similar to the Commission's ongoing annual burden estimate for national securities exchanges and RNSAs regarding the data collection and reporting for the consolidated audit trail which was approximately 30,958.20burden hours in total. *See* CAT Approval Order, *supra* note 137, at 84922. Given the size of the overall equity market vs. the size of the securities lending market the Commission preliminarily believes the CAT burden hours would overestimate the burden hours to develop the infrastructure to provide information required by Rule 10c–1 to the RNSA and for the RNSA to provide such information to the public. Accordingly, the Commission preliminarily believes that the initial burden should be calculated based on the size of the securities lending market in comparison to the size of the equities market. The Commission estimates that the average daily dollar value of securities lending transactions is approximately $120 billion dollars compared to the average daily equity trading volume of $475 billion. Accordingly, the size of the securities lending market is approximately 25% of the U.S. equity market. Therefore the Commission estimates that the initial burden to develop and implement the needed systems changes to capture and publish the 10c–1 information is 25% of the burden hours for CAT, which would be 7,739.5 burden hours.

[185] This estimate is similar to the Commission's ongoing annual burden estimate for national securities exchanges and RNSAs regarding the data collection and reporting for Rule 17a–1, which requires that every national securities exchange, national securities association, registered clearing agency, and the Municipal Securities Rulemaking Board keep on file for a period of not less than five years, the first two years in an easily accessible place, at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records made or received by it in the course of its business as such and in the conduct of its self-regulatory activity. *See* Paperwork Reduction Act Extension Notice for Exchange Act Rule 17a–1, 84 FR 57920 (Oct. 29, 2019).

PRA TABLE 2—SUMMARY OF ESTIMATED BURDENS FOR RNSA

Requirement	Type of burden	Number of entities impacted	Total initial industry burden	Total annual industry burden
Implement and maintain the infrastructure for Lenders to report information to the RNSA including written policies and procedures.	Reporting and Third Party Disclosure.	1	10,924	7,739.5
RNSA retain the information collected pursuant to paragraphs (b) through (f) of proposed Rule 10c–1.	Recordkeeping	1	0	52

F. Collection of Information Is Mandatory

Each collection of information discussed above would be a mandatory collection of information.

G. Confidentiality

The Commission could receive confidential information as a result of this collection of information, such as the identity of Lenders. The proposed Rule does not permit the RNSA to make such information public. Aside from this information, the collection of information is expected to be, for the most part, publicly available information. To the extent that the Commission does receive confidential information pursuant to this collection of information, such information will be kept confidential, subject to the provisions of applicable law.

H. Retention Period of Recordkeeping Requirement

Pursuant to proposed Rule 10c–1(g)(1), an RNSA would be required to retain the information collected pursuant to paragraphs (b) through (e) of proposed Rule 10c–1 in a convenient and usable standard electronic data format that is directly available and searchable electronically without any manual intervention for a period of five years. Pursuant to proposed Rule 10c–1(a)(2)(iv) a reporting agent would be required to retain information for a period of not less than three years, the first two years in an easily accessible place.

I. Request for Comment

The Commission requests comment on whether the estimates for burden hours and costs are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) determine whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. The Commission also requests that commenters provide data to support their discussion of the burden estimates.

While the Commission welcomes any public input on this topic, the Commission asks commenters to consider the following questions:

72. Is the Commission adequately capturing the respondents that would be subject to the burdens under the proposed Rule? Specifically, would more or fewer than 37 lending agents, 94 reporting agents, and 278 Lenders that would not employ a lending agent be required by proposed Rule 10c–1 to provide information to an RNSA?

73. Are there any additional factors that the Commission should consider when estimating whether a Lender would employ a reporting agent?

74. Are there any other hourly burdens associated with complying with the proposed Rule 10c–1? If so, what are the other hourly burdens associated with complying with the proposed Rule?

75. Would any aspects of the proposed Rule that are not discussed in this PRA Analysis impact the burden associated with the collection of information?

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov,* and send a copy to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–18–21. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–18–21, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

VI. Economic Analysis

A. Introduction and Market Failure

1. Introduction

The Commission has considered the economic effects of the proposed Rule and wherever possible, the Commission has quantified the likely economic effects of the proposed Rule.[186] The Commission is providing both a qualitative assessment and quantified estimates of the potential economic effects of the proposed Rule where feasible. The Commission has incorporated data and other information to assist it in the analysis of the economic effects of the proposed Rule. However, as explained in more detail below, because the Commission does not have, and in certain cases does not believe it can reasonably obtain, data that may inform the Commission on certain economic effects, the Commission is unable to quantify

[186] Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. Additionally, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition. Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

certain economic effects. Further, even in cases where the Commission has some data, it is not practicable due to the number and type of assumptions necessary to quantify certain economic effects, which render any such quantification unreliable. Our inability to quantify certain costs, benefits, and effects does not imply that such costs, benefits, or effects are less significant. The Commission requests that commenters provide relevant data and information to assist the Commission in quantifying the economic consequences of the proposed Rule.

The Commission preliminarily believes that the proposed Rule would result in increased transparency in the securities lending market by making available the public portion of new 10c–1 information, which is more comprehensive than existing data, and by making such data available to a wider range of market participants and other interested persons than currently access existing data. This effect could be similar to what was observed with the implementation of TRACE in corporate bonds.[187]

The subsequent benefits include a reduction of the information disadvantage faced by end borrowers and beneficial owners in the securities lending market, improved price discovery in the securities lending market, increased competition among providers of securities lending analytics services, reduced administrative costs for broker-dealers and lending programs, and improved balance sheet management for financial institutions. The Commission preliminarily believes the proposed Rule would also likely reduce the cost of short selling, leading to improved price discovery and liquidity in the underlying security markets. The Commission also preliminarily believes the proposed Rule would also benefit investors by increasing the ability of regulators to surveil, study, and provide oversight of both the securities lending market and also individual market participants.

The Commission preliminarily believes that there will be costs that would result from the proposed Rule. The proposed Rule would lead to direct compliance costs as entities providing the 10c–1 information to an RNSA would have to build or adjust systems to meet the requirements of the proposed Rule. Further, the RNSA managing the collection of data may impose fees on entities that provide 10c–1 information to an RNSA. These costs may be absorbed by the entities that provide 10c–1 information to an RNSA in the form of lower profits, or they may be passed on to the end customer in the form of increased fees for broker-dealer services or lending program services. The proposal would also impose direct costs on the RNSA responsible for collecting, maintaining, and distributing the data. Additionally, the Commission preliminarily believes that the proposed Rule would render existing securities lending data less valuable, leading to less revenue for the firms currently compiling and distributing this data. Also, broker-dealers and lending programs would have costs in the form of lost information advantage when dealing with beneficial owners and end borrowers in the securities lending market. Lastly, making public securities lending data that is currently either not reported, or where access to the data is limited, may affect the profitability of certain trading strategies as investors use the data in the proposal to learn about market sentiment and adjust their trading strategies accordingly.

2. Market Failures

The securities lending market is characterized by asymmetric information between market participants and a general lack of information on current market conditions,[188] which can lead to inefficient prices for securities loans (including equity lending and fixed income lending).[189] These information frictions stem from the fact that access to timely lending market data is very limited for some market participants. The current ''give-to-get'' model of commercial data for securities lending means that only those market entities with data to report for themselves are able to get access to the data. Furthermore, participation in the give-to-get data product is purely voluntary, meaning that the data could be missing observations in a systematic fashion, thus biasing the impression it creates of the lending market.

The Commission preliminarily believes that opacity in the lending market is unlikely to be solved by market forces. Firstly, the primary source for data about the securities lending market comes from commercial data vendors who operate under a give-to-get model where entities who wish to obtain securities lending are typically required to: (1), Be participants in the lending market themselves with data that they could provide; and (2), provide their data to the commercial vendor in order to access the full dataset provided by the vendor.[190] Data vendors may see restricting access to the data as necessary to persuade current contributors to participate, and thus may be unable to change their current practice. If the data vendors expand who has access to their data then some of the entities that contribute data may choose to no longer contribute their data because they no longer have an incentive to do so, making the data less comprehensive than it currently is. By keeping access to the data somewhat restrictive data vendors enhance the comprehensiveness of the data, but they limit who has access.

Secondly, those market participants who choose not to contribute data to existing private data products likely do so because they believe it is in their interest to keep their own data out of public view, making it unlikely that an entity will be able to produce a comprehensive lending data product.

B. Baseline

1. Securities Lending

A securities loan is typically a fully collateralized transaction whereby the lender, also known as the beneficial owner, temporarily transfers legal right to a security to the borrower, the counterparty, in exchange for compensation. The form of compensation depends on the type of collateral used to secure the transaction. There are two general types of collateral: Cash and non-cash.

In the United States, the most common form of collateral for equity security loans is cash. The borrower of the security deposits typically 102% or 105% of the current value of the asset being loaned as collateral. The lender then reinvests this collateral, usually in low-risk interest-bearing securities, then rebates a portion of the interest earned back to the borrower. The difference between the interest earned and what is rebated to the borrower is the lending fee earned by the lender. The portion of the interest earned on the reinvested collateral that is returned to the borrower is called the rebate rate, and is a guaranteed amount set forth in the terms of the loan. It is possible for the lender to lose money on the loan if the interest earned on the reinvestment of the collateral does not exceed the rebate

[187] *See infra* Section IV.C.1.(a) for a discussion of TRACE.

[188] *See infra* Part VI.B.2.

[189] The Commission preliminarily believes that the issues discussed in this part apply to all securities. The Commission requests comment on this belief.

[190] As discussed in Part VI.B.5, while the primary sources for lending market data come from the main commercial data vendors operating on a give-to-get system, some firms obtain and distribute securities lending data by surveying some fund managers about their lending experience.

rate. If the security is in high demand in the borrowing market, the rebate rate may be negative, indicating that the borrower does not receive any rebate and must also provide additional compensation to the lender.

Lending fees are influenced by factors including: The current demand for the given security, the potential difficulty a particular broker dealer may face finding an alternative source of loans, the length of the loan, the collateral used, the credit worthiness of the counterparty, and the relative bargaining power of the parties involved, among others. Consequently there is usually a significant range of fees charged for loans of the same security on the same day to different entities.[191]

Securities loans are most commonly obtained through bilateral negotiations between lending programs and broker-dealers, often with a phone call.[192] Generally, when an end investor wishes to borrow a share, and its broker-dealer does not have the share available in their own inventory or through customer margin accounts to loan, its broker-dealer will borrow a share from a lending agent with whom it has a relationship. The broker-dealer will then re-lend the share to its customer. As previously noted, loans from lending programs to broker-dealers occur in the Wholesale Market and loans from a broker-dealer to the end borrower occur in what is referred to as the Retail Market. Obtaining a securities loan often involves extensive search for counterparties by broker-dealers.[193]

Investors borrow securities for a variety of reasons. A primary reason for borrowing equity shares is to facilitate a short sale. Investors use short sales to take a directional position in a security, or to hedge existing positions.[194] When investors execute a short sale, they do not borrow the shares on the day of the short sale. Rather, because the stock market settles at T+2 and the lending market has same day settlement, the loan actually occurs on the settlement day, two trading days after the stock market transaction took place.

Option market activity can also be a source of demand for security loans as short selling is a critical component of delta hedging. Delta hedging occurs when options market participants, particularly options market makers, holding directional positions hedge their inventory exposure by taking offsetting positions in the underlying stock.[195] Equity options markets are often significantly less liquid than the markets for their underlying securities. Delta hedging a long call or short put position requires short selling, which in turn requires borrowing the underlying asset.

Equity security loans can also occur to close out a failure to deliver (FTD). FTDs occur when one party of a transaction is unable to deliver at settlement the security that they previously sold. FTDs can occur for multiple reasons.[196] Regulation SHO Rule 204 states that a party needing to close out an FTD can borrow shares in the lending market and deliver the borrowed share to settle the transaction. Doing so allows more time for the individual to source the shares or purchase them in the open market.

The financial management activity of banks also drives securities loans, particularly in fixed income securities. It is the Commission's understanding that a significant fraction of debt security loans occur as banks manage liquidity on their balance sheet. Securities loans help banks manage liquidity on their balance sheets because when a security is on loan, legal claim to the security transfers to the borrower.[197] Thus banks lacking sufficient high-quality liquid assets on their balance sheet may borrow such assets to bolster their liquidity ratios.[198] Consequently, the most common securities to be lent are US Treasury/Agency bonds.[199]

Also, the Commission understands that some financial entities may use securities loans to obtain the type of collateral required by other agreements they are trying to enter into. For example, if a contract requires a certain kind of fixed income security as collateral, a firm may borrow that security to collateralize the contract.

Additionally, because dividends and substitute dividends are sometimes taxed differently, an investor for whom a substitute dividend is taxed lower than a dividend may loan its shares to an investor for whom dividends are taxed less than substitute dividends.[200]

While a security is on loan, the borrower is the legal owner of the security and receives any dividends, interest payments, and, in the case of equity security loans, holds the voting rights associated with the shares.[201] Usually the terms of the loan stipulate that dividends and interest payments must be passed back to the beneficial owner in the form of substitute payments. Voting rights cannot be transferred and remain with the borrower until the loan is returned.

2. Current State of Transparency in Securities Lending

As described above,[202] data on securities lending are incomplete, and, may be unavailable to certain market participants. The available data are produced by commercial vendors. Data from commercial vendors are based on voluntary data contributions, largely from lending programs. Consequently, these data by and large only cover the Wholesale Market. Because the primary data providers to the commercial vendors are lending programs, which primarily lend to broker dealers in the Wholesale Market, the data have limited coverage of the Retail Market. Moreover, even in the Wholesale Market the data are incomplete as it is unlikely that the full universe of lending programs contribute all data to any given data provider. The voluntary nature of the submissions may mean that some data will be withheld. Market participants that choose not to disclose their data to the commercial providers likely do so because it is in their strategic interest

[191] *See* Part VI.B.3 for statistics on the range of fees.

[192] Most broker dealers are regulated by FINRA and are subject to securities lending rules such as FINRA rules 4314, 4320, and 4330.

[193] *See e.g.,* Adam C. Kolasinski, Adam V. Reed & Matthew C. Ringgenberg, *A Multiple Lender Approach to Understanding Supply and Search in the Equity Lending Market,* 68 J. Fin. 559–95 (2013).

[194] Market makers in the equity market also use short selling to facilitate liquidity provision in the absence of sufficient inventory. However, these short sales are not considered here because they are almost always reversed intraday and thus do not result in a securities loan.

[195] For a given option contract, a quantity known as the "delta" captures the sensitivity of the option's price to a $1 increase in the price of the underlying security. When hedging inventory, the market maker determines the appropriate position size in the underlying stock according to the delta.

[196] *See e.g.,* Amendments to Regulation SHO at note 8, 61691, available at *https://www.sec.gov/rules/final/2008/34-58775fr.pdf.*

[197] *See e.g., Concept Release on the U.S. Proxy System,* Exchange Act Release No. 62495 (July 13, 2010), 75 FR 42982, 42994 (July 22, 2010) ("When an institution lends out its portfolio securities, all incidents of ownership relating to the loaned securities, including voting rights, generally transfer to the borrower for the duration of the loan.").

[198] To ensure that the balance sheet is actually improved by the transaction, such loans are collateralized with securities instead of cash.

[199] *See OFR Pilot Survey, supra* note 24.

[200] This is known as dividend arbitrage. While the IRS has passed regulations to try to combat this type of dividend arbitrage, there is evidence that it still occurs. *See* Peter N. Dixon, Corbin A. Fox & Eric K. Kelley, *To Own or Not to Own: Stock Loans around Dividend Payments,* 140 J. Fin. Econ. 539–59 (2021).

[201] *See e.g.,* OFR Reference Guide, *supra* note 14, at 36. *See also* Viktoria Baklanova, Adam M. Copeland, and Rebecca McCaughrin, "Reference Guide to US Repo and Securities Lending Markets," 740 *FRB of New York Staff Report* (2015).

[202] *See supra* Part VI.A.2.

not to do so, resulting in nonrandom omissions. These omissions likely insert bias into the commercial databases. Because the data are missing, the extent of the biases cannot be determined.

As mentioned above, these data lack significant coverage of the Retail Market. This omission has been noted by industry participants who have stated that even with the commercial data they still feel unable to benchmark the performance of their lending programs because they have very little insight in to the retail portion of the lending market.[203]

Access to data provided by the commercial vendors is also restricted, as only certain entities can purchase the data. The Commission understands that these entities access the data using various means such as an application programming interface (API), spreadsheet add-in applications, file downloads, or directly from the distributor's website. However, it is the Commission's understanding that some large institutional investors who would like the data, such as hedge funds, cannot access it, even for a fee, because they do not provide lending data to the commercial vendors and distributing the data to them may discourage other market participants from contributing their data to the data vendors. Expanding access to the commercial data may discourage some participants from contributing data because securities loans are often entered into to facilitate various trading and hedging strategies. Consequently, if sophisticated traders such as hedge funds can access the data, then some market participants may be leery of contributing data to the commercial data vendors for fear of hedge funds learning about their trading or hedging strategies. Additionally, while some data vendors do allow non-lending market participants, such as academics and regulators, to access the data for a fee, they sometimes place usage restrictions on the data that make it unusable for regulatory and some academic functions.

The Commission preliminary believes, based on conversations with industry participants and our staff's use of some of the data, that the coverage and timeliness of the three biggest commercial data vendors are roughly comparable. Other firms provide a different approach to securities lending data by surveying fund managers about their borrowing experience, such as the fees they paid to borrow, from which they provide estimates of lending fees.[204]

The current state of data availability, combined with the need for extensive search to facilitate security loans in the bilateral market,[205] means that the largest and most centrally connected broker-dealers and lending programs likely have access to better information about the current state of the lending market than other participants, including their customers, the beneficial owners and end borrowers. This asymmetric information between those in the center of the lending market and those on the periphery may lead to inferior terms for those on the periphery, in the form of lower performance and less favorable prices for beneficial owners and end borrowers.[206]

Furthermore, because of the limited insight of existing commercial data into the retail market and the limits on access under the give-to-get model used by these data vendors, the commercially available data products for the securities lending market do not alleviate this information asymmetry.

In addition to the specific problem of information asymmetry, the lack of comprehensive and widely available data on securities lending activity likely means that the prices at which securities loans take place are not efficient, relative to the hypothetical case where complete information about securities lending activity were widely available. Asymmetric information deters outsiders from entering the market, as they anticipate not being able to transact on the same terms. This limits both liquidity (because fewer participants enter to transact) and price discovery (because not all information enters prices). Moreover, even connected participants lack a complete picture of the lending market, implying that the prices that they quote may not be as efficient as they otherwise would be.

3. Characteristics of the Securities Lending Market

The value of securities available to be loaned generally far exceeds the total value on loan. The OFR Pilot Survey documented that in 2015 only about 10% of the value of securities available for lending were on loan.[207] However, for a specific security it is not always true that shares available to loan far exceeds shares on loan. For some securities, particularly highly shorted securities, it can be extremely difficult and expensive to find securities to borrow. Securities that are difficult to borrow are said to be ''on special'' and can have average lending fees many times higher than a security that is not on special. In addition to significant variation in fees across different securities, there can also be a wide range of fees charged to borrow the same security on the same day.

Table [1] provides descriptive statistics illustrating these characteristics of the securities lending market. The data come from FIS (a/k/a Fidelity National Information Services, Inc.) and so reflect conditions in the wholesale lending market for the sample of lenders for which FIS obtains data. The data cover US equities on the same days as the OFR Pilot Study.[208] Panel A of Table[1] provides the distribution of utilization rates (defined as the percent of shares currently on loan relative to the total number of shares available for lending).[209] This panel highlights that utilization rates are highly positively

[203] *See, e.g.,* Bob Currie, *The Power of Reinvention,* Sec. Fin. Times, Aug. 31, 2021, at 20, *available at https://www.securitiesfinancetimes.com/sltimes/SFT_issue_285.pdf* (interviewing Matthew Chessum).

[204] *See* Garango Antonio, *Short Selling Activity and Future Returns: Evidence from FinTech Data* (2020), at 1 and 3, *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775338.*

[205] *See e.g.,* Adam C. Kolasinski, Adam C., Adam V. Reed, and Matthew C. Ringgenberg. ''A multiple lender approach to understanding supply and search in the equity lending market. ''*The Journal of Finance* 68, no. 2 (2013): 559–595. For a discussion of search costs in the securities lending market.

[206] For example, broker-dealers acting on behalf of customers have an incentive to lend from their own inventory, even if lower cost borrowing options exists, because they keep the whole lending fee in this case. The lack of data available to the end borrower about the state of the lending market makes it difficult for the end borrower to monitor the performance of its broker-dealer for situations like this.

[207] *See* Viktoria Baklanova, Cecilia Caglio, Frank M. Keane & R. Burt Porter, *A Pilot Survey of Agent Securities Lending Activity* (Off. of Fin. Research, Working Paper No. 16–08, 2016). Also, the number of shares available for loan must be interpreted carefully. It is the Commission's preliminary understanding that some beneficial owners may report a supply of shares available that, if borrowed, would exceed the total amount of securities lending they are willing to engage in, so that not all shares reported as available could in fact be borrowed at once. Investment companies that engage in securities lending consistent with SEC staff's current guidance generally limit securities lending to no more than one third of the value of their portfolio on loan at a given point in time. Some investment companies may set individual portfolio limits lower. *See supra* note 109.

[208] We limited our sample to these dates for comparison to the OFR study. Additionally, while the data presented here is limited to equities, the proposal applies to all securities and the Commission preliminarily believes that given that there exists the same lack of transparency for fixed income loans and equity loans, the same economic structure likely applies to both fixed income and equities.

[209] The statistics in Table 1 derive from data obtained from FIS for U.S. common stocks. The table includes data from the same period of time as the OFR Pilot Survey (October 9, 2015, November 10, 2015, and December 31, 2015).

skewed. For most stocks supply significantly outstrips demand with median utilization rates of approximately 12%. For stocks at the 90th percentile, utilization rates are near 70%, implying that an investor seeking to find shares of such a stock to borrow may have a difficult time doing so.

Panel B of Table [1] shows that the lending fees paid for securities loans exhibit a wide range.[210] Some stocks, *i.e.,* those on special, can have fees many times higher than the median stock. Specifically, stocks at the 90th percentile of lending fees have an average lending fee of 7% per year while the median stock has a lending fee of about 0.6% per year. Even when loans involve the same stock, and on the same day, there can be a significant range in fees paid to borrow securities.

Panel C of Table [1] highlights the range of fees charged for the same stock on the same day. The range in fees is defined as the difference in the maximum and minimum fees reported to FIS for loans of the same stock on that day. This range can be quite substantial. For the median stock the range is about 3 percentage points, or approximately five time the median fee charged for securities lending transactions.

The level of average fees is affected by the overall demand for the security while the range of fees for the same security can be influenced by a number of characteristics: The Credit worthiness of the borrower, the type of collateral used, and the term of the loan. The range in fees may also represent asymmetric information between the parties to the loan negotiation, such that one party is able to charge a higher fee than would be possible if the other party were more aware of the current rates for the security to be loaned. It may also represent a general lack of price efficiency, as market participants operate without a clear view of the market as a whole.

BILLING CODE 8011–01–P

Table [1] Distribution of lending fees for US Common stocks. *

Panel A: Distribution of Utilization Rates

	p10	p20	p30	p40	Median	Mean	p60	p70	p80	p90	N
9-Oct-15	1.02	2.94	5.42	8.28	12.06	22.70	17.21	24.83	39.35	68.98	3638
10-Nov-15	0.94	2.82	5.18	8.19	11.72	22.51	16.87	24.59	38.59	68.10	3638
31-Dec-15	0.75	2.35	4.52	7.31	11.17	22.25	16.49	25.02	40.42	67.64	3639

Panel B: Distribution of Average Lending Fees

	p10	p20	p30	p40	Median	Mean	p60	p70	p80	p90	N
9-Oct-15	0.48	0.56	0.58	0.6	0.65	3.76	0.76	1.24	2.62	7.07	3727
10-Nov-15	0.47	0.56	0.59	0.61	0.66	3.77	0.77	1.32	2.76	7.36	3725
31-Dec-15	0.37	0.46	0.5	0.54	0.58	3.86	0.66	1.12	2.77	7.51	3725

Panel C: Distribution of Range of Lending Fees

	p10	p20	p30	p40	Median	Mean	p60	p70	p80	p90	N
9-Oct-15	1.01	1.35	1.85	2.27	2.85	8.42	3.57	5.21	7.76	10.41	3727
10-Nov-15	0.93	1.31	1.81	2.36	2.98	8.39	3.78	5.51	7.73	11.16	3725
31-Dec-15	1.15	1.48	1.84	2.25	2.68	8.20	3.43	4.20	6.36	11.41	3725

* This table provides descriptive statistics using data from FIS on securities lending fees for US Common stocks. Panel A provides estimates of the distribution of average fee for each stock. For loans collateralized by cash, rebate rates are converted to fees using the conventional method of subtracting the rebate rate from the Federal funds rate. The sample matches the OFR Pilot Survey's sample dates and provides percentile thresholds for lending fees. Panel A shows the distribution of average fees. Since there is a distribution of fees levied for the same stock on the same day, the average fee is computed as the value weighted average fee across all loans for a given stock on a given day. Panel B shows statistics for the range of fees levied for the same stock on the same day defined as the maximum fee minus the minimum fee. Fees are converted to annual percent. Panel C shows the distribution of utilization rates for US common stock where the utilization rate is computed as the percent of shares on loan relative to total shares available for lending. N reports the number of observations from which FIS has reported the relevant statistics.

[210] This result is consistent with the academic literature *See e.g.,* Peter N. Dixon, Corbin A. Fox, and Eric K. Kelley. "To Own or Not to Own: Stock Loans Around Dividend Payments," *Journal of Financial Economics,* 140, 2 (2021), 539–559. Also consistent with the academic literature, average fees for each stock each day are computed by FIS as the share weighted average fee across all loans outstanding reported to FIS for a given stock on a given day. Stocks are sorted by average fee and percentiles are determined.

BILLING CODE 8011–01–C

4. Structure of the Securities Lending Market

The securities lending market is made up of a market for borrowing and borrowing services, and a market for lending services. End borrowers can borrow securities either through their broker-dealer, or by themselves if they maintain their own relationships with lending programs. If they borrow through their broker-dealer, then they transact in the Retail Market. If they maintain their own relationships and borrow directly from lending programs, then they transact in the Wholesale Market. Beneficial owners can either supply shares to the lending market by contracting with a lending program, or they can run their own lending program and lend directly to entities such as large hedge funds with which they maintain relationships. In either case, such a transaction occurs in the Wholesale Market. Lenders can also be broker-dealers who lend to end borrowers either from their own account or from customer margin accounts. These lenders transact in the Retail Market. The following sections discuss the structure of the market for borrowing and borrowing services and the market for lending services.

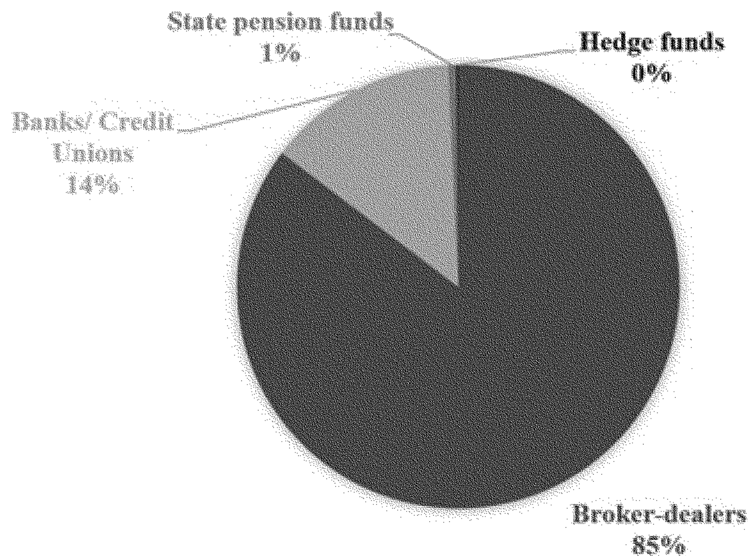
(a) Market for Borrowing and Borrowing Services

A market participant wishing to borrow shares usually does so through its broker-dealer, who offers to find shares to borrow as part of its suite of services offered to customers. A broker-dealer may start by providing a security loan to its customer with shares from its own inventory or out of another customer's margin account. The Commission understands that in order to facilitate the amount of borrowing customers wish to do, a broker-dealer will typically have to find external sources of shares. To that end, broker-dealers maintain relationships with various lending programs.

Additionally, some large institutions, such as banks, credit unions, pension funds, and hedge funds, choose to maintain their own relationships with lending programs. These entities bypass broker-dealers to search for borrowable shares themselves. This option is not feasible for smaller institutions, who lack both the scale to make it cost effective, and the creditworthiness to be an acceptable counterparty for the lending programs in the absence of an intermediary, *e.g.,* a broker-dealer.

The OFR Pilot Survey estimated that there were approximately $1 trillion of shares on loan. The OFR primarily focuses on the Wholesale Market, consequently the overwhelming majority of borrowers were broker-dealers, who are generally arranging the loan on behalf of a customer (such as a hedge fund) that wishes to borrow shares, typically to deliver shares to settle a short transaction. Consequently the OFR Pilot Survey does not provide much insight into who the end borrowers are for the trades facilitated by broker-dealers. Figure [1] provides the fraction of total securities on loan by type of borrower based on the OFR Pilot Survey.

Figure [1] Fraction of shares on loan by borrower type



Source: OFR Pilot Survey of Agent Securities Lending Activity

There is currently no common source that those seeking security loans can use to determine where to find shares available to lend, which is why broker-dealers rely on relationships with lending programs to secure loans. This situation has contributed to high search costs in this market.[211] High search costs imply that transactions cannot take place without a costly effort to find a favorable counterparty. The need for such costly effort can inhibit market efficiency.

Broker-dealers possess some market power over their customers. Generally, broker-dealers assist investors in finding shares to borrow as part of a suite of services and switching costs to selecting a new broker dealer can be high. This relationship can make it difficult for investors to change broker-dealers if they underperform in one area because it is not just a securities lending relationship that would be changed, but the whole suite of broker-dealer services would be affected.[212] Additionally, the

[211] Kolasinski, Reed & Ringgenberg, *supra* note 193.

[212] Some entities, such as some hedge funds, have multiple prime-brokers. For such institutions it would be less difficult to switch between broker-dealers if one is performing poorly as they could

relationship nature of the lending market favors larger broker-dealers who can maintain high-volume relationships with more lending programs. Finally, the lack of data make it difficult for customers to evaluate the performance of broker-dealers. Customers as well as lenders thus rely on relationships and reputation, a situation that also leads to market power.

(b) Market for Lending Services

The primary sources of shares to loan are long term investors such as investment firms, pension and endowment funds, governmental entities, and insurance companies. These entities generally make their shares available to lend either through a lending program run by a lending agent or by running their own lending program. Additionally, broker-dealers may lend shares from their own inventory, from fully paid shares, and from customer margin accounts.

As described above, a beneficial owner seeking to lend shares will generally provide those shares to a lending agent, which runs a lending program. There are two broad categories of lending programs: Custodian banks and third-party lending programs. In the case of custodian banks, the lending program is generally offered as part of their general custodian services.

Both types of lending programs will generally pool shares across accounts with which they have lending agreements to create a common pool of shares available to lend. As shares are lent out the revenue earned from the pool of shares is generally distributed across all accounts contributing shares to the pool of shares on loan on a pro-rata basis. In pooled lending programs the lending program generally splits the fees generated from lending with the beneficial owners. Based on the staff's experience, the Commission preliminarily believes that the lending program will usually take about a third of the fees earned. In the case of custodian banks, the custodian bank may, rather than return the lending revenue directly to the beneficial owner, instead apply the beneficial owner's portion of the lending revenue to other fees charged by the custodian bank for other services.

Lending programs typically indemnify the beneficial owner from default by the borrower. This indemnity gives the lending program an incentive to ensure the creditworthiness of the borrower, and a lending program may assess higher fees to borrowers it deems as less creditworthy.

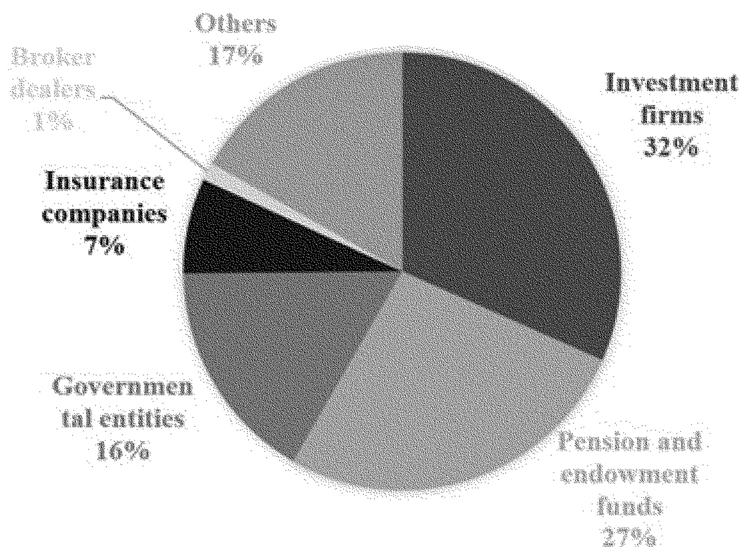
Lastly, over the past two decades, auction-based security lending has become an alternative for lender-borrower interactions. In this setting, unlike the directed lending programs, positions of different beneficial owners are not pooled to cater to security-specific demand from borrowers. Instead, after determining the desired income streams, the lender's entire portfolio, or its segments, are offered via blind single-bid auctions.

In some cases, a beneficial owner may choose to set up its own lending program. This course is more common among very large funds that have the resources to build up the expertise necessary to operate a lending program.

The Commission preliminarily believes that the current relationship and network structure of lending programs and broker-dealers favors larger lending programs that have the resources to maintain relationships with more and larger lending broker-dealers. Thus, the Commission preliminarily believes that the market for lending services is likely dominated by a few large lending programs, including those run by the large custodian banks.

The OFR Pilot Survey estimated that as of the latter part of 2015 there were approximately $9.5 trillion worth of shares available for lending.[213] Figure [2] provides a breakout of the percent of shares available for lending provided by the various entities.

Figure [2]: Sources of lendable shares (2015)



Source: OFR Pilot Survey of Agent Securities Lending Activity

redirect securities lending business to their top performing prime-broker.

[213] Commercial vendors typically report a value for securities available to loan that is larger than what is reported in the OFR study. This difference is likely due to sample construction. The commercial vendors likely have a larger sample of lending programs to draw from, particularly the lending programs based outside of the United States.

5. Market for Securities Lending Data and Analytics

The market to collect and disseminate securities lending data is an outgrowth of the market for securities lending market analytics.[214] This market consists of a few established vendors that specialize in geographic areas (U.S. and non-U.S.) but seek to compete in all geographic areas. Most vendors collect the data to support the analysis business in which they provide data-based service to institutions and other lending programs. Others collect data through their facilitation of security loans. As such, the data vendor business is often an outgrowth of another business.

The Commission preliminarily believes that the data provided by the various data vendors are largely comparable.[215] However the entities providing data to the vendors are also their customers. This relationship limits the market power of the vendors with respect to their clients who provide data but results in the clients' incentives limiting the competitiveness of the market.[216] This results in the market being largely inaccessible for many entities that could use the data for their own benefit or the benefit of the market as a whole.[217]

The give-to-get model for securities lending data is a significant barrier to entry to any firm seeking to provide analytics services. Firms cannot provide analytics services without data, and the biggest three data vendors have established relationships with data contributors to collect data. Such data contributors have an incentive to also control who can access that data. Consequently, the Commission understands that the market for securities lending data and securities lending analytics is largely concentrated among the three biggest data vendors.

C. Economic Effects of the Proposed Rule

1. Effects of Increased Transparency in the Lending Market

The Commission preliminarily believes that the primary impact of the proposed Rule would be to increase transparency in the securities lending market. The proposed Rule would improve transparency through increased completeness, accuracy, accessibility, and timeliness of securities lending data. Due to uncertainties about existing data discussed in IV.B.2, the Commission has some uncertainty in describing how much more complete, accurate, and timely the data provided by the proposal will be. However, the Commission preliminarily believes that the data provided by the proposal will improve upon existing data in each of these areas. While commercial data vendors collect data only from a segment of the market, the proposed Rule would seek to collect all security loan transactions. In addition, unlike the often voluntary data reporting of subscribers to commercial data vendors, the proposed Rule mandates reporting. As such, the data provided by the proposed Rule would be more comprehensive than the data offered by any individual data vendor.

The data provided by the proposed Rule would encompass more data fields than those offered by individual existing commercial data vendors, improving the breadth of the available securities lending data. While both commercial data and the data provided by the proposal will provide information on fees (rebate rates) and the dollar value of the loan, the proposed rule requires reporting of additional information relevant to the loan including: The name of the platform or venue where the security loan transaction was executed, the security loan's termination date, type of collateral, and borrower type. In addition, as described in Part III.B.1.b), the proposed Rule would collect detailed security loan modification data while existing commercially available data often fails to cover such information.

Commercial data vendors restrict data access via usage restrictions. In contrast, the proposed Rule expands accessibility of the data by allowing all market participants to access data.[218] While the Commission preliminarily believes that the lack of such usage restrictions would expand access, the Commission is uncertain as to whether the RNSA would develop systems to facilitate access with a degree of convenience comparable to current data vendors. Nevertheless, the Commission preliminarily believes that the commercial vendors may process the data available through the RNSA to provide conveniently accessible comprehensive securities lending data, along with the other relevant products, to clients.[219]

Lastly, the proposed Rule would likely improve the timeliness of data available to the public. While the Commission understands that most of the major data vendors provide some data on transactions intraday, it is unclear if all do. These vendors make intraday data available in 15 minute increments. However it is not clear whether these data vendors require their data contributors to report transactions within 15 minutes thus the Commission is uncertain about the comprehensiveness of existing intraday data offerings.[220] Consequently, the proposed Rule's 15 minute reporting window will in the extreme case likely result in data that is at least as timely as some existing data and will likely be more timely.

While the Proposal provides improvements in many areas as discussed above, and the Commission preliminarily believes that the Proposal will lead to an overall increase in transparency, the Commission preliminarily believes that in some areas, the Proposal will produce data that that may be less timely than existing commercial data. For example the Proposal requires the RNSA to report end of day quantities of securities available for lending and loans outstanding. These data will be made available to the public as soon as practicable, but not later than the next business day. The Commission preliminarily understands that the

[214] *See* the business model descriptions in IHS Markit's comment letter responding to FINRA's Regulatory Notice 21–19, *available at https://www.finra.org/sites/default/files/NoticeComment/IHS%20Markit_Paul%20Wilson_21-19_9.30.2021%20-%20IHSM%20Cmt%20Ltr%20re%20FINRA%20RFC%20Short%20Interest%20Position%20Reporting.pdf.*

[215] *See* Truong X. Duong, Zsuzsa R. Huszár, Ruth SK Tan, and Weina Zhang. ''The Information Value of Stock Lending Fees: Are Lenders Price Takers?'' *Review of Finance* 21, no. 6 (2017): 2353–2377 (who provide a comparative analysis of the datasets of two of the main commercial data vendors and find very high correlations between the values presented in the different datasets).

[216] *See supra* Part VI.A.2.

[217] *See supra* Part VI.B.4.(b).

[218] *See* Part VI.C.3 for estimated compliance costs.

[219] The Commission understands that there are different ways that market participants currently access data as discussed in Part VI.B.1, and that these ways may be different from how market participants access the data created by the Proposal. However, the Commission preliminarily believes that how market participants access the data will likely have a significantly smaller impact on the economic effects of the rule relative to the effects of the content of the data, its accessibility, and its timeliness. The Commission preliminarily believes that market participants will relatively easily adapt to optimally use the data generated by the proposal. These adaptations will likely be relatively small given the similarity of the structure of the current data with the data generated by the Proposal. Thus the Commission's discussion of economic effects in this section focus on the content of the data.

[220] Fifteen-minute reporting frequency is currently implemented in corporate bond markets, where reporting is often handled manually. Hence, in any market with a degree of automation, *e.g.,* security lending markets, a 15-minute reporting frequency would be unlikely to present technological challenges.

current practice by market participants is to provide preliminary statistics on the same day based on the intraday data collected by the vendors—potentially one day sooner than the Proposal—while the main data are disseminated one day later. Thus while the Commission preliminarily expects that the data for shares on loan and shares available to loan could be more comprehensive than existing commercial data, it may also be disseminated one day later than the preliminary statistics produced by the commercial vendors.

Despite this potential reduction in the timeliness of one data element, increased transparency from the proposed Rule would have several notable economic effects. First, it reduces information asymmetries, which would be beneficial to some and costly to others. The improvements in the information available to various participants could affect revenues from borrowing securities, lending securities, intermediating loans and selling data. Third, the improvements in efficiency in the securities lending market would reduce the costs of short selling, potentially affecting markets more broadly. Finally, improvements in transparency in the securities lending market can assist financial institutions in managing collateral and their balance sheets more broadly.

As discussed below, the Commission preliminarily believes that the data provided by the proposal may decrease the cost of lending. Consequently, some investors may see returns decrease due to more competitive fee pricing which may lower securities lending revenue for some lenders. On the other hand, other investors may see returns increase if the cost of borrowing securities decreases as it will facilitate investment, hedging, and potentially market making strategies. Many investors may experience both effects. In general, the Commission believes that reductions in transaction costs ultimately benefit investors.

(a) Reduction in Information Asymmetry

The Commission preliminarily believes that the transparency created by the proposed Rule would reduce information asymmetries between various market participants. Specifically, it would reduce the information asymmetries between dealers and end borrowers and between beneficial owners and lending programs, resulting in lower costs for end borrowers but reduced revenues for some broker-dealers and lending programs. In addition, beneficial owners could benefit from better terms but could also experience reduced revenues from their lending activities.

The Commission preliminarily believes that the transparency created by the proposed Rule would benefit end borrowers by reducing the information disadvantage they have with a broker when borrowing shares, leading to lower prices for end borrowers. Because most security loans are facilitated through broker-dealers, the data would allow end borrowers to determine the extent to which their broker-dealer is obtaining terms that are better, worse, or consistent with current market conditions for loans with similar characteristics. If a particular broker-dealer is consistently underperforming relative to the rest of the market, an investor would have the tools to identify such underperformance and address it with his or her broker dealer, or to find a new broker dealer.[221] Such improvements are consistent with the experience in other markets. For example, the implementation of TRACE in the corporate bond markets improved transparency in that market and has been studied extensively. Research has shown that TRACE lowered both the average cost of transacting as well as the dispersion of transaction costs—largely by reducing the information asymmetries between customers and their broker-dealers.[222] Additionally, recent research from Brazil has shown that improving securities lending transparency led to lower fees, increased liquidity, and increased price efficiency.[223]

The Commission preliminarily believes that the proposed Rule would benefit beneficial owners by reducing their information disadvantage with respect to their lending programs. By allowing beneficial owners to more easily benchmark their lending programs through access to data on lending fees and other characteristics of recently transacted security loans, the proposed Rule would provide these lenders with an improved ability to determine the quality of the loans that their lending program executes on their behalf relative to other loans with similar characteristics and to discuss performance with their lending program, find a different lending program, or find a new route to market.

Reduction in information asymmetry could result in reduced revenue for some broker-dealers and lending programs. Because end borrowers and beneficial owners would have more information about the state of the lending market, broker dealers and lending programs who consistently underperform the market may lose customers to better performing broker-dealers and lending programs, or begin offering better terms to their customers. Both possibilities represent a reduction in revenue for broker-dealers and lending programs. It is possible some broker-dealers and lending programs may choose to exit some or all of the market for lending services as a result of this loss of revenue.[224] The loss of revenue will in part be a transfer to end borrowers, beneficial owners, better performing lending programs, and better performing broker-dealers.

Lending programs may also experience reduced revenues through the change in terms offered by broker-dealers to their customers. If a given lending program has become skilled in cultivating relationships with broker-dealers willing currently to pay higher fees, then the increased competition that broker-dealers face as a result of the rule may lead to lower overall fees being charged for security loans—lowering the total lending revenue produced by securities lending.[225] Lower overall lending fees may reduce the revenue earned by beneficial owners and would represent a partial transfer to the end borrowers who may receive better terms on average as a result of decreased information asymmetries.[226]

[221] The costs associated with switching broker dealers may be high, particularly for smaller borrowers. Switching broker-dealers may not be cost effective for these borrowers, however, the data would provide benchmark statistics that may enable smaller borrowers to select higher performing broker-dealers initially.

[222] *See e.g.,* Amy K. Edwards, Lawrence E. Harris, and Michael S. Piwowar. ''Corporate Bond Market Transaction Costs and Transparency.'' *The Journal of Finance* 62.3 (2007): 1421–1451, Michael Goldstein, Edith S. Hotchkiss, and Erik R. Sirri. ''Transparency and Liquidity: A Controlled Experiment on Corporate Bonds.'' *The Review of Financial Studies* 20.2 (2007): 235–273, Hendrik Bessembinder, William Maxwell, and Kumar Venkataraman. ''Market Transparency, Liquidity Externalities, and Institutional Trading Costs in Corporate Bonds.'' *Journal of Financial Economics* 82.2 (2006): 251–288, Michael A. Goldstein, and Edith S. Hotchkiss. ''Dealer Behavior and the Trading of Newly issued Corporate Bonds.'' *AFA 2009 San Francisco meetings paper.* 2007, and Hendrik Bessembinder and William Maxwell. ''Markets: Transparency and the Corporate Bond Market.'' *Journal of economic perspectives* 22.2 (2008): 217–234.

[223] *See* Fábio Cereda, Fernando Chague, Rodrigo De-Losso, Alan Genaro, and Bruno Giovannetti. ''Price transparency in OTC equity lending markets: Evidence from a loan fee benchmark.'' *Journal of Financial Economics* (Forthcoming).

[224] *See infra* Part VI.D.

[225] For a discussion of the potential for broker-dealers to face increased competition, *see supra* Part VI.D.2.

[226] *See supra* Part VI.B.

(b) Improved Information for Participants in the Securities Lending Market

The Commission preliminarily believes that the increased transparency that would result from the proposed Rule would increase the information about the state of and activity in the securities lending markets that is available to market participants generally. This would result in benefits in the form of increased trading profits for investors and beneficial owners, reduced costs of business for broker-dealers, improved performance and reduced costs for lending programs, improved price discovery in the securities lending market, and new business opportunities for data vendors. The increase in securities lending information would also result in costs in the form of lost revenue for current providers of commercial securities lending data.

The Commission preliminarily believes the improved information that would result from the proposed Rule would lead to increased profits for certain investors by increasing their certainty regarding investment strategies that require borrowing securities. Prior to a short sale transaction, the end borrower will be able to get a better sense of the likely costs associated with such an investment strategy, using the information that would be provided under the proposed Rule. This increase in certainty regarding the costs of borrowing a security may decrease risk, and thereby increase risk-adjusted profits, of pursuing investment strategies that require short sales.

The improved information access would lead to the benefit of improved price discovery in the security lending market itself. As all participants in the securities lending market obtain better data on that market, utilize the insights contained in the data, and then improve their decisions based on it, the price discovery process would improve. This would lead to more efficient prices for securities loans.

Access to the information that would be made available by this proposal would benefit investors by potentially enabling them to make more informed decisions about whether to buy, hold, or sell a given security. Extant research has demonstrated that securities lending data has information relevant to the prices of the underlying security.[227] This information may therefore enable more informed investment decisions by those investors who utilize the insights into the underlying market available from the lending market. More informed investment decisions facilitated by the proposal may also improve market stability by allowing investors to better manage risk.

Furthermore, this improved information access may also improve price discovery in the market for the securities underlying the security loans. Because these data currently are not widely observed, [228] it is possible that the information about the underlying securities contained in security lending market data are not incorporated in those underlying securities' prices. For example, existing research shows that lending fees themselves contain information that is relevant to prices.[229] Additionally, a more accurate estimation of shares on loan can provide a clearer view into daily changes in short interest which can provide market participants with improved information about bearish sentiment. Consequently, by publicly disseminating securities lending data, the proposal may increase price efficiency by allowing a broader section of investors to learn from and trade based on signals obtained from the securities lending market.

Additionally, an improved view of current lending market conditions for various securities could help inform beneficial owners in making decisions concerning which shares to make available for lending, potentially leading to more profitable lending. For instance, to the extent that beneficial owners do not currently have a way of determining which securities are in high demand, the new information may be able to alert them about securities with high lending fees, which would enable them to better optimize which shares in their portfolio they make available for lending.[230]

A clearer understanding of lending market conditions facilitated by the dissemination of new 10c–1 information may benefit broker-dealers by decreasing the cost incurred to obtain a locate in order to facilitate a short sale on behalf of a customer. The increased information that would be created by the proposed Rule would allow a broker-dealer to better ascertain current market conditions for security loans with certain characteristics prior to calling lending programs to get competing quotes. As described in Part VI.B.4., broker-dealers tend to find loans for their customers through their network of lending programs with which they have relationships, after they have exhausted their own inventory and customer margin accounts.[231] The data from the proposed Rule would enable them to determine whether or not a quote from a lending program is competitive with greater ease. It is possible new broker-dealers may choose to enter this market as a result of this reduction in cost.[232]

The proposed Rule would benefit lending programs by providing a means by which they may improve the performance of their lending. New 10c–1 data will provide lending programs with a source of more comprehensive data on the securities lending market than existing commercial data. With this data the lending programs would have an improved ability to determine prevailing market conditions as they compete to lend shares, which may improve their lending performance.

The Commission preliminarily believes that the proposed Rule may cause a loss in revenue for the commercial vendors of securities lending data. The proposed Rule would create data that are similar to, but more comprehensive than the data currently available from private data vendors. Consequently, for many users the data provided by the proposal may supplant the data currently provided by the commercial vendors, and these users would then drop their subscriptions to the data vendors.

The Commission preliminarily believes that a potential mitigating factor that could reduce the severity of this loss in revenue would be that commercial data vendors could offset some of the impact of lowered demand for their data by enhancing their related businesses [233] using the data in the proposed Rule. As discussed in Part VI.B.5, commercial data vendors also

[227] *See* Truong X. Duong, Zsuzsa R. Huszár, Ruth S. K. Tan & Weina Zhang, *The Information Value of Stock Lending Fees: Are Lenders Price Takers?* 21 Rev. Fin. 2353–77 (2017). This study shows that after controlling for the level of short selling, securities lending fees are predictive of future stock returns with higher fees associated with lower future returns. These result imply that, all things equal, lenders charge higher fees to lend their shares when they have negative information about a company. And *See* Kaitlin Hendrix & Gavin Crabb, *Borrowing Fees and Expected Stock Returns* (2020), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3726227.*

[228] *See supra* Part VI.B.2.

[229] *See, e.g.,* Duong, Huszár, Tan, and Zhang *supra* note 215.

[230] This decision can be important because beneficial owners that engage in securities lending activities consistent with the SEC staff's current guidance limit the portion of their portfolios that can be on loan at any point in time. *See supra* note 109. This additional information may help a beneficial owner that is close to its program limit to optimally choose which shares to make available.

[231] *See also supra* Part VI.B.1 (discussing the role of broker-dealers in facilitating borrowing by customers).

[232] *See infra* Part VI.D.

[233] The proposal would also lower barriers to entry for new entrants desiring to offer analytics solutions for the equity lending market. This outcome is discussed in Part VI.D.2.

provide analytics to their customers, and would be able to support these analytics data with the data provided by the proposed Rule. Further, because the commercial vendors would not need to protect their relationship with their current data vendors, they could provide analytics to more market participants. However, as discussed below in Part VI.D.2, the data vendors may see increased competition for data analytics services as the barriers to entry for providing analytics services decline and new entrants compete to provide analytics services. This effect would lower what the data vendors can charge for analytics services. Additionally, to the extent that the commercial data vendors offer their customers other securities lending services, such as execution services, the proposal may enhance their other business lines by providing more comprehensive data to support other securities lending market services.

The Commission recognizes that these benefits are somewhat limited because the data will not contain all information necessary to perfectly compare the fees on different loans, though the Commission preliminarily believes that the proposed Rule improves the ability to compare loans. For example, as discussed in Part IV.B.1, loan fees are determined by a variety of factors including counterparty creditworthiness—which is not captured in the proposal's data. As such, two loans could appear to be similar in the information the proposed Rule would provide, but the counterparty risk differences could result in different fees. While recognizing this limitation, the Commission does not believe this limitation could be solved by adding information on counterparty risk. In particular, the Commission is unaware of reliable measures for counterparty risk that would be informative when attached to transaction information. However, the Commission requests comment on whether commenters believe any such measures exist.

(c) Improved Market Function Through Effects on Short Selling

As described in Parts VI.C.1.a) and VI.C.1.b), the Commission preliminarily believes that the proposed Rule would likely reduce the cost to borrow securities. This would have a number of effects through the impact on short selling. Because maintaining a short position requires borrowing the security, reducing the cost to borrow securities would reduce the cost to short sell. Reduced costs for short selling would result in benefits in the form of enabling investors to profitably engage in more fundamental research, improving price discovery in securities markets, providing more discipline for corporate managers, and increasing liquidity in the stock and options markets.

The reduced costs to short selling would benefit investors by enabling them to profitably engage in more fundamental research. Indeed, academic research indicates that when short selling costs diminish, investors will do more fundamental research because it is easier to trade on their information if they uncover negative information.[234] This new fundamental research may in turn lead to better investment decisions for these investors.

Additionally, by facilitating more short selling and more research, the proposed Rule would benefit market participants by improving price discovery. Academic research shows that short sellers, through their research, contribute to price efficiency by gathering and trading on relevant private information.[235]

Short sellers also serve as valuable monitors of management. Extant research has demonstrated that when management knows that short sellers may be studying their firms, they are less likely to engage in inappropriate and/or value-destroying behavior.[236] Research also indicates that when short selling becomes easier the effectiveness of short sellers as monitors increases.[237]

Reducing the costs of short selling may also have the benefit of increasing the liquidity in the underlying securities. Short sellers are key contributors to liquidity in both equity and options markets and existing research shows that when short selling is constrained by tightness in the securities lending market, the stock market is less liquid.[238]Also, lower costs to short selling would have potential benefits in the options markets in the form of increased liquidity. As discussed in Part VI.B.1, securities lending affects liquidity in the options market through its impact on how easily options market makers can delta hedge. Less costly delta hedging may therefore increase liquidity in the options market.

Also, since some price discovery occurs in the options market, to the extent that the rule increases the ease with which investors can trade in options, the proposal may further enhance price efficiency in the spot market.[239]

However, the proposal may somewhat diminish the value of collecting and trading on negative information. Specifically, the proposal would provide information that may provide a more timely view into short selling activity than currently exists. Increasing short selling transparency may make it more costly for short sellers to implement their positions as other market participants would more quickly learn about and react to short sellers' activities. These dynamics decrease the profitability of short selling and may mitigate some of the benefits discussed in the preceding paragraphs. [240]

[234] *See* Dixon, Fox & Kelly, *supra* note 200. It is not necessary that the information uncovered by this research be negative in nature for this to be true. The possibility of easier securities borrowing ensures that if the information happens to be negative, it will still be profitable. Thus, the risk of engaging in costly research decreases and more information, both positive and negative, is uncovered as a result.

[235] *See e.g.* Jesse Blocher, Adam V. Reed, and Edward D. Van Wesep. ''Connecting Two Markets: An Equilibrium Framework for Shorts, Longs, and Stock Loans.'' *Journal of Financial Economics* 108, no. 2 (2013): 302–322 and Peter Dixon, *Why Do Short Selling Bans Increase Adverse Selection and Decrease Price Efficiency?* Review of Asset Pricing Studies *1*(1), 122–168.

[236] *See e.g.* Eric C. Chang, Tse-Chun Lin, and Xiaorong Ma. ''Does Short-Selling Threat Discipline Managers in Mergers and Acquisitions Decisions?'' *Journal of Accounting and Economics* 68, no. 1 (2019): 101223. See also Massimo Massa, Bohui Zhang, and Hong Zhang. ''The Invisible Hand of Short Selling: Does Short Selling Discipline Earnings Management?'' *The Review of Financial Studies* 28, no. 6 (2015): 1701–1736.

[237] *See e.g.* Vivian W. Fang, Allen H. Huang, and Jonathan M. Karpoff. ''Short Selling and Earnings Management: A Controlled Experiment.'' *The Journal of Finance* 71, no. 3 (2016): 1251–1294.

[238] *See* Dixon, Fox & Kelley, *supra* note 200. 18.6 (2014):, 18, 6, 2153–2195.

[239] *See, e.g.,* David Easley, Maureen O'Hara & Pulle Subrahmanya Srinivas, *Option Volume and Stock Prices: Evidence on Where Informed Traders Trade,* 53 J. Fin. 431–65 (1998); Jun Pan & Allen M. Poteshman, *The Information in Option Volume for Future Stock Prices,* 19 Rev. Fin. Stud. 871–908 (2006); Sophie Ni, Neil D. Pearson & Allen M. Poteshman, *Stock Price Clustering on Option Expiration Dates,* 78 J. Fin. Econ. 49–87 (2005).

[240] While the literature examining the effects of short selling on financial markets is overwhelming positive, it is not uniformly so. Two theoretical studies posit that in certain circumstances short selling can lead to stock price manipulation with adverse effects for the firms whose stock prices are manipulated. *See* Markus K. Brunnermeier and Martin Oehmke, *Predatory Short Selling Review of Finance,* 18, 6 (2014), 2153–2195. *See also* Itay Goldstein and Alexander Guembel, *Manipulation and the Allocational Role of Prices, The Review of Economic Studies,*75, 1 (2008), 133–164. However, there has yet to be strong empirical evidence supporting these studies. One study shows using international empirical data that the markets that allow short selling tend to exhibit more negative skewness, implying an increase in risk for extremely negative return events. It is unclear whether this pattern indicates that short sellers exacerbate crash risk, or whether this pattern simply reflects short sellers quickly incorporate negative information into stock prices (a behavior that enhances price efficiency). *See* Arturo Bris, William N. Goetzmann, and Ning Zhu, *Efficiency and the Bear: Short Sales and Markets around the*

Continued

(d) Improved Financial Management for Financial Institutions

As discussed in Part VI.B.1, financial institutions such as banks and broker-dealers use the securities lending market in order to manage collateral needed for other transactions. These entities can face the same opacity concerns as do end borrowers and beneficial owners, and thus an increase in market transparency may lead to improved ability to manage collateral.

Also, as discussed in Part VI.B.1, banks borrow securities to manage their balance sheets, and the Commission expects that this too may become easier to do as a result of the proposed Rule, leading to the benefit of improved balance sheet management by banks.

2. Regulatory Benefits

The proposed Rule would improve upon current data sources by providing an RNSA (FINRA is the only RNSA) and the Commission access to securities lending information that identifies the parties to the loans, indicates when a broker-dealer loans its own securities to its customers, and indicates whether the purpose of such a loan was to close out a failure to deliver. Further, the improved access and comprehensiveness and reduced bias of the publicly available data would also accrue to FINRA and the Commission, as well as any other regulators using this data. This access would benefit investors by enhancing regulatory tools employed to promote fair and orderly securities transactions. In particular, benefits to investors could result from improved surveillance and enforcement uses, market reconstruction uses, and market research uses.

(a) Surveillance and Enforcement Uses

The party identities and purpose information could facilitate better surveillance by FINRA for regulatory compliance by its members, and could improve its ability to enforce such regulations. Additionally, FINRA would be able to notify another regulator as appropriate.

For example, for FINRA, the information on whether the security is loaned from a broker-dealer's securities inventory to its customer could assist FINRA in determining whether the broker-dealer was charging lending fees or paying rebates commensurate with the market. Thus, beneficial owners and end borrowers, who engage in securities lending transactions, would be protected against potential unfair pricing of securities by broker-dealers. In addition, FINRA can use the data more generally to assist in its surveillance of FINRA Rules 4314, 4320, and 4330 regarding securities lending and short selling that primarily intend to reduce information asymmetry in the securities lending markets. For instance, the proposed Rule could help FINRA identify broker-dealers who tend to lend to or borrow from non-FINRA members to examine compliance with provisions of FINRA rules 4314 and 4330 that entail agreement, disclosure, and other requirements for this activity. In addition, the information on how much borrowing particular FINRA members engage in can assist FINRA in identifying which broker-dealers to examine for compliance with FINRA rule 4320—which contains short sale delivery requirements. These types of activities would better protect investors by helping to ensure that entities engaging in certain securities lending transactions are authorized to do so and are in compliance with applicable regulations. FINRA can also use the information to monitor when broker-dealers are building up risk, thereby protecting broker-dealers' customers against potential instabilities. FINRA could use data on the identity and activity of its members to provide an early warning with regard to the behavior of its members during a short squeeze.

Additionally, the securities lending data would facilitate the Commission's oversight of compliance with Regulation SHO, such as the locate requirement and the close out requirement. In particular, the information on shares available and shares on loan would provide the Commission with a way to identify securities for which obtaining a locate would be more difficult because securities with little difference between shares available and shares on loan would be harder to locate and borrow. Coupled with other data, the Commission could identify short sale orders, short sellers, and their broker-dealers who are active in such securities, which would allow the Commission to more efficiently target broker-dealers for locate examinations. In addition, the information on whether the loan is being used to close out a fail to deliver could assist in examinations for Rule 204 compliance. Importantly, being able to estimate the securities lending revenues and costs of particular participants could help to fine tune disgorgement estimations. The Commission could also use the data to oversee broker-dealer compliance with Exchange Act rule 15c3–3.[241]

(b) Market Reconstruction Uses

The data provided by the Proposal may help regulators reconstruct market events. For example, in January 2021 trading in so called 'meme' stocks led to many questions about securities lending being asked by law makers, investors, and the media as well as calls by some for increased regulation in some areas.[242] The data provided by the proposal would allow for more detailed evaluations of such events in the future than was possible with existing data during January 2021. For example, January 2021 information on market participants' securities lending activity would have provided FINRA and Commission staff a more timely and fulsome view of who was entering into new loans and who was no longer borrowing securities. This would have facilitated a deeper understanding of how the events were or were not impacting market participants. Such analysis can help determine if further regulatory intervention in markets is warranted, and can inform the nature of any intervention.

(c) Market Research Uses

Greater access and more comprehensive data on the securities lending market would improve the quality and expand the scope of research by both academics and regulators, which would better inform the regulators. In particular, improving the information available for their policy decisions would promote fair, orderly, and efficient markets and the protection of investors. For example, the data could facilitate research on the effectiveness of regulations such as Regulation SHO or FINRA Rules 4320 and 4330. Additionally, research conducted by academic researchers and market participants could also improve the value of public comment letters on Commission and FINRA proposals, which would also better inform policy decisions.

3. Direct Compliance Costs

The Proposal will require various entities to enter into contracts and develop recording and reporting systems to comply with the proposal. This section provides estimates of those costs.

World, The Journal of Finance, 62, 3 (2007), 1029–1079.

[241] *See* 17 CFR 240.15c3–3.

[242] *See, e.g., supra* note 11.

Table [2]: Total Quantified Compliance Costs

	#	Total Initial Industry Cost	Total Annual Industry Cost
Lenders and Reporting Agents	409	$375,000,000[a]	$140,000,000[b]
RNSA	1	$3,500,000[c]	$2,480,000[d]

[a] $375,000,000 ≈ sum of figures estimated in *infra* Table [3] note p and Table [4] note h. The Commission estimates the wage rate associated with these burden hours based on salary information for the securities information compiled by SIFMA. The estimated wage figure for attorneys, for example, is based on published rates for attorneys, modified to account for a 1,800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead yielding an effective hourly rate for 2013 of $380 for attorneys. *See* Securities Industry and Financial Markets Association, Management & Professional Earnings in the Securities Industry—2013, available at https://www.sifma.org/resources/research/management-and-professional-earnings-in-the-securities-industry-2013/. These estimates are adjusted for an inflation rate of 16.83 percent based on the Bureau of Labor Statistics data on CPI-U between September 2013 and August 2021. Therefore, the current inflation adjusted effective hourly wage rates for attorneys are estimated at $444 ($380 x 1.1683), $365 ($315 x 1.1683) for compliance managers, $304 ($260 x 1.1683) for senior systems analysts, and $75 ($64 x 1.1683) for compliance clerks.

[b] $140,000,000 = figure estimated in *infra* Table [3] note q.

[c] 10,924 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $3,500,000. *See supra* notes 182 and note a.

[d] 7739.5 hours x (0.75 x $304/hour + 0.25 x $368/hour) + 52 hours x $75/hour ≈ $2,480,000. *See supra* notes 184, 185, and note a.

Table [2] shows that the Commission preliminary believes that the proposed requirements would impose a one-time cost of $3.50 million and ongoing expenses of $2.48 million on FINRA, the only RNSA. As discussed in Part V, the RNSA would incur these costs to develop systems to take and disseminate data required by the proposal. These include larger costs associated with creating and maintaining the infrastructure to enable Lenders to provide the RNSA with the 10c–1 information and entering into written agreements with Lenders, as well as smaller costs associated with providing such information to the public.

Table [2] also shows that Lenders and reporting agents would, in aggregate, incur roughly $375 million in initial costs and $140 million annually in ongoing costs to comply with the proposal. These costs come from costs to develop and maintain systems and from costs to enter into agreements. Tables [3] and [4] break these costs down by those incurred by Lenders and reporting agents based on the decision by Lenders to self-report or use a reporting agent.

BILLING CODE 8011–01–P

Table [3] Quantified Compliance Costs for Systems Development and Maintenance Incurred by Lenders and Reporting Agents

	#	Total Initial Industry Cost (millions)	Total Annual Industry Cost (millions)
Providing Lending Agents[a]	3	$3.46[b]	$1.30[c]
Non-Providing Lending Agents[d]	34	$19.6[e]	$7.34[f]
Reporting Agents[g]	94	$108[h]	$41.0[i]
Self-Providing Lenders[j]	139	$160[k]	$60.0[l]
Lenders that Would Directly Employ a Reporting Agent[m]	139	$80.1[n]	$30.0[o]
Total	409	$371[p]	$140[q]

[a] Providing Lending Agents would provide information directly to an RNSA.

[b] 10,800 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $3,460,000. *See supra* notes 146 and Table [2] note a.

[c] 4,050 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $1,300,000. *See supra* notes 149 and Table [2] note a.

[d] Non-Providing Lending Agents would use a reporting agent to provide information to an RNSA.

[e] 61,200 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $19,600,000. *See supra* notes 150 and Table [2] note a.

[f] 22,950 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $7,340,000. *See supra* notes 152 and Table [2] note a.

[g] Reporting Agents would provide information directly to an RNSA.

[h] 338,400 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $108,000,000. *See supra* notes 158 and Table [2] note a.

[i] 126,900 hours x (0.75 x $304/hour + 0.25 x $368/hour) + 4888 hours x $75/hour ≈ $41,000,000. *See supra* notes 160, 166, and Table [2] note a.

[j] Self-Providing Lenders run their own securities lending program and would report information directly to an RNSA.

[k] 500,400 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $160,000,000. *See supra* notes 168 and Table [2] note a.

[l] 187,650 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $60,000,000. *See supra* notes 170 and Table [2] note a.

[m] Lenders that Would Directly Employ a Reporting Agent run their own securities lending program and would use a reporting agent to provide information to an RNSA.

[n] 250,200 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $80,100,000. *See supra* notes 172 and Table [2] note a.

[o] 93,825 hours x (0.75 x $304/hour + 0.25 x $368/hour) ≈ $30,000,000. *See supra* notes 174 and Table [2] note a.

[p] $371 million ≈ sum of figures estimated in *supra* notes b, e, h, k, and n.

[q] $140 million ≈ sum of figures estimated in *supra* notes c, f, i, l, and o.

BILLING CODE 8011–01–C

Table [3] shows that Lenders and reporting agents would incur an aggregate of roughly $371 million in initial costs and $140 million annually in ongoing costs to develop and maintain systems for reporting securities lending information. These include larger costs associated with developing and reconfiguring their current systems to capture the required data elements, as well as smaller costs associated with implementing changes and monitoring systems, most of which would be incurred by Self-Providing Lenders.

Table [4]: Quantified Compliance Costs of Entering into Agreements

	#	Agreement Counterparty	Total Initial Industry Cost	Total Annual Industry Cost
Non-Providing Lending Agents[a]	34	Reporting Agent	$453,000[b]	$0
Reporting Agents[c]	94	Person who Provides 10c-1 Information	$1,250,000[d]	$0
		RNSA	$7,050[e]	$0
Lenders that Would Directly Employ a Reporting Agent[f]	139	Reporting Agent	$1,850,000[g]	$0
Total	267		$3,560,000[h]	$0

[a] *See supra* note Table [3] note d.

[b] 1020 hours x $444/hour ≈ $453,000. *See supra* notes 154 and Table [2] note a.

[c] *See supra* note Table [3] note g.

[d] 2,820 hours x $444/hour ≈ $1,250,000. *See supra* notes 162 and Table [2] note a.

[e] 94 hours x $75/hour ≈ $7,050. *See supra* notes 165 and Table [2] note a.

[f] *See supra* Table [3] note m.

[g] 4,170 hours x $444/hour ≈ $1,850,000. *See supra* notes 178 and Table [2] note a.

[h] $3,560,000 ≈ sum of figures estimated in *supra* notes b, d, e, and g.

Table [4] shows that Lenders and reporting agents would incur an aggregate of $3.56 million in initial costs and $0 annually in ongoing costs to enter into agreements for reporting securities lending information. These include costs associated with drafting, negotiating, and executing agreements with counterparties, most of which would be incurred by Lenders that would directly employ a reporting agent, but there would not be ongoing costs because once an agreement is signed, there would be no need to modify the written agreement or take additional action after it is executed.

In addition to the above enumerated costs, the estimated 409 reporting entities would also be required to pay reporting fees to the RNSA. The Commission estimates these costs would be reasonably related to the cost that the RNSA would incur to administer and distribute the data.[243] As shown in Table [2], the Commission expects the RNSA to incur ongoing costs of $2.48 million per year. Consequently, dividing the cost incurred by the RNSA by the 409 reporting entities to estimate the fees for the reporting entities results in an annual fee per reporting entity of approximately $6,000, or approximately $500 per month. This estimate represents a lower bound on the estimated fees levied by the RNSA as the RNSA likely would need to recoup some of the initial fixed costs associated with administering the data.[244]

4. Indirect Costs

Given the fixed costs associated with establishing and maintaining systems to report data, or the costs associated with having another entity report data, the Commission preliminarily believes that the proposed Rule may cause some smaller lending programs and broker-dealers to exit the market for lending services, potentially leading to slightly more consolidation in the lending program and broker-dealer space.[245]

This may pose indirect costs on these broker-dealers' and lending programs' customers. Such costs would include the cost of switching to a new broker-dealer or lending program, the loss of potentially more suitable options for such services if the exiting entity was highly specialized, and potentially higher prices associated with reduced competitive pressures.

In the discussion of competition in Part VI.D.2, the Commission further discusses the possibility of exit by broker-dealers and lending programs from the securities lending market, along with a mitigating factor which the Commission preliminarily believes would reduce the chance of such exits.

5. Risk of Circumvention Through Repurchase Agreements

The Commission recognizes a risk that the comprehensiveness of the data, and hence the benefits that accrue due to the comprehensive nature of the data, would be diminished if the proposal induces market participants to substitute repurchase agreements (''repo'') for securities lending agreements.[246] This substitution may

[243] SRO rule filings are subject to notice, comment and Commission review pursuant to Section 19 of the Exchange Act. The SRO must demonstrate that proposed fees satisfy Exchange Act requirements, including that such proposed fees equitably allocate reasonable dues, fees and other charges among members and issuers and other persons using the SRO's facilities. Further, such proposed fees cannot not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. When competitive forces do not constrain costs, such as with data products such as TRACE or the data provided by this Proposal, SROs can satisfy Exchange Act requirements by demonstrating that fees are reasonably related to costs. *See infra* Part V.E.

[244] The numbers provided in this section are estimates. To the extent the Commission has over- or underestimated burden hours or hourly costs, or the number of entities subject to each reporting requirement, the actual compliance costs may be higher or lower. However, the Commission views the estimates provided herein as best guess estimates based on the information currently available to the Commission.

[245] *See infra* Part VI.D.2 (discussing possible entry and exit from the market for broker-dealer and lending program services).

[246] In a repurchase agreement, one party sells an asset, usually a Treasury security or other fixed income security, to another party with an agreement to repurchase the asset at a later date at a slightly higher price. Repo contracts are a common form of short-term corporate financing. In a repo, the party selling the security is similar to the lender in a securities lending agreement; the party purchasing the security is similar to a borrower in cash

Continued

occur because a cash collateralized securities loan is economically very similar to a repo. While the Commission is unaware of short sales of equities currently being facilitated by repo contracts, the Commission understands that in fixed income it is fairly common for entities wishing to short sell a bond to facilitate that transaction with a repo instead of a securities loan.

The Commission preliminarily believes that this risk varies across asset classes. In equities, the Commission preliminarily believes that the current risk of such migration may be minimal because of the lack of a well-developed repo market for equities. However, this risk may increase if the market for equity repos becomes more developed in the future.[247] Among fixed income securities the risk is substantially greater due to a well-developed repo market for fixed income securities and the established practice of using both securities loans and repo transactions to facilitate short sales of fixed income securities. In all asset classes, if the Proposal leads to improvements in the functioning of the securities lending market, then the risk of migration may diminish as improved efficiency in the securities lending market may diminish the incentive to transfer activity to the relatively less developed equity repo market.

Should this substitution affect a significant volume of securities lending, certain benefits and costs discussed above would decline. The less comprehensive data could reduce the extent to which the proposal reduces any bias in the data. For instance, market participants who use the data to price securities loans would have a less accurate and potentially biased view of the market, which would limit the improvements to efficiency. Additionally, regulators using the data to determine lending market conditions at the time of, for example, a Reg SHO violation would be using less precise data—limiting the benefits of Reg SHO enforcement. On the other hand, such substitution could reduce compliance costs for some. Obviously, those substituting into repo would incur lower compliance costs from the proposed Rule, including one-time implementation costs if they replaced all securities lending with repo. Further, a significant substitution would reduce the ongoing costs of the RNSA because the RNSA would not have to collect and process as many transaction reports.

D. Impact on Efficiency, Competition, and Capital Formation

1. Efficiency

In the securities lending market, the availability of new 10c–1 information for market participants would lead to more efficient prices for securities loans.[248] The reduction in asymmetric information in the market for lending programs and broker-dealers may also make those markets more efficient.[249] Additionally, the Commission preliminary believes that the proposal may have secondary effects that could increase price efficiency in the stock and options market.[250] Also, the increased ease with which banks and other financial institutions would be able to manage collateral and balance sheets as a result of the proposed Rule could lead to increased efficiency in their functioning and in those markets in which they play a role.

2. Competition

The Commission preliminarily believes that the net impact of the proposal on competition is difficult to predict, in that some aspects would likely increase competition and some aspects would likely reduce competition. The markets in which competition would likely be impacted are the markets for broker-dealer services, lending programs and securities lending data vendors.

The Commission preliminarily believes that the increased access to securities lending information would increase competition between lending programs, and between broker-dealers. The new 10c–1 information would allow all participants in the securities lending markets to observe data that could serve as benchmarks for performance of both lending programs and broker-dealers when they act on behalf of their respective customers in the market.[251] This would permit better monitoring of the performance of these entities by their respective customers, and would likely force these entities to do more to match the performance of their competitors, to the extent that they do not already do so.

Also, the increased ability for broker-dealers to monitor conditions in the lending market may encourage new broker-dealers to enter the market, further increasing competition for broker-dealer services. This same argument may be true for platforms that engage in securities lending. Improved data may allow for better evaluation of the performance of such platforms and may also lower barriers to entry for new platforms—enhancing competition among securities lending platforms.

At the same time, the reduction in asymmetric information in the securities lending market that would result from the proposed Rule would diminish broker-dealer and lending program profits to the extent that it reduces their current information advantage over their customers.[252] To this end, some broker-dealers and lending programs whose profitability primarily depends on economic inefficiencies associated with asymmetric information may exit the market for facilitating securities loans.

The Commission also preliminarily believes that given the significant fixed costs of implementing the systems required by the proposed Rule for lending programs to report to an RNSA, smaller[253] lending programs and broker-dealers may be forced to consolidate or exit the lending market. The Commission preliminarily believes that a mitigating factor leading to less consolidation is that the current relationship and network structure of lending programs and broker dealers already favors larger lending programs and broker-dealers who have the resources to maintain relationships with more and larger securities lending counterparties. Consequently, the Commission preliminarily believes that the market for lending programs and broker-dealer security borrowing

collateralized securities lending. In both cases, the transaction is facilitated by cash transferring from the purchaser (borrower) to the seller (lender). In a securities loan, the cash is in the form of collateral while in a repo transaction the cash is payment for the security. In both cases, the purchaser or borrower becomes the legal owner of the security. To unwind the repurchase agreement or securities loan, cash transfers back to the purchaser in terms of the repurchase cost for a repo or in the form of returned collateral in a securities loan. Repos and securities loans differ in that repos typically are primarily used for short-term financing while securities loans typically are used to gain access to the security itself. Also loans generally allow the lender to recall the security on demand while repos do not. Additionally, the cash received by the seller of a repo is often not re-invested but is used to finance the operations of a company whereas the cash received in a securities loan is generally re-invested in low risk fixed income securities for the life of the loan. *See e.g.* Gary Gorton & Andrew Metrick, ''Securitized Banking and the Run on Repo,'' 104 *J. Fin. Econ.* 425 (2012).

[247] The Commission preliminarily views it as unlikely that the equity repo market will develop to a similar extent as the fixed income repo market in the near future. Repos are primarily used for short term finance and due to the volatility of equities relative to fixed income securities, equities are a significantly riskier collateral type, limiting their appeal as ''collateral'' for short term finance.

[248] *See supra* Part VI.C.1.(b).

[249] *See supra* Part VI.C.1.(a).

[250] *See supra* Part VI.C.1.(c).

[251] *See supra* Part VI.C.1.(b).

[252] *See supra* Part VI.C.1.(a).

[253] The term ''smaller'' in the Economic Analysis does not mean that these are ''small businesses'' or ''small entities'' for purposes of the Regulatory Flexibility Act. *See infra* Part VII. Rather, smaller is meant to convey the size of these entities in relation to larger market participants engaged in securities lending transactions.

services is already likely dominated by larger lending programs and broker-dealers that the Commission does not believe would cease operating as a result of these fixed costs.[254]

The Commission preliminarily believes that the new information provided in the Rule would change the competitive landscape for analytics services by increasing opportunities for enhancing products and services that depend on securities lending data and lowering barriers to entry concerning who can provide those services. Increased competition in this space will likely lead to more options for consumers of analytics services, lower prices, and improved analytics services. The new information available through the RNSA as a result of this proposal would produce an alternative to the existing data vendor products. The Commission preliminarily believes that it would be hard for a vendor to offer value with data not derived from the proposed new information, since data not based on proposed new information would be unlikely to be as comprehensive.[255]

3. Capital Formation

The Commission preliminarily believes that the impact of the proposal on capital formation would be small, but positive. In particular, improved price discovery in securities markets[256] and improved balance sheet management by financial institutions[257] could facilitate improvements in the provision of capital. In addition, the proposed Rule would reduce the costs of short selling. To the extent that this effect would enhance short selling activity, it may facilitate more effective discovery of negative information that in turn could lead to more efficient allocation of capital.

E. Alternatives

1. Broker-Dealer Reporting

The Commission could require only broker-dealers, rather than all participants, to report securities lending transactions to the RNSA. The Commission preliminarily believes that this alternative would be less costly overall than the proposal. Specifically, non-broker-dealer Lenders would not incur any of the costs of reporting. As a result, fewer entities would incur costs. Further, most broker-dealers already have connections to FINRA so the overall implementation costs associated with connecting to FINRA would be lower.

In addition, because most broker dealers currently have relationships with FINRA, the Commission preliminarily believes that this alternative could be implemented sooner, allowing the market and market participants to internalize the benefits of securities lending transparency sooner.

However, the reported transaction data would not provide a comprehensive view into the securities lending market. Even though broker-dealer activity makes up a significant majority of securities lending transactions, the alternative would exclude other significant players such as lending programs. Thus, the alternative would obscure a large swath of the Wholesale Market, making it more difficult for lending institutions, for example, to benefit from securities lending transparency because the included data would provide a less relevant benchmark.

Requiring only broker dealers to report data could also create a competitive advantage for non-broker dealer entities that engage in securities lending. Such entities would not be required to report their transactions and thus would have lower costs. They would also be in a position to attract business from entities seeking to keep their transactions out of the public view, further tilting the economic landscape in their favor. This effect both could create an uneven playing field for entities engaged in the securities lending market and could also further dilute the value of the data provided by the proposed Rule, diminishing the benefits of the rule.

2. Publicly Releasing the Information in 10c–1(d)

As an alternative to the proposal, the Commission could consider publicly disclosing the information in 10c–1(d), namely available identifiers for each party to the transaction, whether the security is loaned from a broker's or dealer's securities inventory to a customer of such broker or dealer, and if known whether the loan is being used to close out a fail to deliver.

Information on who the parties to the transaction are and whether a broker or dealer is lending to its own customer could refine the context around the data elements in 10c–1(b) and (c), which are proposed to be public. Such refinement would be likely to alter trading strategies, which could have both positive and negative effects on market quality. For example, this information could allow the market to identify the positions of large short sellers. Empirical studies support the idea that short sellers are informed, suggesting that additional information about short selling could help investors better value securities.[258] Professional traders, might seek to profit by developing trading strategies based on signals from the identities of those borrowing securities, particularly those borrowing a high volume. In addition, the information could be used to reduce the search costs in the securities lending market.

However, the information on whether the security loan is being used to close out a fail to deliver may be of little use to anyone other than regulators. At this time, the Commission is unaware of potential non-regulatory uses of such information that would be beneficial to the market.

The alternative would result in higher costs to the RNSA, to those who access the data, and to participants in the securities lending market. The RNSA would incur higher costs to release the greater volume of data and those who access the data would incur higher costs to import and process the data. Trading strategies incorporating the identities of borrowers and lenders could negatively impact those borrowers and lenders in ways that could ultimately degrade price efficiency. In particular, identifying large short sellers could facilitate ''copycat strategies'' that seek to profit by copying the activity of others believed to have better information or by trading ahead of them.[259] If it facilitates such trading strategies, releasing the identities of short sellers could act as a constraint on fundamental short selling, reducing the incentives to conduct fundamental research.[260] Less fundamental research

[254] An additional mitigating factor in the case of broker-dealers is that the Commission views it as likely that smaller broker-dealers currently contract with larger broker-dealers to help facilitate securities loans for their customers, and thus, may be able to easily contract with these larger broker-dealers to also act as a reporting agent on their behalf. This dynamic may limit the potential for new entrants the broker-dealer space to compete with established broker dealers.

[255] *See supra* Part VI.B.2

[256] *See supra* Parts VI.C.1.(b), VI.C.1.(c).

[257] *See supra* Part VI.C.1.(d).

[258] *See, e.g.,* Joseph E. Engleberg, Adam V. Reed & Matthew C. Ringgenberg, *How are Shorts Informed?: Short Sellers, News, and Information Processing,* 105 J. Fin. Econ. 260–78 (2012); David E. Rapach, Matthew C. Ringgenberg & Guofu Zhou, *Short Interest and Aggregate Stock Returns,* 121 J. Fin. Econ. 46–65 (2016). However, one academic study finds that prices react to short sales even when short sales are not transparent to the market. *See* Michael J. Aitken, Alex Frino, Michael S. McCorry & Peter L. Swan, *Short Sales Are Almost Instantaneously Bad News: Evidence from the Australian Stock Exchange,* 53(6) J. Fin. 2205–2223 (Dec. 1998).

[259] *See* Congressional Study, ''Short Sale Position and Transaction Reporting,'' at available at *https://www.sec.gov/files/short-sale-position-and-transaction-reporting%2C0.pdf* at 52 and 53.

[260] *See* Sanford J. Grossman & Joseph E. Stiglitz, On the Impossibility of Informationally Efficient Markets, 70(2) Am. Econ. Rev. 393–408 (1980).

could potentially result in over- or under-pricing, because prices would not incorporate information short sellers would have otherwise collected and traded on. Revealing the identities of participants and when they are borrowing to close failures to deliver in the securities lending market could also result in pressure on lenders to recall loans or negative campaigns against short sellers.

3. Additional Information in the Reported or Disseminated Information

The Commission could consider alternatives that would add additional fields to the reported information or to require the RNSA to compute derived fields for public dissemination. For example, the Commission could require the RNSA to calculate and disseminate the utilization rate calculated from the shares on loan and the shares available to loan. The utilization rate is a commonly used measure for determining the availability of shares to borrow, which could be useful for market participants in complying with the locate requirement of regulation SHO and for broker-dealer back offices in planning their borrowing activity. However, because shares on loan and shares available are an end-of-day measure, to the alternative would not provide benefits from real time utilization rates. Further, individual users may prefer to calculate utilization rates themselves with bespoke adjustments. The calculation would require additional processing resources of the RNSA. While the alternative would require the RNSA to calculate and disseminate utilization rate, the proposal does not preclude the RNSA from doing so if users demand the measure.

The Commission could add required data elements to 10c–1(e) to indicate the extent to which volume of shares available to lend that comes from sources that are less accessible to acquire or that could be restricted. Securities, such as securities owned by broker-dealer customers who have agreed to participate in a fully paid lending program, and the securities in broker-dealers' margin customers' accounts, may be readily available to the broker-dealer managing the accounts, but may not be available for others. Further, because beneficial owners that engage in securities lending consistent with the SEC staff's current guidance may restrict the portion of their portfolios that can be on loan at any point in time,[261] they, or their lending agents, may report more shares available to lend than they could lend out all at once, particularly when they are far from their limit. Therefore, these two additional fields can facilitate estimating refined measures of the utilization rate that exclude shares that market participants might not be able to reach. As such, these alternative measures could improve the accuracy of the data provided by 10c–1(e). On the other hand, these additional fields would increase the complexity and the costs of reporting, processing and disseminating the securities lending information.

The Commission could also include in 10c–1(d) information on whether, if the lender is a broker or dealer, the securities are borrowed from customers who have agreed to participate in fully paid lending programs or from securities owned in its margin customers' accounts. Such information would improve the efficiency of surveillance of, for example, compliance with Rule 15c3–3(b)(3) related to providing the lender collateral to secure the loans of securities when broker-dealers lend shares from fully paid or excess margin securities from customers. As such, this information would help protect investors. Including this data would likely increase initial costs associated with the rule for broker-dealers as it would require expanding systems beyond the current proposal to capture the data. However, the Commission preliminarily believes that broker-dealers likely already have ready access to this data, thus the Commission does not expect that including such data would significantly affect broker-dealer operations after the initial set-up costs.

The Commission could also require entities to report in their lending transactions whether a given loan was transacted on their own behalf, or on behalf of a customer. That is, is the loan transacted on a principal or agent basis? This alternative would allow FINRA and the Commission to oversee compliance with various regulations. This data could allow examiners at the Commission and FINRA to review transactions that occur by an entity on a principal and agent basis to look for systematically different terms between the two different types of transactions by the same broker dealer. Such differences may flag to regulators that broker-dealers are not fulfilling their obligations and may be in violation of existing rules. Requiring such data would add complexity and additional cost to the rule. However, these costs may be minimal for broker-dealers, who are FINRA members, as the Commission understands that FINRA members already collect much of this information.[262] However, the Commission is unaware of any regulation or rule requiring non-FINRA members to collect this information, consequently this alternative may significantly increase costs for non-FINRA members who would be required to build out systems to collect and report such information.

4. Alternative Timeframes for Reporting or Dissemination

The Commission could consider alternative delays for reporting or disseminating the securities lending transaction information. For example, the Commission could require reporting timeframes of less than fifteen minutes as well as more than fifteen minutes. The Commission also could require reporting transactions at the end of the day only. Further, the Commission could require the RNSA to delay the dissemination of transaction reports instead of disseminating as soon as practicable.

Because trades cannot be disseminated until after they are reported, alternative reporting timeframes reflect different tradeoffs between the value of disseminating security loan terms close to the time of a trade and the cost of reporting trades at shorter time horizons. Alternatives requiring reporting timeframes of less than 15 minutes may be more costly to implement. Currently, 15 minute reporting is used in various settings. For instance, TRACE requires reporting trades at the 15 minute time horizon, and some of the data vendors release data at 15 minute intervals. These facts suggest that the industry has experience with reporting information to regulators and data vendors at 15 minute horizons. Consequently, the Commission preliminarily expects that deviating from this time horizon to require a shorter timeframe may significantly increase costs associated with complying with the rule. In contrast, alternatives allowing a longer time to report would also delay the dissemination, which could reduce the price discovery and price efficiency benefits associated with an increase in transparency if securities lending transactions occur frequently enough. Additionally, the Commission preliminarily believes that longer reporting horizons would likely not decrease the cost substantially due to the automated nature of the securities lending transactions and the need to build out systems regardless.

Alternative dissemination timeframes reflect different tradeoffs between price

[261] *See supra* note 109.

[262] *See, e.g.,* FINRA Rule 4314.

discovery and price efficiency benefits on one hand and harmful information leakage on the other, as well as the cost of reporting at a faster or slower horizon. An alternative dissemination timeline could require a later dissemination time for large trades. However, intermediaries in the securities lending market do not generally take on risk the way dealers do in other markets where dealers have argued for delays, such as the corporate bond market.[263] For instance, intermediaries in the corporate bond market frequently hold large inventories and buy, sell, and facilitate trades out of their own inventory—assuming significant inventory risk in the process. This is not true in the securities lending market where broker-dealers are more likely to facilitate transactions between lending programs and end borrowers.

The current Proposal requires the RNSA to disseminate transaction-level information as soon as practicable. Alternatively, the Commission could limit the proposal by requiring the RNSA to aggregate the transaction–level information prior to disseminating. Specifically, the RNSA could aggregate the data in items identified in 10c–1(b) and (c) and make it public at the end of the day it is reported. Given the need to build out systems regardless and the automated nature of securities lending transactions, the Commission preliminarily believes that this alternative would likely be nearly as costly to implement as the current proposal for entities reporting data to the RNSA. It would, however, likely lower costs to the RNSA as they would not be required to build out systems capable of intraday dissemination. Additionally, daily aggregate data would not provide the same price discovery benefits as the current proposal. Specifically, market participants could not use intraday trends in the securities lending market to make investment decisions. Also, without a comprehensive transaction tape, it would be more difficult for market participants to study and understand pricing dynamics in the securities lending market. The alternative would also make it more difficult for end investors to determine if the terms that their broker-dealer offers are consistent with current market prices—rendering it more difficult for investors to evaluate the performance of their broker-dealer. Similarly, without transaction data beneficial owners would be hampered in their ability to determine whether the terms for loans secured by their lending agents were consistent with market conditions for loans with similar characteristics—rendering it more difficult for beneficial owners to evaluate the performance of their lending agents—reducing the benefits of improved competition. The lack of a lending tape may also hinder broker-dealers from determining if the terms being offered by a lending agent for a loan are consistent with market conditions for similar loans. The diminished transparency of this alternative relative to the Proposal may also lead to less improvement in the efficiency of the securities lending market leading to fewer short selling benefits described above in Part IV.C.1.(c) This alternative would also hamper research into the securities lending market by academics, regulators, and other market participants as they would be prevented from performing intraday and event study analysis on the securities lending market.

The Commission could also require alternative time frames for reporting the data required in paragraph (e) of the proposed rule regarding shares on loan and shares available to the RNSA. The Commission preliminarily believes that time horizons longer than what is required in the current proposal would diminish the usefulness of the data by making it less timely. Additionally, due to the automated nature of the industry, the Commission preliminarily does not believe that longer reporting horizons would significantly decrease the cost of compliance. Moreover the Commission could require reporting at time horizons that are shorter than what is currently required in the proposal. Such data may be somewhat more timely, but the Commission preliminarily believes that shorter requirements would be a deviation from current industry standard and thus may significantly increase the cost of implementation.

Finally, the Commission could require the RNSA to distribute the collected data required in paragraph (c) at different horizons, such as by the following morning instead of by the end of the following day. This alternative would allow market participants to benefit from the data a business day earlier than currently proposed. Given the automated nature of the data, this alternative may not be significantly costlier than the current proposal, although it would not allow the RNSA to process the data during regular business hours potentially limiting the amount of data validation the RNSA could perform prior to distributing the data.

5. Allow an RNSA To Charge Fees To Distribute the Data

The Commission could consider allowing the RNSA to charge fees to access the securities lending data, similar to the model currently employed with TRACE data.

The effect on costs of this alternative would follow from allowing the RNSA an additional way to obtain revenue from providing new 10c–1 information. This additional revenue could help pay for costs to collect and disseminate the data. It may also allow the RNSA to reduce the reporting fees it would charge under the proposed Rule.

As discussed in Part VI.C.3, the Commission preliminarily believes that fees levied by the RNSA would be reasonably related to cost.[264] Thus, the estimates provided in that section could be either entirely applied to entities purchasing data, or they could be split between providers and purchasers of data. In the case that fees were applied primarily to subscribers of data, and if all 409 entities providing data were the only entities to subscribe to the data, then as discussed in Part VI.C.3, estimated annual fees to subscribe to the data would be approximately $6,000 per year. This estimate would go down if the RNSA chose to split the fees between data subscribers and data providers. It would also go down if more than the 409 estimated entities providing data chose to subscribe the data. This estimate is similar to the fees currently charged for a TRACE enterprise license. As discussed in part VI.C.1, TRACE has been successful in mitigating inefficiencies in the corporate bond market. Consequently, given the experience with TRACE and the expectation that most of the entities likely in a position to effect the securities lending market or to use information from the securities lending market to affect other markets would subscribe to the data even if there was a cost to subscribing, the Commission preliminarily believes that allowing the RNSA to charge for data would likely still result in significant benefits to the securities lending market.

This alternative would also reduce benefits relative to the proposed Rule, in

[263] In the corporate fixed income market, some participants argued for the delay in the dissemination of information on large trades. Specifically, they argue that immediate dissemination coupled with 15-minute reporting times harms institutional investors because dealers are either less willing to trade with them or dealers charge them higher markups to offset the costs of offsetting large transactions *See, e.g.,* comments from JPMorgan & Co. on the Fixed Income Market Structure Advisory Committee (FIMSAC), available at *https://www.sec.gov/comments/265-30/26530-3974442-167144.pdf.* The Commission notes that we are unaware of any empirical data in support of these arguments.

[264] *See infra* note 243.

that charging for access to the new 10c–1 information may reduce the number of market participants who access it, to the extent that any market participant would find such fees cost-prohibitive. A reduction in access to the data may reduce many of the benefits that would otherwise accrue to the proposed Rule, such as increased price discovery and security market efficiency. The Commission preliminarily believes that many of the market participants providing data to the RNSA under the proposed Rule would also be consumers of the data; for these market participants it is unclear how much difference this shift in fees would make.

6. Longer Holding Period Requirement

The Commission could also require the RNSA to retain and make publicly available the data for a period longer than the 5 years specified—*e.g.,* 10 or 20 years. This alternative would ensure that the data are available to regulators and market participants at longer horizons. For instance, if regulators or market participants wanted to evaluate how the lending market reacts to different market events, such as across the business cycle, then five years of data may not be sufficient. The average business cycle is 3–5 years, and so to study the dynamics of the lending market across the business cycle would require at least 10 years, if not more, of data. Additionally, because there is likely persistence in conditions in the securities lending market a five year time horizon may not be sufficient for certain statistical analyses.[265] Improved understanding of the dynamics of the securities lending market across various market conditions may benefit both regulators and investors by providing more precise information with which to make regulatory and investment decisions—enhancing many of the benefits described in Parts VI.C.1 and VI.C.2. For example, longer term data may enable superior statistical analysis by market participants of the dynamics of the securities lending market in various environments, which in turn may lead to better investment decisions and thus improved market performance. Additionally, the Commission could use longer term data to provide more precise estimates of damages in, for example Reg SHO violations or violations of Exchange Act rule 15c3–3 (Customer Protection Rule), to calculate disgorgement.

The Commission preliminarily believes that the alternative would impose additional costs on the RNSA not required by the current proposal in terms of storing and maintaining historical data. However, since the current proposal already requires the RNSA to build systems to collect and disseminate 5-years of data, these costs would likely be relatively small because the Commission understands that the cost of storing data is relatively small compared to the cost of producing and maintaining the systems needed to collect, process, and disseminate the data.

While the current proposal allows FINRA to destroy the data after 5-years, the Commission preliminarily believes that it is unlikely that FINRA would do so. This is because the cost of retaining the data is likely relatively small and may have commercial value. For instance, while the proposal requires the most recent 5-years of data to be made publicly available free of charge, there is no requirement to make data beyond 5-years available to the public free of charge. Consequently an RNSA could determine to offset some of the cost of implementing the proposal through fees levied on historical data. If this is the case, and the RNSA chooses to keep the historical data under the current proposal, then the cost difference to an RNSA between the current proposal and this alternative would likely be minimal given that this alternative would require the RNSA to comply with a requirement that they may already choose to do on their own.

7. Report to the Commission Rather Than to an RNSA

The Commission could propose to have Lenders disclose the 10c–1 information directly to the Commission—for example, through EDGAR, rather than to an RNSA. Such an alternative could alter who incurs costs and would likely increase overall costs relative to the proposal because, for example, many entities who possess reporting capabilities to an RNSA, *e.g.,* members of FINRA, would need to establish comparable reporting relationships with the Commission. In particular, many broker-dealers already have connectivity to FINRA systems that support the kind of intraday submission process required for providing new 10c–1 information.[266] Establishing similar connectivity with EDGAR may require additional effort for Lenders compared to the proposal. Finally, FINRA has expertise creating repositories similar to that called for in the proposal, suggesting that the proposal would likely be more efficient than the alternative.

The Commission is uncertain of how the benefits of this alternative would compare to the benefits of the proposal. While the alternative would not alter the content of the data in the proposal, the accessibility and timeliness depend on how the Commission would develop the functionality for distributing the data. In particular, we cannot at this time assess whether the alternative would result in more or less timely or accessible data or if the differences would be meaningful. For example, data obtained from the Commission could be less accessible if the Commission could not develop functionality allowing market participants to access the data with the same ease as the RNSA could do given the RNSA has more experience collecting and disseminating similar data (*e.g.,* TRACE).

Additionally, the regulatory benefits of the alternative relative to the proposal would depend on whether the Commission chooses to grant SROs direct access to the confidential data. If the Commission chose to do so, then the regulatory benefits of this alternative would be the same as the current proposal. If the Commission chose not to grant SROs access to the confidential data, then the regulatory benefits would decline significantly as many of the regulatory benefits, such as improved monitoring of broker-dealers for compliance with various legal requirements, require access to the confidential data. Thus, the regulatory benefits of the rule would be severely diminished.

8. Report Through an NMS Plan

Because the nature of securities lending data is similar to the transaction data governed by the NMS data plans, such as the CT Plan,[267] the Commission could propose to require a new NMS Plan to set up a reporting and dissemination process that mirrors the CT Plan. Specifically, reporting entities could report the data to a Transaction Reporting Facility operated by an SRO. The data would then be purchased by competing consolidators [268] to

[265] Persistence in conditions implies that observations are not independent. When this is the case even relatively large datasets may lack statistical power for some modeling applications, such as factor models. The solution in such cases is to significantly increase the sample size.

[266] For example, FINRA's TRACE system.

[267] Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data, Exchange Act Rel. No. 92586, 86 FR 44142 (Aug. 11, 2021) available at: *https://www.sec.gov/rules/sro/nms/2021/34-92586.pdf, appeal filed, Nasdaq Stock Market LLC* v. *SEC,* No. 21–1167 (D.C. Cir. Aug. 9, 2021).

[268] A competing consolidator is a ''securities information processor required to be registered pursuant to [17 CFR] 242.614 (Rule 614) or a

consolidate and distribute for a fee. The NMS Plan would set the fee for competing consolidators as well as for those who purchase and consolidate the data for internal use.

This alternative could provide for the public dissemination of securities lending transaction information without the reliance on the RNSA alone. It could also leverage the processes of the NMS Plan, but would require compliance costs by one or more SROs who choose to set up and operate a Transaction Reporting Facility. Fees for reporting transactions could offset such compliance costs. While we can't be sure how these fees would compare to the fees paid under the proposal, the alternative provides for the opportunity for a reporting facility that could be more efficient than that of an RNSA.

This alternative is more likely than the proposal to improve the competitiveness of the market for securities lending data in ways that could be less costly to incumbents than the proposal would be. Specifically, the alternative would not result in a situation in which existing data vendors had to compete with an RNSA that had superior data access. Instead, the current data vendors, who all have experience collecting and disseminating such information, could compete as competing consolidators for equity lending data and have the same access to the supply of consolidated data as any other competing consolidator, including an RNSA or SRO. It would also reduce the barriers to entry in selling securities lending data because all new entrants would have access to the same data for consolidation and distribution.

While the alternative is unlikely to affect the content or timeliness of securities lending data relative to the proposal, the improvements in access to securities lending data under this alternative could be less than the improvements to access under the proposal. As in the proposal, the data vendors would not be as dependent on market participants providing data, consequently these market participants could not exert power over the data vendors to limit access. However, under this alternative, both the new NMS Plan and the competing consolidators under that Plan would be able to charge for access to the data, whereas under the proposal, the RNSA is not permitted to charge for access. Thus, the cost of data access under the alternative would be greater. This could mean some market participants, who could potentially have access to data under the proposal, could determine it was not cost-effective for them to purchase securities lending data under the alternative.

national securities exchange or national securities association that receives information with respect to quotations for and transactions in NMS stocks and generates a consolidated market data product for dissemination to any person.'' 17 CFR 242.600(b)(16).

F. Request for Comment

The Commission is sensitive to the potential economic effects, including costs and benefits, of the proposed Rule. The Commission has identified certain costs and benefits associated with the proposal and requests comment on all aspects of its preliminary economic analysis, including with respect to the specific questions below. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits.

76. Do you agree with the Commission's assessment of the market failures? Are there additional market failures or other economic justifications related to these issues that are not described in this release?

77. Do you believe the Commission has sufficiently described the baseline for its economic analysis concerning the securities lending market, its characteristics and structure? Are there additional relevant market features or participants that are not discussed in the baseline which relate to this release? If so, please describe. Do you agree with the Commission's description of the competitive landscape of the securities lending market? Please explain.

78. Do you agree that the securities lending market is opaque? If not, what sources of insight into the securities lending market activity do you believe provide transparency in the lending market? How do those sources compare to the transparency that would be provided by the proposed Rule?

79. Do you agree with the Commission's assessment of the causes and effects of opacity in the securities lending market? Why or why not? What are the consequences of the current level of opacity in the securities lending market? Please provide details. Does opacity in the lending market inhibit some market participants from engaging in fundamental research? Why or why not? To what extent does the opacity in the lending market contribute to the wide variation in rebate rates or lending fees? Do you agree that the opacity results in high search costs or other costs in the securities lending market? Do you agree that this inhibits the securities lending market's efficiency? Why or why not?

80. Do you believe the Commission has adequately described the baseline for the market for securities lending data and analytics? Are there elements of this market that are relevant to the proposed Rule that are not discussed in the release? If so, please describe what information you believe is missing. Do you agree that the data provision services are an outgrowth of other businesses such as the analytics business? Please explain.

81. Do you agree with the Commission's assessment that the proposed Rule will improve transparency of the securities lending market? Why, or why not? Do you agree that the proposed Rule would increase transparency by providing information about the securities lending market that is more complete than current information? Do you agree that the increased completeness would improve the accuracy of information on securities lending? Do you agree that the proposed Rule would result in information that is more accessible than current information? Do you agree that the proposed Rule would result in loan-level information that is at least as timely as current information? Would the information on shares on loan and shares available be more or less timely than current information? Please explain.

82. Do you agree with the Commission's assessment of the economic effects of the proposed rule, including the effects from improvements to transparency, the regulatory benefits, the compliance costs, and the indirect effects? Why or why not? If not, please provide the details that you believe are missing.

83. Do you agree that the proposed Rule will ameliorate information asymmetry in the securities lending market? Do you agree that this effect is sufficient to make security loan terms more competitive that they currently are? Would the public information in the proposed Rule have an impact on the risk of market instability? Would the public information in the proposed Rule have an impact on the efficiency of the securities lending market or the underlying market? Please explain.

84. How do the lending markets in equities differ significantly from lending markets for other securities? Do these markets have problems similar to those documented in the baseline for stocks? Please explain and provide data and analysis, if available. How would the economic effects of the proposed Rule differ across the different types of securities covered? Please explain.

85. Do you believe that the Commission has accurately quantified the compliance costs that the proposed Rule imposes on various market

participants? If not, please provide alternative estimates. Are there any sources of compliance costs not included in the Commission's estimates? If so, please describe the activity that generates the cost and provide estimates.

86. Do you agree with the Commission's characterization of the effects of the proposed Rule on the commercial providers of security lending data? If not, please provide the details you believe are missing.

87. Do you agree with the Commission's assessment of both the risk and the economic effects associated with potential substitution of repurchase agreements for securities lending? Why or why not? Is there anything missing from the Commission's analysis of this issue that should be considered? Please provide details. How does the counterparty risk and other differences between securities lending and repo affect this risk?

88. Do you agree with the Commission's assessment of the likely impacts on efficiency, competition and capital formation? Why or why not? Do commenters agree that the proposed Rule would improve competition? Please explain.

89. Do you agree with the Commission's assessment of the effects of the alternative whereby only broker-dealers would be required to report to the RNSA? Why or why not? How would the alternative compare to the proposed Rule—would it be any more or less information or would it be any more or less biased? Please explain.

90. Do you agree with the Commission's assessment of the effects of the alternative whereby some data would be made public that the proposed Rule indicates would only be accessible by the RNSA and the Commission? Why or why not? Are there any data elements that the proposed Rule does not make public that should be made public? If so, please identify the specific data elements and articulate their benefits and costs relative to the proposed Rule.

91. Do you agree with the Commission's assessment of the effects of the alternative whereby additional data may be required to be reported to the RNSA? Why or why not? Should the Commission include any other additional data elements? Are there any additional data elements that could feasibly measure counterparty risk that could help explain variations in lending fees and rebate rates? Are there other factors that could help compare lending fees and rebate rates that could be including in Rule 10c–1? If so, what data elements and what are the costs and benefits of including those data elements relative to the proposed Rule?

92. Do you agree with the Commission's assessment of the effects of the alternative discussing different reporting or dissemination timeframes? Why or why not? Do securities lending transactions occur often enough during the day for intraday reporting to be beneficial? Would a shorter or longer time for reporting be more beneficial or less costly? Please explain.

93. Do you agree with the Commission's assessment of the effects of the alternative whereby the RNSA could charge to distribute the data delivered on the RNSA website? Why or why not? Based on other data sold by an RNSA, would the ability to sell the data materially reduce the costs to those who report the information?

94. Do you agree with the Commission's assessment of the effects of the alternative requiring the RNSA to keep and publicly disseminate the data for a longer time horizon? Why or why not? Are there additional benefits or costs to this approach not considered in this economic analysis? Please explain and provide details.

95. Do you agree with the Commission's assessment of the effects of the alternative whereby reporting would be to the Commission rather than to an RNSA? Why or why not? How many entities who would have to report under the proposed Rule do not current file reports with the Commission and would, therefore, have to establish connections? Would reporting to the Commission significantly affect the regulatory benefits or any other benefits? Please explain.

96. Do you agree with the Commission's assessment of the effects of the alternative whereby reporting would take place through an NMS plan? Why or why not? Would reporting through an NMS Plan be any more or less efficient than the proposed Rule? Would reporting through an NMS Plan create a more or less competitive environment for the sale of securities lending data than the proposed Rule? Please explain.

97. Are there any other reasonable alternatives that the Commission should consider? If so, how would the potential costs and benefits of the alternative compare to the Proposed Rule? Please provide quantification, if possible.

VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA") [269] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small businesses. Section 603(a) [270] of the Administrative Procedure Act,[271] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small businesses" [272] unless the Commission certifies that the rule, if adopted, would not have a significant impact on a substantial number of "small entities." [273]

As discussed above in the PRA above, first, the Commission preliminarily believes that the proposed Rule would impact 94 reporting agents. The Commission estimates that all reporting agents would be broker-dealers. A broker-dealer is a small entity if it has total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a–5(d), and it is not affiliated with any person (other than a natural person) that is not a small business or small organization.[274]

Second, the Commission preliminarily believes that the proposed Rule would impact 278 investment companies that do not employ a lending agent. For purposes of Commission rulemaking in connection with the Regulatory Flexibility Act, an investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of $50 million or less as of the end of its most recent fiscal year.[275]

Third, the Commission preliminarily believes that the proposed Rule would impact 37 lending agents, which would include broker-dealers and banks.[276] For purposes of Commission rulemaking in connection with the Regulatory Flexibility Act, lending agents that are not broker-dealers, such as a bank, would be a small entity if on the last day of its most recent fiscal year, such

[269] 5 U.S.C. 601 *et seq.*

[270] *Id.*

[271] 5 U.S.C. 551 *et seq.*

[272] Although Section 601(b) of the RFA defines the term "small business," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term small business for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10 under the Exchange Act. Exchange Act Rule 0–10 ("Rule 0–10").

[273] 5 U.S.C. 605(b).

[274] Exchange Act Rule 0–10(c).

[275] *See* 17 CFR 270.0–10(a).

[276] For example, some investment companies report using a bank as a lending agent on Form N–CEN.

issuer or person had total assets of $5 million or less.[277] Furthermore, clearing agencies could also be lending agents for purposes of proposed Rule 10c–1. A clearing agency is a ''small entity'' if such clearing agency: (i) Compared, cleared, and settled less than $500 million in securities transactions during the preceding fiscal year, (ii) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter), and (iii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[278]

Based on a review of data, the Commission does not believe that any of the persons impacted by the proposed Rule are small entities under the above definitions.[279] It is possible that in the future a small entity may become impacted by the Rule. Based on experience with persons who participate in this market, however, the Commission preliminarily believes that this scenario will be unlikely since firms that enter the market are unlikely to meet the criteria to be a small entity.

For the foregoing reason, the Commission certifies that proposed Rule 10c–1 would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission encourages written comments regarding this certification, and requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate the extent of the impact.

VIII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission is also requesting information regarding the potential impact of the proposed amendments on the economy on an annual basis. In particular, comments should address whether the proposed changes, if adopted, would have a $100,000,000 annual effect on the economy, cause a major increase in costs or prices, or have a significant adverse effect on competition, investment, or innovations. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[277] *See* 17 CFR 240.0–10(a).

[278] See 17 CFR 240.0–10(d).

[279] *See supra* Parts V and VI.

IX. Statutory Authority

Proposed Rule 10c–1 is being proposed pursuant to Sections 3, 10(b), 10(c), 15(c), 15(h), 15A, 17(a), 23(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78c, 78j(b), 78j(c), 78k–1, 78o(c), 78o(g), 78o–3, 78q(a), and 78w(a), and Public Law 111–203, 984(b), 124 Stat. 1376 (2010).

List of Subjects in 17 CFR Parts 240

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

Text of Rule Amendments

For the reasons set out in the preamble, the Commission is proposing to amend title 17, chapter II of the Code of the Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The general authority citation for part 240 continues to read, and sectional authority for § 240.10c–1 is added to read, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.10c–1 also issued under 15 U.S.C. 78j(c), and Pub, L. 111–203, 984(b), 124 Stat. 1376 (2010).

* * * * *

■ 2. Add § 240.10c–1 to read as follows:

§ 240.10c–1 Securities lending transparency.

(a) *Reporting.* (1) Any person that loans a security on behalf of itself or another person shall provide to a registered national securities association (RNSA) the information in paragraphs (b) through (e) of this section (Rule 10c–1 information), in the format and manner required by the rules of an RNSA; *provided however,*

(i)(A) A bank, clearing agency, broker, or dealer that acts as an intermediary to a loan of securities (lending agent) on behalf of a person that owns the loaned securities (beneficial owner) shall:

(*1*) Provide the 10c–1 information to an RNSA on behalf of the beneficial owner within the time periods specified by Rule 10c–1; or

(*2*) Enter into a written agreement that meets the requirements of paragraph (a)(1)(ii)(A) of this section.

(B) A beneficial owner is not required to provide the Rule 10c–1 information to an RNSA if a lending agent acts as an intermediary to the loan of securities on behalf of the beneficial owner.

(ii)(A) A person required to provide Rule 10c–1 information under paragraph (a) of this section, including a lending agent, may enter into a written agreement with a broker or dealer that agrees to provide the Rule 10c–1 information to an RNSA (reporting agent) within the time periods specified in Rule 10c–1.

(B) A reporting agent is required to provide the Rule 10c–1 information to an RNSA if it has entered into a written agreement under paragraph (a)(1)(ii)(A) of this section and is provided timely access to the Rule 10c–1 information.

(C) Any person that enters into a written agreement under paragraph (a)(1)(ii) of this section with a reporting agent is not required to provide the Rule 10c–1 information to an RNSA if the reporting agent is provided timely access to the Rule 10c–1 information.

(2) Any reporting agent that enters into a written agreement under paragraph (a)(1)(ii)(A) of this section shall:

(i) Establish, maintain, and enforce reasonably designed written policies and procedures to provide Rule 10c–1 information to an RNSA on behalf of another person in the manner, format, and time consistent with Rule 10c–1;

(ii) Enter into a written agreement with an RNSA that permits the reporting agent to provide Rule 10c–1 information to the RNSA on behalf of another person;

(iii) Provide the RNSA a list of each person and lending agent on whose behalf the reporting agent is providing Rule 10c–1 information to the RNSA and provides the RNSA an updated list of such persons by the end of the day on the day such list changes; and

(iv) Preserve for a period of not less than three years, the first two years in an easily accessible place:

(A) The Rule 10c–1 information obtained by the reporting agent from any person pursuant to paragraph (a)(1)(ii) of this section, including the time of receipt, and the corresponding Rule 10c–1 information provided by the reporting agent to the RNSA, including the time of transmission to the RNSA; and

(B) The written agreements under paragraphs (a)(1)(ii)(A) and (a)(2)(ii) of this section.

(b) *Transaction data elements.* If required by paragraph (a) of this section,

a person shall provide the following information to an RNSA within 15 minutes after each loan is effected, and the RNSA shall assign each loan a unique transaction identifier and make such information public as soon as practicable:

(1) The legal name of the security issuer, and the Legal Entity Identifier (LEI) of the issuer, if the issuer has an active LEI;

(2) The ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier;

(3) The date the loan was effected;

(4) The time the loan was effected;

(5) For a loan effected on a platform or venue, the name of the platform or venue where effected;

(6) The amount of the security loaned;

(7) For a loan not collateralized by cash, the securities lending fee or rate, or any other fee or charges;

(8) The type of collateral used to secure the loan of securities;

(9) For a loan collateralized by cash, the rebate rate or any other fee or charges;

(10) The percentage of collateral to value of loaned securities required to secure such loan;

(11) The termination date of the loan, if applicable; and

(12) Whether the borrower is a broker or dealer, a customer (if the person lending securities is a broker or dealer), a clearing agency, a bank, a custodian, or other person.

(c) *Loan modification data elements.* If required by paragraph (a) of this section, a person shall provide the following information to an RNSA within 15 minutes after each loan is modified if the modification results in a change to information required to be provided to an RNSA under paragraph (b) of this section, and the RNSA shall make such information public as soon as practicable:

(1) The date and time of the modification;

(2) A description of the modification; and

(3) The unique transaction identifier assigned to the original loan.

(d) *Confidential data elements.* If required by paragraph (a), a person shall provide the following information to an RNSA within 15 minutes after each loan is effected, however, the RNSA shall keep such information confidential, subject to the provisions of applicable law:

(1) The legal name of each party to the transaction, CRD or IARD Number, if the party has a CRD or IARD Number, market participant identification (''MPID''), if the party has an MPID, and the LEI of each party to the transaction, if the party has an active LEI, and whether such person is the lender, the borrower, or an intermediary between the lender and the borrower (if known);

(2) If the person lending securities is a broker or dealer and the borrower is its customer, whether the security is loaned from a broker's or dealer's securities inventory to a customer of such broker or dealer; and

(3) If known, whether the loan is being used to close out a fail to deliver pursuant to 242.204 of this chapter (Rule 204 of Regulation SHO) or to close out a fail to deliver outside of Regulation SHO.

(e) *Securities available to loan and securities on loan.* The following information shall be provided to an RNSA by the end of each business day that a person included in paragraphs (e)(1) or (2) of this section either was required to provide information to an RNSA under paragraph (a) of this section or had an open securities loan about which it was required provide information to an RNSA under paragraph (a) of this section:

(1) A lending agent shall provide the following information directly to an RNSA or to a reporting agent who shall provide such information and the identity of the person on whose behalf it is providing the information to an RNSA:

(i) The legal name of the security issuer, and the LEI of the issuer, if the issuer has an active LEI;

(ii) The ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier;

(iii) The total amount of each security that is not subject to legal or other restrictions that prevent it from being lent (''available to lend''):

(A) If the lending agent is a broker or dealer, the total amount of each security available to lend by the broker or dealer, including the securities owned by the broker or dealer, the securities owned by its customers who have agreed to participate in a fully paid lending program, and the securities in its margin customers' accounts;

(B) If the lending agent is not a broker or dealer, the total amount of each security available to the lending agent to lend, including any securities owned by the lending agent;

(iv) The total amount of each security on loan that has been contractually booked and settled (''security on loan''):

(A) If the lending agent is a broker or dealer, the total amount of each security on loan by the broker or dealer, including the securities owned by the broker or dealer, the securities owned by its customers who have agreed to participate in a fully paid lending program, and the securities in its margin customers' accounts;

(B) If the lending agent is not a broker or dealer, the total amount of each security on loan where the lending agent acted as an intermediary on behalf of a beneficial owner and securities owned by the lending agent.

(2) Any person that does not employ a lending agent shall provide the following information directly to an RNSA or to a reporting agent who shall provide such information and the identity of the person on whose behalf it is providing the information to the RNSA:

(i) The legal name of the security issuer, and the LEI of the issuer, if the issuer has an active LEI;

(ii) The ticker symbol, ISIN, CUSIP, or FIGI of the security, if assigned, or other identifier;

(iii) The total amount of each specific security that is owned by the person and available to lend;

(iv) The total amount of each specific security on loan owned by the person.

(3) For each security about which the RNSA receives information pursuant to paragraphs (e)(1) or (2) of this section, the RNSA shall make available to the public only aggregated information for that security, including information required by (e)(1)(i) and (ii) and (e)(2)(i) and (ii) of this section. All identifying information about lending agents, reporting agents, and other persons using reporting agents, shall not be made publicly available, and the RNSA shall keep such information confidential, subject to the provisions of applicable law. For information that is required to be made publicly available, the RNSA shall make it available as soon as practicable, but not later than the next business day.

(f) *RNSA rules.* The RNSA shall implement rules regarding the format and manner to administer the collection of information in paragraphs (b) through (e) of this section and distribute such information in accordance with rules approved by the Commission pursuant to section 19(b) of the Exchange Act and Rule 19b–4 thereunder.

(g) *Data retention and availability.* The RNSA shall:

(1) Retain the information collected pursuant to paragraphs (b) through (e) of this section in a convenient and usable standard electronic data format that is machine readable and text searchable without any manual intervention for a period of five years;

(2) Make the information collected pursuant to paragraph (a)(2)(iii) and paragraphs (b) through (e) of this section available to the Commission or other persons as the Commission may

designate by order upon a demonstrated regulatory need;

(3) Provide the information collected under paragraphs (b) and (c) of this section and the aggregate of the information provided pursuant to paragraph (e) of this section available to the public in the same manner such information is maintained pursuant to paragraph (g)(1) of this section on the RNSA's website or similar means of electronic distribution, without charge and without use restrictions, for at least a five-year period; and

(4) Establish, maintain, and enforce reasonably designed written policies and procedures to maintain the security and confidentiality of confidential information required by paragraphs (d) and (e)(3).

(h) *RNSA fees.* The RNSA may establish and collect reasonable fees, pursuant to rules that are effective pursuant to section 19(b) of the Exchange Act and Rule 19b–4 thereunder, from each person who provides any data set forth in paragraphs (b) through (e) of this section directly to the RNSA.

By the Commission.

Dated: November 18, 2021.

J. Matthew DeLesDernier,

Assistant Secretary."

[FR Doc. 2021–25739 Filed 12–7–21; 8:45 am]

BILLING CODE 8011–01–P

FEDERAL REGISTER

Vol. 86 Wednesday,

No. 233 December 8, 2021

Part IV

Department of Justice

28 CFR Part 72

Registration Requirements Under the Sex Offender Registration and Notification Act; Final Rule

DEPARTMENT OF JUSTICE

28 CFR Part 72

[Docket No. OAG 157; AG Order No. 5244–2021]

RIN 1105–AB52

Registration Requirements Under the Sex Offender Registration and Notification Act

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is adopting a rule that specifies the registration requirements under the Sex Offender Registration and Notification Act (''SORNA''). The rule in part reflects express requirements of SORNA and in part reflects the exercise of authorities SORNA grants to the Attorney General to interpret and implement SORNA's requirements. SORNA's requirements have previously been delineated in guidelines issued by the Attorney General for implementation of SORNA's requirements by registration jurisdictions.

DATES: This rule is effective January 7, 2022.

FOR FURTHER INFORMATION CONTACT: David J. Karp, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Washington, DC, 202–514–3273.

SUPPLEMENTARY INFORMATION: This rule finalizes a proposed rule, Registration Requirements Under the Sex Offender Registration and Notification Act (OAG 157; RIN 1105–AB52) (published August 13, 2020, at 85 FR 49332).

Overview

The Sex Offender Registration and Notification Act (''SORNA''), which is title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109–248, 34 U.S.C. 20901 *et seq.,* establishes national standards for sex offender registration and notification in the United States. SORNA has a dual character, imposing registration obligations on sex offenders as a matter of Federal law that are federally enforceable under circumstances supporting Federal jurisdiction, *see* 18 U.S.C. 2250, and providing minimum national standards that non-Federal jurisdictions are expected to incorporate in their sex offender registration and notification programs, subject to a reduction of Federal funding for those that fail to do so, *see* 34 U.S.C. 20912(a), 20926–27.

The Justice Department's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (''SMART Office'') administers the national standards for sex offender registration and notification under SORNA and assists all jurisdictions in implementing the SORNA standards in their programs. *See id.* 20945. As provided by SORNA, the Department of Justice also (i) prosecutes SORNA violations by sex offenders committed under circumstances supporting Federal jurisdiction, *see* 18 U.S.C. 2250; (ii) assists in the enforcement of sex offender registration requirements through the activities of the U.S. Marshals Service, *see* 34 U.S.C. 20941; (iii) operates, through the Federal Bureau of Investigation, the National Sex Offender Registry, which compiles the information obtained through the sex offender registration programs of the states and other registration jurisdictions and makes it available on a nationwide basis for law enforcement purposes, *see id.* 20921; and (iv) operates the Dru Sjodin National Sex Offender Public website, *www.nsopw.gov,* which provides public access through a single national site to the information about sex offenders posted on the public sex offender websites of the various registration jurisdictions, *see id.* 20922.

SORNA generally directs the Attorney General to ''issue guidelines and regulations to interpret and implement [SORNA].'' *Id.* 20912(b). SORNA also authorizes the Attorney General to take more specific actions in certain contexts.

One such provision is 34 U.S.C. 20913. That section states in subsection (b) that sex offenders are generally to register initially before release from imprisonment, or within three business days of sentencing if not sentenced to imprisonment, but it provides further in subsection (d) that the Attorney General has ''the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of [SORNA] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).'' As discussed below in connection with 28 CFR 72.3, section 20913(d) is not a constitutionally impermissible delegation of legislative authority. Rather, it enables the Attorney General to effectuate the legislative intent that SORNA apply to all sex offenders, regardless of when they were convicted.

Another relevant provision lists several types of information that sex offenders must provide for inclusion in sex offender registries, and states that sex offenders must also provide ''[a]ny other information required by the Attorney General.'' *Id.* 20914(a)(8). This provision as well is not an impermissible delegation of legislative authority, but rather is instrumental to the Attorney General's effectuating the legislative objective to ''protect the public from sex offenders and offenders against children'' by ''establish[ing] a comprehensive national system for the registration of those offenders.'' *Id.* 20901; *see* 73 FR at 38054–57; 76 FR at 1637. The Attorney General's exercise of the authority under section 20914(a)(8) is limited to requiring additional information that furthers the legislative public safety objective or the implementation or enforcement of SORNA's provisions. How that has been done is explained below in connection with 28 CFR 72.6 and 72.7.

The Attorney General has exercised these authorities in previous rulemakings and issuances of guidelines under SORNA, as detailed in the rulemaking history and section-by-section analysis below, and the interpretations and policy decisions in this rule follow those already adopted in existing SORNA-related documents. The present rule provides a concise and comprehensive statement of what sex offenders must do to comply with SORNA's requirements.

In addition to SORNA's original provisions, described above, this rulemaking draws on and implements provisions of the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders (''International Megan's Law''), Public Law 114–119. Section 6 of International Megan's Law amended SORNA by (i) redesignating, in 34 U.S.C. 20914(a), former paragraph (7) as paragraph (8) and adding a new paragraph (7) that requires a sex offender to provide for inclusion in the sex offender registry information relating to intended travel outside the United States, including several specified types of information ''and any other itinerary or other travel-related information required by the Attorney General''; (ii) adding a new subsection (c) to 34 U.S.C. 20914 that requires sex offenders to provide and update registration information required by SORNA ''in conformity with any time and manner requirements prescribed by the Attorney General''; and (iii) adding a new subsection (b) to SORNA's criminal provision, 18 U.S.C. 2250, that specifically reaches international travel reporting violations.

This rulemaking is not innovative in terms of policy. Many of the requirements it articulates reflect

express SORNA requirements. These include, inter alia, statutory specifications about (i) where and when sex offenders must register; (ii) several categories of required registration information; (iii) how long sex offenders must continue to register, including different registration periods for sex offenders in different tiers and lifetime registration for those in the highest tier; and (iv) a requirement to appear periodically to verify the registration information. *See* 34 U.S.C. 20911(2)–(4), 20913, 20914(a)(1)–(7), 20915, 20918.

Other features of the rule reflect exercises of the Attorney General's powers to implement SORNA's requirements. These include additional specifications regarding information sex offenders must provide, how and when they must report certain changes in registration information, and the time and manner for complying with SORNA's registration requirements by sex offenders who cannot comply with SORNA's normal registration procedures. On these matters, however, the rule embodies the same policies as those appearing in the previously issued SORNA guidelines and prior rulemakings under SORNA.

The rule also makes no change in what registration jurisdictions need to do to substantially implement SORNA in their registration programs, a matter that will continue to be governed by the previously issued guidelines for SORNA implementation.

While this rule does not make new policy, as discussed above, it is expected to have a number of benefits. The rule will facilitate enforcement of SORNA's registration requirements through prosecution of noncompliant sex offenders under 18 U.S.C. 2250. By providing a comprehensive articulation of SORNA's registration requirements in regulations addressed to sex offenders, it will provide a more secure basis for prosecution of sex offenders who engage in knowing violations of any of SORNA's requirements. It will also resolve a number of specific concerns that have arisen in past litigation or could be expected to arise in future litigation, if not clarified and resolved by this rule. For example, as discussed below, the amendment of § 72.3 in the rule will ensure that its application of SORNA's requirements to sex offenders with pre-SORNA convictions is given effect consistently, resolving an issue resulting from the decision in *United States* v. *DeJarnette,* 741 F.3d 971 (9th Cir. 2013).

Beyond the benefits to effective enforcement of SORNA's requirements, the rule will benefit sex offenders by providing a clear and comprehensive statement of their registration obligations under SORNA. This statement will make it easier for sex offenders to determine what they are required to do and thus facilitate compliance.

By facilitating the enforcement of, and compliance with, SORNA's registration requirements, the rule will further SORNA's public safety objectives. *See* 34 U.S.C. 20901. More consistent adherence to these requirements will enable registration and law enforcement authorities to better track and monitor released sex offenders in the community and enhance the basis for public notification regarding registered sex offenders that SORNA requires. *See id.* 20920, 20923.

Effective September 1, 2017, the provisions of SORNA, formerly appearing at 42 U.S.C. 16901 *et seq.,* were recodified in a new title 34 of the United States Code, and now appear at 34 U.S.C. 20901 *et seq. See http://uscode.house.gov/editorial reclassification/t34/index.html.* United States Code citations of SORNA provisions in this rule accordingly differ from the corresponding citations in earlier sources and documents.

Rulemaking History

This rule is the tenth document the Attorney General has published pursuant to the statutory directive to the Attorney General to issue guidelines and regulations to interpret and implement SORNA. *See* 34 U.S.C. 20912(b). The previous SORNA-related documents are as follows:

(1) Interim rule entitled, ''Applicability of the Sex Offender Registration and Notification Act,'' published at 72 FR 8894 (Feb. 28, 2007). The interim rule solicited public comments, and the comment period ended on April 30, 2007. The interim rule added a new part 72 to title 28 of the Code of Federal Regulations, entitled ''Sex Offender Registration and Notification.'' The interim rule provided that ''[t]he requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.'' 28 CFR 72.3.

(2) Proposed guidelines, published at 72 FR 30210 (May 30, 2007), whose general purpose was to provide guidance and assistance to registration jurisdictions in implementing the SORNA standards in their sex offender registration and notification programs. The proposed guidelines solicited public comment, and the comment period ended on August 1, 2007.

(3) Final guidelines for registration jurisdictions regarding SORNA implementation entitled, ''The National Guidelines for Sex Offender Registration and Notification'' (the ''SORNA Guidelines''), published at 73 FR 38030 (July 2, 2008).

(4) Proposed supplemental guidelines for SORNA implementation, published at 75 FR 27362 (May 14, 2010), whose general purpose was to address certain issues arising in SORNA implementation that required that some aspects of the SORNA Guidelines be augmented or modified. The proposed supplemental guidelines solicited public comment, and the comment period closed on July 13, 2010.

(5) Final rule entitled, ''Applicability of the Sex Offender Registration and Notification Act,'' published at 75 FR 81849 (Dec. 29, 2010). This rule finalized the February 28, 2007, interim rule providing for SORNA's applicability to all sex offenders, including those with pre-SORNA convictions.

(6) Final supplemental guidelines for SORNA implementation entitled, ''Supplemental Guidelines for Sex Offender Registration and Notification'' (the ''SORNA Supplemental Guidelines''), published at 76 FR 1630 (Jan. 11, 2011).

(7) Proposed supplemental guidelines, published at 81 FR 21397 (Apr. 11, 2016), whose general purpose was to afford registration jurisdictions greater flexibility in their efforts to substantially implement SORNA's juvenile registration requirement. These proposed supplemental guidelines solicited public comment, and the comment period closed on June 10, 2016.

(8) Final supplemental guidelines regarding substantial implementation of SORNA's juvenile registration requirement entitled, ''Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act,'' published at 81 FR 50552 (Aug. 1, 2016).

(9) Proposed rule entitled, ''Registration Requirements Under the Sex Offender Registration and Notification Act,'' published at 85 FR 49332 (Aug. 13, 2020). The proposed rule solicited public comments and the comment period closed on October 13, 2020.

Summary of Comments

The Department of Justice received over 700 comments on this rulemaking from individuals and organizations. Most of the comments amounted to general criticisms of sex offender registration or SORNA. Some of the

comments proposed specific changes to the provisions of the proposed rule. Having carefully considered all comments, the Department of Justice has concluded that the regulations in this rulemaking should be promulgated without change from the proposed rule, except for amendment of § 72.8(a)(1)(i)–(ii) to specify the circumstances in which SORNA violations may result in Federal criminal liability. The ensuing discussion summarizes the principal issues that were raised in the public comments.

General Comments

Most of the comments received amounted to general criticisms of sex offender registration or associated public notification requirements. Comments of this nature generally argued that sex offender registration is of little or no value in protecting public safety and that any value it may have is outweighed by adverse effects on sex offenders and their families. Some comments in this class proposed that sex offender registration be restricted, if not entirely eliminated, such as by narrowly limiting the sex offenders or sex offenses for which registration is required, ending disclosure of information about sex offenders to the general public, setting shorter registration periods, or providing broader means for terminating registration. Some of these comments criticized requirements in this rule that track express statutory requirements, including the statutory requirements relating to the jurisdictions in which sex offenders must register, the information sex offenders must provide, the duration of registration periods, and reporting and verification of certain information through in-person appearances. *See* 34 U.S.C. 20913–16, 20918.

These comments could not be accepted in this rulemaking because the Attorney General has no authority to repeal the requirements enacted by Congress in SORNA or the sex offender registration laws of non-Federal jurisdictions. This rule interprets and implements SORNA, as directed by 34 U.S.C. 20912(b). The Attorney General's regulatory authority under SORNA does not include second-guessing the underlying legislative policy judgments or nullifying the measures that Congress has adopted in the law. *See* 73 FR at 38036.

Some comments criticized the rule's specification of registration requirements which, wholly or in part, do not appear expressly in SORNA. The matters criticized included requirements to provide information about actual and purported dates of birth and Social Security numbers, temporary lodging away from residence, passports and immigration documents, and professional licenses. In addition to comments criticizing the extent of the information required by the rule, some comments in this class criticized requirements adopted by the Attorney General to keep registration information up to date. These include requirements to report in advance departure from a jurisdiction, the requirement to report within three business days changes relating to remote communication identifiers, temporary lodging, and vehicle information, and the requirement to report international travel at least 21 days in advance.

The Attorney General has adopted these measures in the exercise of powers that SORNA provides to interpret and implement SORNA, specify required registration information, and prescribe time-and-manner requirements for providing and updating the information. *See* 34 U.S.C. 20912(b), 20914(a)(7)–(8), (c). Each of these measures is justified as a means of furthering SORNA's objective of protecting the public from sex offenders and offenders against children by establishing a comprehensive national registration system, *see id.* 20901, or as a means of implementing or enforcing SORNA's provisions. The specific reasons for the various requirements are explained in the section-by-section analysis below. The comments received provided no persuasive grounds to abrogate or modify these requirements.

Some comments argued that SORNA or this rule are unconstitutional on various grounds, such as the prohibitions of cruel and unusual punishment, double jeopardy, and ex post facto laws, the right to travel, and the requirement of due process. Claims of this nature are familiar to the Department of Justice, having been raised in litigative challenges to SORNA and rejected by the Federal courts. *See, e.g., Willman* v. *Att'y Gen.,* 972 F.3d 819, 824–27 (6th Cir. 2020). The comments provided no persuasive reason to believe that any aspect of SORNA or this rule is unconstitutional.

Some comments objected to the application of SORNA's requirements to sex offenders whose offenses or convictions predate SORNA, as provided in § 72.3 in this rule. Section 72.3 is necessary to implement Congress's intent that SORNA apply to all sex offenders, regardless of when they were convicted. *See Reynolds* v. *United States,* 565 U.S. 432, 442–45 (2012); *id.* at 448–49 & n. (Scalia, J., dissenting) (agreeing that Congress intended for SORNA to apply to all sex offenders); *Gundy* v. *United States,* 139 S. Ct. 2116, 2123–30 (2019) (plurality opinion). The section-by-section analysis below provides further explanation of the provisions and rationale of § 72.3.

Some comments objected to substantive restrictions imposed on sex offenders in some jurisdictions, such as restrictions on where they can live, prohibitions of proximity to schools or children, or exclusion from some types of employment. These comments are not germane to this rule, which articulates SORNA's registration requirements for sex offenders, because SORNA's requirements are informational in nature and do not restrict where sex offenders can go or what they can do. *See* 73 FR at 38032. A similar response applies to comments that were critical of requirements under other laws that identification documents, such as passports and drivers' licenses, include notations identifying the holders as sex offenders. These comments are misdirected in relation to this rule because SORNA does not impose such requirements, and, where they are prescribed by other laws, the Attorney General has no authority to rescind or modify them by rulemaking.

Some comments criticized public disclosure of information about sex offenders, arguing that access to information in the sex offender registries should be limited to law enforcement or otherwise narrowly restricted. These comments concern the scope of disclosure of sex offender information by registration jurisdictions and, as such, are not germane to this rule, which concerns SORNA's registration requirements for sex offenders. Disclosure of sex offender information is separately addressed in statutory provisions that are not implicated by this rulemaking and in the SORNA Guidelines and SORNA Supplemental Guidelines. *See* 34 U.S.C. 20916(c), 20920, 20922–23; 73 FR at 38042, 38058–61; 76 FR at 1632–33, 1636–37.

Some comments supported issuance of this rule. The benefits perceived by these commenters included protecting public safety, clarifying SORNA's registration requirements for sex offenders, and promoting compliance with those requirements.

A Comment Proposing 10 Changes in the Rule

A lengthy comment proposed 10 specific changes in the rule:

(i) The comment proposed that the rule and each discrete requirement therein should be revised to say that registrants need only comply when

circumstances supporting Federal jurisdiction are present. Section 72.8(a)(1)(i)–(ii) in the final rule reproduces the required jurisdictional circumstances under 18 U.S.C. 2250, making clear the conditions that must be satisfied to support Federal criminal liability for SORNA violations. It would be misleading or incorrect to state that sex offenders need not comply with the requirements set forth in this rule in a broader sense, absent grounds supporting Federal jurisdiction, because those requirements are widely paralleled in the sex offender registration laws of the states and other non-Federal jurisdictions. *See* National Institute of Justice, *Tracking Sex Offenders: Federal Law, Resources Have Led to Marked Improvement of State Registries, But More Work Is Needed* (Nov. 13, 2020) (''At least half the states met implementation thresholds for 13 of the 14 SORNA standard areas; 75% of the states met the thresholds for at least nine areas; and 92% of the states met them for at least half of the SORNA areas.''). Sex offenders accordingly may be subject to criminal penalties under state law for violating these requirements, regardless of whether grounds for Federal jurisdiction exist. While § 72.8(a)(1)(i)–(ii) has been revised in the final rule to state explicitly the scope of Federal jurisdiction to prosecute SORNA violations under 18 U.S.C. 2250, the comment was not persuasive that the jurisdictional limitation should be referenced repeatedly throughout the rule, since the statement in § 72.8(a)(1)(i)–(ii) is clear.

(ii) The comment proposed that the rule incorporate a clear statement that a registrant's duty to act under SORNA arises only when the registrant travels interstate and that travel has a nexus to the alleged SORNA violation. In referring to a registrant's ''duty'' to act, the comment apparently meant amenability to Federal prosecution under 18 U.S.C. 2250 in case of a violation. The proposed change is legally incorrect. The grounds of Federal jurisdiction under section 2250 include grounds other than interstate travel, such as conviction for a Federal sex offense or travel in foreign commerce, and section 2250 specifies no required ''nexus'' between interstate travel and the charged SORNA violation beyond the temporal sequencing implied by the provision's language and structure. *See Carr* v. *United States,* 560 U.S. 438, 446 (2010).

(iii) The comment argued, based on the Supreme Court's decision in *Nichols* v. *United States,* 136 S. Ct. 1113 (2016), that the rule's requirements to report departure from a jurisdiction and termination of residence in a jurisdiction under § 72.7(d) and (g) exceed the Attorney General's powers under 34 U.S.C. 20914(a) and (c). Adopting these requirements is within the Attorney General's powers under SORNA, and consistent with the *Nichols* decision, as explained in the section-by-section analysis below.

(iv) The comment proposed that the rule state that § 72.7(g) absolves registrants of a duty to report information required by SORNA when state law or the local agency does not require that information. The proposed statement is legally incorrect because SORNA's requirements exist independently of state law requirements, *see Willman,* 972 F.3d at 821–24, and it is not needed to avoid unfairness to sex offenders based on differences between SORNA's requirements and state law requirements. Section 72.8(a)(1)(iii) in this rule explains that sex offenders are not held liable under 18 U.S.C. 2250 for violation of registration requirements of which they are unaware, and noncompliance with SORNA may be excused where compliance is prevented by circumstances beyond their control, such as a jurisdiction's failure to carry out a necessary complementary role. These principles apply to all requirements under SORNA, including the requirement of § 72.6 to provide specified types of information for inclusion in the registry. Hence, a sex offender is not held liable for failing to provide a type of information if he is unaware of a requirement to provide that information, as may be the case if a jurisdiction does not request that information in its registration forms, and failure to provide any type of information may be excused if a jurisdiction will not accept that information for inclusion in its registry.

(v) The comment asserted that the interpretation of the affirmative defense of 18 U.S.C. 2250(c), in the analysis statement's discussion of §§ 72.7(g) and 72.8, violates due process because it shifts the burden of proof to defendants. However, § 72.8(a)(1)(iii) explains that liability under 18 U.S.C. 2250(a)–(b) is conditioned on the defendant's being aware of the requirement he is charged with violating. The regulation and the accompanying analysis do not impose on the defendant a burden of proving that he lacked such awareness. Section 72.8(a)(2) states that there is an affirmative defense to liability for noncompliance with SORNA in certain circumstances, pursuant to 18 U.S.C. 2250(c). The regulation and the accompanying discussion do not change the burden of proof on this defense, which Congress has expressly made an ''affirmative defense.'' *Id.*

(vi) The comment asserted that § 72.6(b), requiring the reporting of remote communication identifiers, violates the First Amendment on grounds of ambiguity and because, the comment claimed, it infringes on the right to anonymous speech unless accompanied by restrictions on public disclosure of the identifiers. The rule's specification of covered identifiers is similar to a statutory definition in 34 U.S.C. 20916(e)(2) and sufficiently definite. The conditions for disclosure of sex offender information by registration jurisdictions are beyond the scope of this rulemaking, which concerns the registration requirements for sex offenders under SORNA. Separate statutory provisions and the SORNA Guidelines and SORNA Supplemental Guidelines specify those conditions, which include restrictions on the disclosure of remote communication identifiers. *See* 34 U.S.C. 20916(c); 73 FR at 38059–60; 76 FR at 1633, 1637.

(vii) The comment asserted that § 72.8 is deficient because it does not expressly refer to the required jurisdictional predicates under 18 U.S.C. 2250. As formulated in this final rule, § 72.8 sets forth those jurisdictional predicates.

(viii) The comment asserted that the rule is impermissibly vague in a number of respects, including its definition of remote communication identifiers, the requirement that sex offenders lacking fixed residence addresses or places of employment report the relevant locations with whatever definiteness is possible under the circumstances, the requirement that sex offenders report information concerning places they are staying when away from their residences for seven or more days, and the meaning of a ''clean record'' that may reduce the registration period for certain sex offenders. However, the specification of covered remote communication identifiers in § 72.6(b) is similar to a statutory definition in 34 U.S.C. 20916(e)(2) and sufficiently definite. Where sex offenders do not have definite places of residence or employment, the information they provide under § 72.6(c)(1) and (c)(3) as to where they are living or working must be of a less definite nature, and it is reasonable to require that the information be provided with whatever definiteness is possible under the circumstances. The matter is further explained in the section-by-section analysis below and in 73 FR at 38056. The information required by § 72.6(c)(2)

is ''temporary lodging information'' and a related provision, § 72.7(e), requires sex offenders to report this information to their residence jurisdictions within three business days. The two provisions adequately convey that a sex offender, within three business days of returning to his residence, must report to the residence jurisdiction the places he has lodged while away from his residence for seven or more days. Section 72.5(c) refers to a ''clean record'' as described in 34 U.S.C. 20915(b)(1), so the meaning set forth in that statutory provision applies.

(ix) The comment proposed that § 72.5(c) should clarify that clean record reductions for tier I offenders and (juvenile delinquent) tier III offenders are automatic. Section 72.5(c) states that satisfaction of the clean record requirement reduces the registration period for the affected classes of sex offenders. The conditions a sex offender must satisfy to effect such a reduction are those specified in the applicable statute: ''(A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed; (B) not being convicted of any sex offense; (C) successfully completing any periods of supervised release, probation, and parole; and (D) successfully completing of [sic] an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.'' 34 U.S.C. 20915(b)(1).

(x) The comment stated that the rule should be revised to include a federalism assessment and other requirements under Executive Order 13132 and the Unfunded Mandates Reform Act. However, the relevant regulatory certifications below are correct as they are. This rule satisfies the requirements of Executive Order 13132 and the Unfunded Mandates Reform Act.

A Comment Proposing 13 Changes or Sets of Changes in the Rule

Another comment proposed the following changes in the rule:

(i) The comment argued that § 72.5, relating to the duration of the registration period under SORNA, should be changed in various ways. It first argued that § 72.5 as drafted conflicts with a provision of the Fair Credit Reporting Act, which, the comment asserted, states that arrests and convictions may only be reported on background checks for seven years after release from prison. The reference is apparently to 15 U.S.C. 1681c, which generally ''prohibits [consumer] reporting agencies from disclosing any arrest record or other adverse item more than seven years old but permits them to report 'records of convictions of crimes' no matter how long ago they occurred.'' *Aldaco* v. *RentGrow, Inc.,* 921 F.3d 685, 687 (7th Cir. 2019) (quoting 15 U.S.C. 1681c(a)). Section 72.5 describes the duration of registration required by SORNA. *See* 34 U.S.C. 20915. It does not affect what may be included in consumer reports and does not conflict with the Fair Credit Reporting Act. The comment also stated that § 72.5 should be changed to establish standardized procedures for determining sex offenders' tiers, how long each offender will remain on the registry, and what restrictions can be placed on registrants in compliance with their constitutional rights, and should create a way for tier II offenders to petition for early removal from the registry. The procedures for registration jurisdictions to determine sex offenders' tiers are outside the scope of this rulemaking, but the SORNA Guidelines provide related guidance. *See* 73 FR at 38052–54. The duration of registration under SORNA is governed by statutory criteria, *see* 34 U.S.C. 20915, and cannot be changed by rulemaking. The statutes include no provision for reducing the registration periods of tier II offenders. *Id.* Assessing what restrictions can constitutionally be placed on sex offenders, such as restrictions on where sex offenders may live or work, is outside the scope of this rulemaking, which concerns SORNA's registration requirements for sex offenders.

(ii) The comment criticized § 72.6(b), relating to remote communication identifiers, as likely violating the First Amendment and overly vague. The comment provided no persuasive reason to believe that § 72.6(b) is unconstitutional. The description of covered remote communication identifiers in § 72.6(b) is similar to a statutory definition appearing in 34 U.S.C. 20916(e)(2) and sufficiently definite.

(iii) The comment claimed that § 72.6(c)(2)'s requirement to report temporary lodging information violates a constitutional right to travel because, the comment asserted, most places of lodging will not knowingly allow sex offenders to stay at their locations if a sex offender's travel plans are disclosed to them. The rule requires sex offenders to report temporary lodging information within three business days, not in advance, and it requires reporting of the information to the sex offender's residence jurisdiction, not the premises where he intends to stay. *See* § 72.7(e). The comment provided no persuasive reason to believe that this requirement violates any constitutional right.

(iv) The comment proposed to eliminate § 72.6(c)(3), on the ground that disclosure of sex offenders' employment information will adversely affect the employers and adversely affect the sex offenders' ability to obtain employment. Section 72.6 only requires sex offenders to provide employment information to registration jurisdictions. It does not address the public disclosure of such information and, more broadly, the conditions for disclosure of information about sex offenders are outside the scope of this rulemaking. The SORNA Guidelines separately address the disclosure of sex offender information, including employment information. *See* 73 FR at 38042–43, 38059.

(v) The comment claimed that § 72.6(c)(4)'s requirement to provide school attendance information violates a right to attend public schools without hindrance from the government and a First Amendment right of free association because, the comment asserted, most colleges and universities will not allow registered sex offenders to enroll. However, SORNA requires school attendance information, *see* 34 U.S.C. 20914(a)(5), and that requirement cannot be abrogated by rulemaking. Section 72.6(c)(4) requires sex offenders to provide school attendance information for inclusion in the registries. It does not require or encourage schools to deny enrollment to registered sex offenders, and any schools that have such a policy would potentially deny admission to registered sex offenders regardless of whether SORNA or this rule requires sex offenders to provide school attendance information for inclusion in the registries. The comment provided no persuasive reason to believe that this requirement violates any provision of the Constitution.

(vi) With respect to § 72.6(d), which requires reporting of international travel information, the comment stated that the U.S. government should be prohibited from providing travel plans to foreign nations. Congress made a contrary judgment in International Megan's Law, whose purposes include, as stated in its title, ''[t]o protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism, by providing advance notice of intended travel by registered sex offenders outside the United States to the government of the country of destination''. Public Law 114–119; *see Doe* v. *Kerry,* Case No. 16–cv–0654–PJH, 2016 WL 5339804 (N.D. Cal. Sept. 23, 2016), *appeal dismissed,* No. 16–17100, 2017 WL 5514566 (9th Cir. 2017)

(explaining the background and purposes of International Megan's Law and rejecting a constitutional challenge).

(vii) The comment claimed that § 72.6(g)'s requirement to disclose professional licenses violates a right to engage in commerce because states may revoke such licenses if notified that the licensee is a registered sex offender. The rule does not require states to revoke professional licenses issued to registered sex offenders. Whether and to what extent criminal histories including sex offenses should be disqualifying for professional licenses, such as licenses to teach children or to be care providers for persons in vulnerable populations, are matters for the states' judgment. The comment provided no persuasive reason to believe that requiring sex offenders to report professional licenses is unconstitutional.

(viii) With respect to § 72.8, the comment asserted that the jurisdictional predicate of travel in interstate or foreign commerce in 18 U.S.C. 2250 should be interpreted to apply only on the basis of business-related travel. There is no basis for such a restriction; it would depart from the interpretation of travel in interstate or foreign commerce in other federal laws; and it would conflict with SORNA's objective of reliably tracking sex offenders as they relocate among jurisdictions or travel abroad.

(ix) With respect to § 72.6(c)(3), which requires sex offenders to report the names and addresses of places of employment, the comment argued that this information should not be made public. The matter is outside the scope of this rulemaking, which concerns the registration requirements for sex offenders under SORNA, not the conditions for disclosure of sex offender information by registration jurisdictions. The SORNA Guidelines address the latter issue, including disclosure of employment information. *See* 73 FR at 38042–43, 38059.

(x) The comment took issue with the regulatory certification below relating to Executive Orders 12866 and 13563. The comment assumed that the requirements in this rule are new requirements and hence will result in increased costs for sex offenders and registration jurisdictions. The premise is incorrect. As the regulatory certification explains, there are no new costs for registration jurisdictions because their requirements under SORNA continue to be those articulated in the previously issued SORNA Guidelines and SORNA Supplemental Guidelines. Likewise, for sex offenders, the requirements articulated in the rule either appear expressly in SORNA or have previously been articulated by the Attorney General in the SORNA Guidelines and SORNA Supplemental Guidelines. This rule will not change the registration procedures of the registration jurisdictions or make those procedures more time-consuming or expensive. There is accordingly no reason to change the relevant regulatory certification.

(xi) The comment took issue with the regulatory certification below relating to Executive Order 13132 (Federalism), claiming that this rule will have a significant impact on the relationship between the states and the Federal government by creating Federal criminal penalties for sex offenders who violate SORNA's requirements and by creating funding reductions for states that do not implement SORNA's requirements in their registration programs. The premise of this comment is incorrect because the relevant Federal criminal penalties and funding incentive have existed since SORNA's enactment in 2006. *See* 18 U.S.C. 2250; 34 U.S.C. 20927.

(xii) The comment took issue with the regulatory certification relating to subtitle E of title II of the Small Business Regulatory Enforcement Fairness Act of 1996 (the "Congressional Review Act"), assuming that the rule will result in novel requirements to provide and disclose sex offenders' employment information with adverse effects on sex offenders and their employers. The assumption is incorrect because the requirements relating to employment information have existed for many years in SORNA and the SORNA Guidelines. *See* 34 U.S.C. 20914(a)(4); 73 FR 38042–43, 38059.

(xiii) With respect to § 72.6(c)(2), the comment stated that the rule must forbid a sex offender's home jurisdiction from routinely notifying a jurisdiction to which a registrant plans to travel or notifying a place of lodging that a registrant plans to stay there. The comment argues that such notification violates a constitutional right to travel because the destination jurisdictions may impose unwanted requirements and restrictions on sex offenders if it is known they are coming and the temporary lodging providers may not allow registered sex offenders to stay on their properties. However, the rule requires sex offenders to report temporary lodging information within three business days, not in advance. *See* § 72.7(e). If the residence jurisdiction knows about the sex offender's travel plans in advance anyway, and conveys the information to the destination jurisdiction or persons therein, no persuasive reason appears to believe that doing so is unconstitutional. Be that as it may, this rule concerns the registration requirements for sex offenders under SORNA, and the conditions for disclosure of information about sex offenders by registration jurisdictions, including temporary lodging information, are outside of its scope. The SORNA Guidelines separately address the conditions for such disclosure. *See* 73 FR at 38058–61.

A Comment Proposing 24 Changes in the Rule

Another comment proposed 24 changes in the rule:

(i) With respect to § 72.1, the comment stated that subsection (b) should be revised to allow states to adopt requirements less stringent than SORNA without fear of losing federal funds, or alternatively, clarify the existing rule that states may adopt registration requirements that are substantially similar to SORNA. The matter is outside the scope of this rulemaking, which is concerned with the registration requirements for sex offenders under SORNA, not the requirements for registration jurisdictions. The funding reduction or reallocation for jurisdictions that do not substantially implement SORNA is a statutory matter and cannot be abrogated by rulemaking. *See* 34 U.S.C. 20927. The SORNA Guidelines and SORNA Supplemental Guidelines explain the substantial implementation requirement and the funding incentive. *See* 73 FR at 38047–48; 76 FR at 1638–39.

(ii) With respect to § 72.3, the comment proposed removing the application of SORNA based on pre-SORNA offenses, or specifying that SORNA does not apply to sex offenders not already required to register prior to SORNA's enactment. That conflicts with Congress's intent that SORNA apply to all sex offenders, regardless of when they were convicted, as discussed above and in the section-by-section analysis below.

(iii) With respect to § 72.5, the comment proposed clarifying that classification of sex offenders should be based upon the risk posed by offenses as represented by tier levels, and revising subsection (c) to allow reductions for all levels consistent with scientific research or recidivism risk. SORNA specifies the criteria for its tier classifications and the conditions for reducing registration periods. *See* 34 U.S.C. 20911(2)–(4); 20915. These matters are determined by statute and cannot be changed by rulemaking.

(iv) With respect to § 72.6(b), relating to remote communication identifiers, the comment proposed clarifying that IP

addresses are not required and proposed stating that requiring telephone numbers of ''known associates'' is a violation of privacy laws. Section 72.6(b) requires that sex offenders provide the designations they use for purposes of routing or self-identification in internet or telephonic communications or postings, including email addresses and telephone numbers. The specification of required information, which is similar to a statutory definition appearing in 34 U.S.C. 20916(e)(2), is sufficiently clear as drafted, and does not require sex offenders to provide IP addresses or the telephone numbers of ''known associates.''

(v) With respect to § 72.6(c), relating to provision of information concerning residence, temporary lodging, employment, and school attendance, the comment proposed providing grace periods for registration to reflect that loss of housing and employment can occur without warning and that it may take time to locate a replacement. SORNA and the rule generally allow three business days to report changes in residence, employment, and school attendance, or temporary lodging information. *See* § 72.7(c), (e). There is no need to stipulate a ''grace period'' for sex offenders who have nothing within the scope of § 72.6(c) to report, as may be the case with a sex offender who has just lost his residence or job and has no expectation about where he will be living or working in the future.

(vi) The comment proposed eliminating § 72.6(c)(2), relating to temporary lodging information, or alternatively, specifying that this information is not part of the public record and may not be promulgated by third-party sites without penalty. The section-by-section analysis below explains the justification for requiring temporary lodging information. The conditions for public disclosure of information about sex offenders by registration jurisdictions, including temporary lodging information, are outside the scope of this rulemaking, which is concerned with the registration requirements for sex offenders under SORNA. The SORNA Guidelines separately address disclosure of sex offender information by registration jurisdictions and do not require registration jurisdictions to disclose sex offenders' temporary lodging information on the public sex offender websites. *See* 73 FR at 38059. The Attorney General has no authority to create penalties for third-party sites that disclose sex offenders' temporary lodging information.

(vii) With respect to § 72.6(c)(3), relating to employment information, the comment proposed defining place of employment. Section 72.6(c)(3) is sufficiently clear as drafted, requiring the name and address of any place where a sex offender is or will be an employee or, for sex offenders who are or will be employed but with no fixed place of employment, other information describing where the sex offender works or will work with whatever definiteness is possible under the circumstances. In referring to place of employment, the language of § 72.6(c)(3) tracks the statutory requirement that sex offenders provide ''[t]he name and address of any place where the sex offender is an employee or will be an employee,'' 34 U.S.C. 20914(a)(4).

(viii) With respect to § 72.6(c)(1), the comment proposed defining residence, specifically asking how a person registers a residence address if he is transient or homeless. The comment identified no lack of clarity in § 72.6(c)(1) that would require further definition. A person who has no residence address cannot, of course, report a residence address. For such situations, § 72.6(c)(1) provides that ''if the sex offender has no present or expected residence address,'' then the sex offender must provide ''other information describing where the sex offender resides or will reside with whatever definiteness is possible under the circumstances.''

(ix) With respect to § 72.6(d) and (e), relating to information about international travel and passports and immigration documents, the comment proposed that the rule prohibit this information from becoming part of the public record. The conditions for public disclosure by registration jurisdictions of information about sex offenders, including information about their international travel and their passports and immigration documents, are outside the scope of this rulemaking, which concerns the registration requirements for sex offenders under SORNA. Disclosure of sex offender information is addressed in statutes not implicated by this rulemaking and in the SORNA Guidelines and SORNA Supplemental Guidelines, which do not require inclusion of international travel, passport, and immigration document information on the public sex offender websites. *See* 73 FR at 38059.

(x) With respect to § 72.6(f), relating to vehicle information, the comment asked for evidence that watercraft and aircraft have been used in the commission of sexual offenses to justify the collection of information about such vehicles. As the section-by-section analysis below explains, vehicle information may be useful to help prevent flight, facilitate investigation, or effect an apprehension if a sex offender commits new offenses or violates registration requirements. This rationale applies to watercraft and aircraft, as well as land vehicles, whether or not the particular vehicles are used in committing sex offenses.

(xi) The comment proposed to specify in § 72.6(g), relating to information about professional licenses, that professional licensing shall not be denied based on conviction for a sexual offense unless it has a relationship to the responsibilities of the job. SORNA imposes no professional or occupational disqualifications on sex offenders, and the matter is outside the scope of this rulemaking, which concerns the registration requirements for sex offenders under SORNA. The Attorney General has no authority to prohibit or restrict any professional or occupational disqualifications for sex offenders that states may adopt.

(xii) The comment said that § 72.6 should be revised because SORNA does not require public disclosure of certain types of information about sex offenders, mentioning specifically employer name, information about tier I sex offenders (not convicted of a specified offense against a minor), and non-sexual offenses. The requirements and exceptions for public disclosure of information about sex offenders by registration jurisdictions are outside the scope of this rulemaking, which concerns the registration requirements for sex offenders under SORNA, and they are not within the subject matter of § 72.6, which identifies types of information sex offenders must provide for inclusion in the registries. Public disclosure of sex offender information is separately addressed in statutes not germane to this rulemaking and in the SORNA Guidelines and SORNA Supplemental Guidelines, which do not require registration jurisdictions to include on their public sex offender websites the types of information referenced in this part of the comment. *See* 73 FR at 38059.

(xiii) The comment said that the regulations should require accurate information (about sex offenders), provide penalties for inaccurate information or for use of the information to harm the family of the person required to register, and discourage third-party dissemination of information. These matters are outside the scope of this rulemaking, which concerns the registration requirements for sex offenders under SORNA. SORNA independently directs registration jurisdictions to ''include instructions on

how to seek correction of information that an individual contends is erroneous'' on their public sex offender websites. 34 U.S.C. 20920(e). It further directs that these websites ''shall include a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address,'' and that ''[t]he warning shall note that any such action could result in civil or criminal penalties.'' *Id.* § 20920(f).

(xiv) With respect to § 72.7(b), regarding periodic in-person verification of registration information, the comment proposed providing an alternative to in-person verification in instances of natural disasters. The in-person verification requirement is statutory, *see* 34 U.S.C. 20918, and cannot be changed by rulemaking. However, § 72.8(a)(2) in this rule explains that noncompliance with SORNA's requirements (including its in-person appearance requirements) may be excused if compliance is prevented by circumstances beyond the sex offender's control, circumstances that could include the exigencies presented in natural disasters.

(xv) With respect to § 72.8, regarding criminal liability under 18 U.S.C. 2250, the comment proposed (a) providing that the penalty for state violations shall be governed by state law, (b) providing a defense for individuals compliant with state law, and (c) providing a defense for persons with out-of-state convictions who fail to register through good-faith belief that registration is not required. These proposed changes are in part legally incorrect and in part already covered. Congress enacted SORNA's criminal provision to provide Federal criminal penalties for both state and Federal sex offenders who violate SORNA's requirements under circumstances supporting Federal jurisdiction. *See* 18 U.S.C. 2250(a)–(b); 34 U.S.C. 20911(1), (5)–(8). SORNA's requirements apply to both state and Federal sex offenders regardless of whether they are paralleled in state law registration requirements. *See Willman,* 972 F.3d at 821–24 and § 72.3 in this rule. As provided in § 72.8(a)(1)(iii), sex offenders are not subject to liability under 18 U.S.C. 2250 for violating registration requirements of which they are unaware, a limitation that applies regardless of whether their convictions are in-state or out-of-state.

(xvi) The comment proposed establishing that these regulations are not intended to replace the legislative process. With respect to the Federal legislative process, this rule interprets and implements Congress's decisions in SORNA, *see* 34 U.S.C. 20912(b), and does not supplant or replace them. Rather, the many comments proposing that this rule abrogate SORNA's requirements seek the replacement of the Federal legislative process with inconsistent rulemaking. The Attorney General's actions in this rulemaking are not exercises of Federal legislative power barred by the non-delegation doctrine, as explained in the section-by-section analysis below. With respect to state legislative processes, the Attorney General has no authority over what state legislatures choose to do and cannot replace their processes by rulemaking.

(xvii) The comment proposed providing that (state) judicial precedents apply in the case of any rules that conflict with state supreme court decisions. State judicial decisions finding state registration laws to be in conflict with the state constitution do not affect the validity of the corresponding requirements under SORNA. However, SORNA allows such decisions to be taken into account in determining whether states have substantially implemented SORNA's requirements in their registration programs. *See* 34 U.S.C. 20927(b).

(xviii) The comment proposed clarification of the process for classification of out-of-state offenders. The process by which states classify out-of-state offenders is outside the scope of this rulemaking, which concerns the registration requirements for sex offenders under SORNA. The SORNA Guidelines provide guidance to the states and other registration jurisdictions regarding the application of SORNA's tiering criteria to all sex offenders, including out-of-state offenders. *See* 73 FR at 38052–54.

(xix) The comment proposed discouraging the inclusion of non-essential information in the public sex offender websites. The matter is outside the scope of this rulemaking, which concerns the registration requirements for sex offenders under SORNA. Other provisions of SORNA and the SORNA Guidelines and SORNA Supplemental Guidelines address the types of information that should or should not be included on the public websites, or whose inclusion or exclusion is within the discretion of the registration jurisdictions. *See* 34 U.S.C. 20920; 73 FR at 38058–61; 76 FR at 1636–37.

(xx) The comment proposed encouraging states to provide penalties for vigilantism. All states already have criminal penalties for unlawful violence against persons, including sex offenders, whether by vigilantes or others, and the Department of Justice rejects and condemns all unlawful violence against persons, including sex offenders. SORNA's standards provide that public sex offender websites ''shall include a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address'' and ''note that any such action could result in civil or criminal penalties.'' 34 U.S.C. 20920(f).

(xxi) The comment proposed encouraging states to use risk assessment and other proven methods for the identification, treatment, and termination of low-risk offenders. The criteria for classification of sex offenders and early termination of registration are statutory and cannot be changed by rulemaking. *See* 34 U.S.C. 20911(2)–(4), 20915. Assessment of sex offenders for purposes of treatment is outside the scope of this rulemaking, which concerns the registration requirements for sex offenders under SORNA.

(xxii) The comment proposed discouraging states from utilizing residency restrictions or other proximity restrictions. SORNA does not prescribe or encourage residency or other proximity restrictions, and the matter is outside the scope of this rulemaking, which concerns the registration requirements for sex offenders under SORNA.

(xxiii) The comment proposed discouraging states from lifetime registration for all, and instead recommending adoption of SORNA's tiered registration periods as provided in § 72.5. SORNA's requirements generally constitute a floor rather than a ceiling for state registration programs. *See* 73 FR at 38032–35, 38046. Whether registration jurisdictions choose to adopt more stringent registration requirements than SORNA's minimum national standards, including longer registration periods, is a matter within their discretion. *See id.* Recommending that states go no further than SORNA's requirements is not necessary for the purposes of this rulemaking, which articulates the registration requirements for sex offenders under SORNA, and the comment was not persuasive that the rule should incorporate such a recommendation. In responding to public comments of a similar nature, the SORNA Guidelines noted that ''many jurisdictions have adopted durational requirements for registration that . . . may . . . exceed the . . . SORNA minimum . . . such as making lifetime registration the norm in relation to registrants generally.'' 73 FR at 38034. Consequently, ''taking the SORNA standards as a ceiling . . . would require many jurisdictions to reduce or

eliminate requirements that they were free to adopt . . . and currently apply,'' which ''is not plausibly the objective of a law (SORNA) enacted with the general purpose of strengthening sex offender registration and notification in the United States.'' *Id.*

(xxiv) The comment proposed providing that International Megan's Law, residency restrictions, and other regulatory measures only apply for the duration of registration. International Megan's Law added the international travel reporting requirements of SORNA and related authorities, appearing in 34 U.S.C. 20914(a)(7), (c) and implemented by §§ 72.6(d), 72.7(f) of this rule. In common with the other requirements under SORNA appearing in this rule, those requirements continue to apply until the end of the SORNA registration period. Whether registration jurisdictions choose to impose such requirements for longer periods than the registration periods prescribed by SORNA is within their discretion. *See* 73 FR at 38046. Residency restrictions, where they exist, are based on the laws of the jurisdictions that choose to adopt them. SORNA does not require such restrictions, the Attorney General has no authority to specify their duration, and they are outside the scope of this rulemaking.

A Comment Proposing Five Changes in the Rule

Another comment proposed five changes in the rule:

(i) The comment stated that the Attorney General should disclose all ''ex parte contacts'' with United States Attorneys because, the comment asserted, some parts of the rule (such as § 72.3) appear to be targeting common defenses raised by sex offenders accused of failing to register and hence may be the product of litigation strategy rather than reasoned rulemaking. The comment reflects a false opposition between addressing issues that have arisen in litigation and reasoned rulemaking. This rulemaking carries out a statutory directive to the Attorney General to issue regulations to interpret and implement SORNA, *see* 34 U.S.C. 20912(b), in furtherance of SORNA's objective of protecting the public from sex offenders by establishing a comprehensive national system for their registration, *see id.* 20901. In carrying out this responsibility, the Attorney General reasonably resolves issues and problems that have arisen in SORNA implementation, including those arising in the enforcement of SORNA by means of the criminal provision Congress has enacted for that purpose, 18 U.S.C. 2250.

(ii) The comment said that the rule, for fair notice reasons, should specify that other uncodified legislative rules imposing registration duties on sex offenders under SORNA are abrogated. The comment did not identify ''legislative rules'' outside of these regulations that it was referring to or provide a persuasive reason for declaring that such rules are abrogated. This rule encompasses all current regulations issued by the Attorney General under SORNA. The other SORNA-related final documents the Attorney General has published in the **Federal Register**, listed in the ''rulemaking history'' section above, are guidelines that provide guidance and assistance to registration jurisdictions in implementing SORNA. Section 72.8(a)(1)(iii) in this rule moots fair notice concerns by explaining that sex offenders are not held liable under 18 U.S.C. 2250 for violating registration requirements of which they are unaware.

(iii) The comment said that the Attorney General, for Tenth Amendment and fair notice reasons, should specify that states are permitted to impose less stringent registration requirements than SORNA's standards and that registrants fully comply with SORNA by complying with state registration laws even if the state has not implemented SORNA. However, this rule articulates SORNA's registration requirements for sex offenders; it does not compel states to do anything. States are afforded a funding incentive to substantially implement SORNA's requirements in their registration programs, a statutory condition that cannot be abrogated by rulemaking. *See* 34 U.S.C. 20927. Section 72.8(a)(1)(iii) in this rule moots fair notice concerns by explaining that sex offenders are not held liable under 18 U.S.C. 2250 for violating requirements of which they are unaware, and § 72.8(a)(2) further explains that noncompliance with SORNA may be excused where compliance was prevented by a state's failure to carry out a necessary complementary role. The notion that sex offenders need only comply with SORNA's registration requirements where state law imposes the same requirements is incorrect as a matter of law. *See Willman,* 972 F.3d at 821–24.

(iv) Section 72.5(b) in the rule states that the registration period of a sex offender sentenced to imprisonment begins to run when he is released from custody. The comment asserted to the contrary that a sex offender's registration period begins to run when the registrant is convicted, for three reasons. First, the comment argued that there is no reason to suspend the running of the registration period during the sex offender's initial confinement. This argument is question-begging because it assumes that the registration period is already running before the sex offender is released. Second, the comment asserted that § 72.5(b)'s interpretation of SORNA is implausible because it would mean that a sex offender must initially register before the registration period has begun, given the requirement of 34 U.S.C. 20913(b)(1) that a sex offender initially register before completing his sentence of imprisonment. However, SORNA logically requires that a sex offender be advised of his registration obligations and initially registered shortly before his release from custody, *see* 34 U.S.C. 20919(a), because that is the point at which he is about to be released into the community and the post-release tracking and notification functions of sex offender registration are initially implicated. *See* 73 FR at 38062–63. Third, the comment asserted that running the registration period from conviction provides a readily ascertainable starting date and is consistent with Congress's decision to base sex offenders' registration duties on the crimes for which they have been convicted. Running the registration period from release likewise provides a definite starting point that is consistent with SORNA's tiering criteria for sex offenders and the associated registration periods. *See* 34 U.S.C. 20911(2)–(4), 20915. The section-by-section analysis below provides further explanation regarding the commencement of sex offenders' registration periods under SORNA and why the starting point is release from custody for an imprisoned offender.

(v) The comment argued that § 72.7(f) violates a constitutional right to travel by requiring sex offenders to report intended international travel at least 21 days in advance because, the comment asserted, it makes registrants liable for felony convictions every time they travel without providing 21 days' notice. It further asserted that Congress's failure to incorporate the 21-day notice requirement into International Megan's Law evinces a congressional judgment that the requirement is unnecessary and unduly burdensome, and that advance notice of less than 21 days may afford Federal authorities adequate time to notify destination countries. However, the Attorney General initially adopted the 21-day advance notice requirement in the SORNA Supplemental Guidelines, reflecting the judgment of

the responsible Federal agencies concerning the time needed for effective notification regarding international travel by sex offenders, but recognizing that exceptions to that requirement may be necessary and appropriate in certain circumstances. *See* 76 FR at 1637–38. This rule follows the same approach, generally requiring 21-day advance notice, but allowing later notice when a sex offender does not anticipate a trip abroad that far in advance. *See* §§ 72.6(d), 72.7(f), 72.8(a)(2) Ex. 3, and the accompanying discussion in the section-by-section analysis below. The analysis explains that ''[t]he 21-day advance notice requirement is designed to provide relevant agencies . . . sufficient lead time for any investigation or inquiry that may be warranted relating to the sex offender's international travel, and for notification of U.S. and foreign authorities in destination countries, prior to the sex offender's arrival in a destination country.'' In SORNA, as amended by International Megan's Law, Congress empowered the Attorney General to prescribe ''time and manner requirements'' in conformity with which sex offenders must ''provide and update information . . . relating to intended travel outside the United States,'' 34 U.S.C. 20914(c), which Congress would not logically have done if it deemed unnecessary and unduly burdensome the 21-day advance notice requirement that the Attorney General had already adopted in the SORNA Supplemental Guidelines. The comment provided no persuasive reason to believe that any constitutional right is violated by these aspects of the rule, which are within the scope of the express authority Congress has given the Attorney General to prescribe timing requirements for reporting international travel.

A Comment Alleging Four Inconsistencies With SORNA

A comment argued that this rule is inconsistent with SORNA in four respects.

(i) The comment claimed that § 72.3, providing in part that sex offenders must comply with SORNA's requirements regardless of whether a jurisdiction has substantially implemented those requirements, is inconsistent with SORNA because Congress did not intend to punish sex offenders for jurisdictions' failures to implement SORNA. However, § 72.3 accurately states the law. *See Willman,* 972 F.3d at 821–24. Section 72.8(a)(1)(iii) explains that sex offenders are not held liable for violating requirements under SORNA of which they are unaware, and § 72.8(a)(2) explains that failure to comply with SORNA's requirements may be excused where compliance is prevented by a jurisdiction's failure to carry out a necessary complementary role. There is accordingly no punishment of sex offenders based on jurisdictions' shortcomings.

(ii) The comment claimed that §§ 72.7(d) and 72.6(c), in requiring departure-notification by sex offenders in certain circumstances, conflict with 34 U.S.C. 20913(c), as interpreted by the Supreme Court in *Nichols,* 136 S. Ct. at 1117–19. However, as the section-by-section analysis below explains, the departure-notification provisions of the rule are premised on powers of the Attorney General under other provisions of SORNA and are consistent with *Nichols.*

(iii) The comment claimed that § 72.7(c) is inconsistent with SORNA in requiring that a sex offender must report changes in residence, employment, and school attendance in the jurisdictions in which they occur, because 34 U.S.C. 20913(c) only requires that a sex offender appear in person and report the change ''in at least 1 jurisdiction involved'' without further specification. However, the section-by-section analysis below explains that the specification of the relevant jurisdiction is within the Attorney General's authority under 34 U.S.C. 20912(b) and 34 U.S.C. 20914(c) to interpret and implement SORNA and to prescribe the manner in which sex offenders must provide and update information required by SORNA. The analysis also explains the justification for this specification based on the purposes of SORNA's in-person appearance requirements.

(iv) The comment proposed amending § 72.7(e) and (f), which require sex offenders to report to the residence jurisdiction information relating to remote communication identifiers, temporary lodging, vehicles, and international travel. Specifically, the comment said that sex offenders should be permitted to report such changes to any ''involved jurisdiction,'' as referenced in 34 U.S.C. 20913(c). In support of the proposed amendment, the comment argued that, for example, it could be nearly impossible for an offender who works long hours at a job in State A, but lives in State B, to report the required information in State B during normal business hours without having to miss work. However, § 72.7(e) and (f) do not require the reporting of information through in-person appearances, but rather allow reporting by whatever means the jurisdiction allows, such as an email or phone call.

Other Comments

Other comments proposed additional changes to this rule, beyond those discussed above, but did not provide persuasive reasons for such changes. The proposals put forward by one or more commenters included the following:

A comment proposed that § 72.6(c)(2)'s requirement that a sex offender report temporary lodging when away from his residence for seven or more days should be changed to require such reporting only when the sex offender is away from his residence for 14 or more days. The reasons given by the comment were that vacation time is generally two weeks and, for families on opposite coasts, it is impossible to drive across the country, visit, and drive back within seven days. However, § 72.6(c)(2) does not prohibit sex offenders from traveling away from their residences for any amount of time. It just requires them to report to the residence jurisdiction within three business days lodging away from their residences for seven or more days. *See* § 72.7(e).

A comment objected to the requirement of § 72.6(f) that sex offenders provide information as to where any vehicle owned or operated by the sex offender is habitually parked, docked, or otherwise kept, on the ground that innocent people should not get dragged onto the registry because they allow a registered sex offender to visit. However, the referenced provision in § 72.6(f) does not require sex offenders to report the identities or addresses of people they visit. It just requires reporting where they habitually keep their vehicles. As the section-by-section analysis below explains, this information may be useful to help prevent flight, facilitate investigation, or effect an apprehension if a sex offender commits new offenses or violates registration requirements.

A comment objected that the rule would burden sex offenders who telework or telelearn with employers or schools in remote jurisdictions by requiring them to travel to those jurisdictions to register or report changes. However, § 72.4 in the rule requires a sex offender to register and keep the registration current in each jurisdiction in which the offender resides, is an employee, or is a student, and § 72.7(c) requires a sex offender to report a change in residence, employment, or school attendance through in-person appearance in the relevant jurisdiction. These provisions implement statutory requirements

appearing in 34 U.S.C. 20913(a), (c). They do not expand the range of jurisdictions in which sex offenders are required to register or report changes beyond those identified in the statute. In particular, §§ 72.4 and 72.7(c) do not require a sex offender to register or appear in a jurisdiction in which he has a telework or telelearning connection but no physical presence. *See* 73 FR at 38062. Nor do they require a sex offender to register in a jurisdiction in which he has some work-related presence but in which he does not regularly work or have a fixed place of employment. *See id.*

A comment requested clarification regarding (i) the state offenses for which SORNA requires registration and (ii) whether SORNA requires sex offenders to register in states whose own laws do not require registration by those offenders. Regarding the first question, SORNA identifies the types of offenses, including state offenses, for which it requires registration, *see* 34 U.S.C. 20911(1), (5)–(8), and the SORNA Guidelines provide further explanation, *see* 73 FR at 38050–52. If a sex offender does not know that he is required to register because he is unaware that the offense for which he was convicted gave rise to a duty to register, then he is not held liable under 18 U.S.C. 2250, which only penalizes violations of known registration obligations, as explained in § 72.8(a)(1)(iii) in this rule. Regarding the second question, SORNA's registration requirements are independent of state law registration requirements, *see Willman,* 972 F.3d at 821–24, but a sex offender's noncompliance with SORNA may be excused where compliance is prevented by a state's failure to carry out a necessary complementary role, as explained in § 72.8(a)(2) in this rule.

A comment proposed that the rule clarify Federal prosecutorial priorities with respect to SORNA violations in jurisdictions that have not implemented SORNA, suggesting that Federal prosecution be limited or forgone where the jurisdiction's laws do not impose the same requirements. However, as § 72.8(a)(1)(iii) in this rule explains, sex offenders are not held liable under 18 U.S.C. 2250 for violation of registration requirements of which they are unaware, and, as § 72.8(a)(2) explains, noncompliance with SORNA may be excused where compliance is prevented by circumstances beyond their control, such as a jurisdiction's failure to carry out a necessary complementary role. The comment was not persuasive that the Department of Justice should adopt a policy of not prosecuting sex offenders for violating known registration obligations under SORNA, where nothing prevented those offenders from complying, just because the registration jurisdiction had not implemented some aspects of SORNA in its registration program. Federal prosecutorial priorities are usually not established by regulation, and addressing prosecutorial priorities is not necessary for purposes of this rulemaking, which articulates sex offenders' registration requirements under SORNA.

A comment asserted that § 72.3's application of SORNA's requirements to all sex offenders, regardless of when they were convicted, may violate due process because, at the state level, courts may determine whether particular sex offenders are required to register. Section 72.3 addresses the general scope of SORNA's application, not whether particular sex offenders are required to register under state law, and raises no due process issue.

A comment proposed adding to § 72.5 a provision requiring that a sex offender be removed from the sex offender registry if he receives a pardon, and that the offense be expunged from all court and law enforcement records. However, only pardons on the ground of innocence terminate registration obligations under SORNA, *see* 73 FR at 38050, and the Attorney General has no authority to require registration jurisdictions to expunge the records of sex offenders who are pardoned in those jurisdictions.

A comment asserted that § 72.6(g), which requires sex offenders to report professional licenses, is vague and not required by SORNA. Section 72.6 is sufficiently definite, requiring sex offenders to provide information concerning licensing that authorizes them to engage in an occupation or carry out a trade or business. Adopting this requirement is an exercise of the Attorney General's authority under 34 U.S.C. 20914(a)(8) to require sex offenders to provide other information, beyond that expressly described in the statute. The section-by-section analysis below explains that information concerning professional licenses may be helpful in locating a registered sex offender if he absconds, may provide a basis for notifying the responsible licensing authority if the offender's conviction of a sex offense may affect his eligibility for the license, and may be useful in crosschecking the accuracy and completeness of other information the offender is required to provide, *e.g.,* if the sex offender is licensed to engage in a certain occupation but does not provide name and address information for a place of employment as required by 34 U.S.C. 20914(a)(4).

A comment proposed generally replacing SORNA's in-person reporting requirements with reporting through remote communication technology. SORNA's requirements to report or verify certain information through in-person appearances are statutory and cannot be abrogated by rulemaking. *See* 34 U.S.C. 20913(c), 20918.

A comment proposed expanding the language in the rule about circumstances that may excuse noncompliance with SORNA's requirements to include public health emergencies and natural disasters. However, § 72.8(a)(2) in the rule makes clear that any uncontrollable circumstances preventing compliance with SORNA, regardless of their character, may excuse noncompliance under the conditions stated in 18 U.S.C. 2250(c).

A comment proposed encouraging registration jurisdictions to conform their registration regulations to SORNA to achieve uniformity across jurisdictions. Jurisdictions are encouraged to conform their registration requirements to SORNA's minimum national standards by the funding incentive of 34 U.S.C. 20927 and the extensive guidance and assistance that the Department of Justice provides to SORNA implementation through the SMART Office. *See* 76 FR at 1638. As § 72.1 in this rule notes, the adoption of more extensive or stringent requirements is within the discretion of the registration jurisdictions. The matter is explained in the section-by-section analysis below and in the SORNA Guidelines, *see* 73 FR at 38032–35, 38046. Making recommendations regarding jurisdictions' adoption of measures not required by SORNA is outside the scope of this rulemaking, which articulates SORNA's registration requirements for sex offenders.

Section-by-Section Analysis

The present rule expands part 72 of title 28 of the Code of Federal Regulations to provide a full statement of the registration requirements for sex offenders under SORNA. It revises the statement of purpose and definitional sections in 28 CFR 72.1 and 72.2. It maintains the existing provision in 28 CFR 72.3 stating that SORNA's requirements apply to all sex offenders, regardless of when they were convicted, and incorporates additional language in § 72.3 to reinforce that point. It also adds to part 72 provisions—§§ 72.4 through 72.8—articulating where sex offenders must register, how long they must register, what information they must provide, how they must register and keep their registrations current to

satisfy SORNA's requirements, and the liability they face for violations, following SORNA's express requirements and the prior articulation of standards for these matters in the SORNA Guidelines and the SORNA Supplemental Guidelines.

Section 72.1—Purpose

Section 72.1(a) states part 72's purpose to specify SORNA's registration requirements and their scope of application. It further notes that the Attorney General has the authority pursuant to provisions of SORNA to specify these requirements and their applicability as provided in part 72.

Section 72.1(b) states that part 72 does not preempt or limit any obligations of or requirements relating to sex offenders under other laws, rules, or policies. It further notes that states and other governmental entities may prescribe requirements, with which sex offenders must comply, that are more extensive or stringent than those prescribed by SORNA. This reflects the fact that SORNA provides minimum national standards for sex offender registration. It is intended to establish a floor rather than a ceiling for the registration programs of states and other jurisdictions, which can prescribe registration requirements binding on sex offenders under their own laws independent of SORNA. Jurisdictions accordingly are free to adopt more stringent or extensive registration requirements for sex offenders than those set forth in this part, including more stringent or extensive requirements regarding where, when, and how long sex offenders must register, what information they must provide, and what they must do to keep their registrations current. *See* 73 FR at 38032–35, 38046.

Section 72.2—Definitions

Section 72.2 states that terms used in part 72 have the same meaning as in SORNA. Hence, for example, references in the part to registration ''jurisdictions'' mean the 50 states, the District of Columbia, the five principal U.S. territories, and Indian tribes qualifying under 34 U.S.C. 20929. *See id.* 20911(10); 73 FR at 38045, 38048. Likewise, where the part uses such terms as sex offender (and tiers thereof), sex offense, convicted or conviction, sex offender registry, student, employee or employment, and reside or residence, the meaning is the same as in SORNA. *See* 34 U.S.C. 20911(1)–(9), (11)–(13); 73 FR at 38050–57, 38061–62.

Section 72.3—Applicability of the Sex Offender Registration and Notification Act

Section 72.3 carries forward in substance current 28 CFR 72.3, which states that SORNA's requirements apply to all sex offenders, including those whose sex offense convictions predate SORNA's enactment. This section was initially adopted on February 28, 2007, and amended on December 29, 2010. The section and its rationale are explained further in the interim and final rulemakings that adopted it. *See* 72 FR 8894; 75 FR 81849.

Section 72.3, and its modification by this rulemaking, are constitutionally sound. In *Smith* v. *Doe,* 538 U.S. 84 (2003), the Supreme Court upheld the retroactive application of sex offender registration requirements against an ex post facto challenge, in reviewing a state registration system whose major features paralleled SORNA's in many ways. The commonalities between SORNA and the state registration program upheld in *Smith* include required registration before release from imprisonment; provision of name, address, employment, vehicle, and other registration information; continued registration and periodic verification of registration information for at least 15 years; lifetime registration and quarterly verification for certain registrants convicted of aggravated or multiple sex offenses; and public internet posting of information about registrants. *See id.* at 90–91. The Federal courts have consistently rejected ex post facto challenges to SORNA itself. *See, e.g., United States* v. *Felts,* 674 F.3d 599, 605–06 (6th Cir. 2012).

Section 72.3 also is not premised on any constitutionally impermissible delegation of legislative authority to the executive branch of government. Congress intended that SORNA apply to all sex offenders, regardless of when they were convicted. *See Reynolds,* 565 U.S. at 442–45; *id.* at 448–49 & n. (Scalia, J., dissenting) (agreeing that Congress intended for SORNA to apply to all sex offenders). Congress authorized the Attorney General to specify the applicability of SORNA's requirements to sex offenders with pre-SORNA and pre-SORNA-implementation convictions, *see* 34 U.S.C. 20913(d), in order to effectuate that intent while enabling the Attorney General to address transitional issues presented in integrating the existing sex offender population into SORNA's comprehensive nationwide registration system. *See Reynolds,* 565 U.S. at 440–42; 72 FR at 8895–97; 73 FR at 38035–36, 38046, 38063–64; 75 FR at 81850–52. In adopting § 72.3, the Attorney General implemented the relevant legislative policy—that SORNA's requirements should apply to all sex offenders—to the maximum, having found no reason to delay or qualify its implementation. Consequently, as an articulation of a legislative policy embodied in SORNA, the issuance of § 72.3 pursuant to 34 U.S.C. 20913(d) involved no exercise of legislative authority and did not contravene the non-delegation doctrine. *See Gundy,* 139 S. Ct. at 2123–30 (plurality opinion); *id.* at 2130–31 (Alito, J., concurring in the judgment); *id.,* Brief for the United States at 22–38.

Moreover, regardless of any question concerning the validity of 34 U.S.C. 20913(d), § 72.3 is adequately supported on the basis of the Attorney General's authority to issue guidelines and regulations to interpret and implement SORNA, appearing in 34 U.S.C. 20912(b). In § 72.3, the Attorney General interpreted SORNA as intended by Congress to apply to all sex offenders regardless of when they were convicted—an interpretation endorsed by the Supreme Court, *see Reynolds,* 565 U.S. at 440–45; *see also Gundy,* 139 S. Ct. at 2123–31—and he implemented that legislative policy by embodying it in a clearly stated rule.

The same considerations apply to the amended version of § 72.3 adopted here, which effectuates more reliably the legislative policy judgment that SORNA's requirements should apply to all sex offenders by restating the current rule with additional specificity, but which involves no change in substance. In comparison with the current formulation of § 72.3, this rule adds a second sentence stating that (i) all sex offenders must comply with all requirements of SORNA, regardless of when they were convicted; (ii) this is so regardless of whether a registration jurisdiction has substantially implemented SORNA or any particular SORNA requirement; and (iii) this is so regardless of whether a particular requirement or class of sex offenders is mentioned in examples in the rules or guidelines issued by the Attorney General.

The first part of the added sentence reiterates § 72.3's specification of SORNA's applicability to all sex offenders in the form of an affirmative direction to sex offenders, and it states explicitly that all of SORNA's requirements so apply.

The added sentence further states that the registration duties SORNA prescribes for sex offenders are not conditional on registration jurisdictions' having adopted SORNA's requirements

in their own registration laws or policies. For example, SORNA requires sex offenders to register in the states (and other registration jurisdictions) in which they reside, work, or attend school. *See* 34 U.S.C. 20913(a). All of the states have sex offender registration programs, which were initially established long before the enactment of SORNA. Hence, sex offenders are able to register in these existing state programs. The fact that a particular state has not modified its registration program at this time to incorporate the full range of SORNA requirements does not prevent a sex offender required to register by SORNA from registering in the state or excuse a failure to do so. *See, e.g., Felts,* 674 F.3d at 603–05.

The same principle applies in situations in which a jurisdiction's law does not track or incorporate a particular SORNA requirement affecting a sex offender. Consider a situation of this nature in which SORNA requires a sex offender to register but the law of the state in which he resides does not. This may occur, for example, because state law does not require registration based on the particular sex offense for which the offender was convicted, or because state law requires registration by sex offenders for shorter periods of time than SORNA, or because state law does not apply its registration requirements ''retroactively'' as broadly as § 72.3 applies SORNA's requirements to sex offenders with pre-SORNA convictions. Notwithstanding the absence of a parallel state law, the registration authorities in the state may be willing to register the sex offender because Federal law (*i.e.,* SORNA) requires him to register. *Cf. Doe* v. *Keathley,* 290 S.W.3d 719 (Mo. 2009) (state constitutional prohibition of retrospective laws does not preclude registration based on SORNA). If the state registration authorities are willing to register the sex offender, he is not relieved of the duty to register merely because state law does not track the Federal law registration requirement.

Hence, sex offenders can be held liable for violating any requirement stated in this rule, regardless of when they were convicted, and regardless of whether the jurisdiction in which the violation occurs has adopted the requirement in its own law. This does not mean, however, that SORNA unfairly holds sex offenders liable for failing to comply with its requirements, where the requirement is unknown to the sex offender or impossible for him to carry out. *Cf. Felts,* 674 F.3d at 605 (noting concern). Federal enforcement of SORNA's requirements occurs primarily through SORNA's criminal provision, 18 U.S.C. 2250. That provision makes it a Federal crime for a person required to register by SORNA to knowingly fail to register or update a registration as required by SORNA under circumstances supporting Federal jurisdiction, such as conviction of a Federal sex offense or interstate or foreign travel. As discussed below, section 2250 holds sex offenders liable only for violations of known registration obligations, and it excuses failures to comply with SORNA under certain conditions if the noncompliance results from circumstances beyond the sex offenders' control.

Consider first the concern that sex offenders may lack notice regarding registration obligations. Under the procedures prescribed by SORNA, and under standard procedures that have generally been adopted by registration jurisdictions whether or not they have implemented SORNA's requirements, the registration of sex offenders normally involves (i) informing sex offenders of their registration duties, (ii) obtaining from sex offenders signed acknowledgments confirming receipt of that information, and (iii) having sex offenders provide the required registration information. *See* 34 U.S.C. 20919(a); 73 FR at 38062–63.

Registration procedures of this nature inform sex offenders of what they must do, and the acknowledgments obtained from them provide evidence that they were so informed. *See* 76 FR at 1638. If a jurisdiction that registers a sex offender has not fully revised its processes for conformity to SORNA, then it may not tell the sex offender about some of the registration requirements imposed by SORNA, such as those that the jurisdiction has not incorporated in its own laws. If the jurisdiction fails to inform a sex offender about some of SORNA's registration requirements, the sex offender then does not know about some of his registration obligations under SORNA based on the information received from the jurisdiction, and may not learn of them from other sources. In such cases, the possibility of liability under 18 U.S.C. 2250 continues to be limited to cases in which a sex offender ''knowingly fails to register or update a registration as required by [SORNA].'' The limitation to ''knowing[ ]'' violations provides a safeguard against liability based on unwitting violations of SORNA requirements of which a sex offender was not aware. Section 72.8(a)(1)(iii) of this rule, and the accompanying discussion below, provide further explanation about the limitation of liability under 18 U.S.C. 2250 to cases involving violation of known registration obligations.

The second concern about fairness involves situations in which a sex offender has failed to do something SORNA requires because it is impossible for him to do so. For example, as noted above, a jurisdiction with laws that do not require registration based on the particular offense for which a sex offender was convicted may nevertheless be willing to register him in light of his Federal law (SORNA) registration obligation. But alternatively, the jurisdiction's law or practice may constrain its registration personnel to register only sex offenders whom its own laws require to register. In such a case, it is impossible for the sex offender to register in that jurisdiction, though subject to a registration duty under SORNA. This is so because registration is by its nature a two-party transaction, involving a sex offender's providing information about where he resides and other matters as required, and acceptance of that information by the jurisdiction for inclusion in the sex offender registry. If the jurisdiction is unwilling to carry out its side of the transaction, then the sex offender cannot register.

Concerns of this nature are also addressed in SORNA's criminal provision, 18 U.S.C. 2250. Subsection (c) of section 2250 provides an affirmative defense to liability for SORNA violations if ''(1) uncontrollable circumstances prevented the individual from complying; (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and (3) the individual complied as soon as such circumstances ceased to exist.'' A registration jurisdiction's law or practice that precludes registration of a sex offender, as described above, is a circumstance that the sex offender cannot control and to which he did not contribute, so he cannot be held liable for failure to register with that jurisdiction as SORNA requires.

The defense in section 2250(c) comes with the proviso that the defendant must comply with SORNA ''as soon as [the preventing] circumstances cease[ ] to exist.'' For example, consider the case posed above of a jurisdiction that refuses to register sex offenders based on a particular offense for which SORNA requires registration, so that a sex offender residing in the jurisdiction who was convicted of that offense cannot register there. Suppose that the jurisdiction later progresses in its implementation of SORNA and becomes willing to register offenders who have been convicted for that sex offense. In

light of the proviso, the sex offender's obligation to register revives once the jurisdiction becomes willing to register him. That is fair, because the circumstance preventing his compliance with the SORNA registration requirement no longer exists.

Section 72.8(a)(2) of this rule, and the accompanying discussion below, provide further explanation about the contours of the impossibility defense under 18 U.S.C. 2250(c).

Returning to the text of § 72.3, the added sentence states at the end that sex offenders must comply with SORNA's requirements ''regardless of whether any particular requirement or class of sex offenders is mentioned in examples in this regulation or in other regulations or guidelines issued by the Attorney General.'' In conjunction with the earlier statement in the provision that all sex offenders must comply with all SORNA requirements, the added language responds to a judicial decision that did not give full effect to the current regulation.

Section 72.3, as currently formulated, states that SORNA's ''requirements . . . apply to all sex offenders,'' exercising the Attorney General's ''authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of [SORNA] or its implementation in a particular jurisdiction.'' 34 U.S.C. 20913(d); *see Reynolds,* 565 U.S. at 441–45 (explaining Congress's decision to give the Attorney General authority to apply SORNA's requirements to sex offenders with pre-SORNA convictions). Nevertheless, in *United States* v. *DeJarnette,* 741 F.3d 971 (9th Cir. 2013), the court believed that the Attorney General had not made all of SORNA's requirements applicable to all sex offenders. The case concerned the applicability of SORNA's requirement that a sex offender register initially in the jurisdiction in which he is convicted, if it differs from his residence jurisdiction, *see* 34 U.S.C. 20913(a) (second sentence), where the sex offender's conviction predated SORNA's enactment. Notwithstanding 28 CFR 72.3, the court concluded that the Attorney General had not made this SORNA requirement applicable to sex offenders with pre-SORNA convictions, if they were already subject to state law registration requirements. *DeJarnette,* 741 F.3d at 982. The decision was largely premised on the fact that the particular SORNA requirement at issue was not mentioned in relation to that particular class of sex offenders in the examples of sex offenders subject to SORNA's requirements in 28 CFR 72.3 and the SORNA Guidelines. *DeJarnette,* 741 F.3d at 976–80.

The sentence added to § 72.3 by this rulemaking will foreclose future decisions of this nature and ensure that § 72.3's application of SORNA's requirements to all sex offenders is given effect consistently.

The rule includes one further change in § 72.3, affecting the first example in the provision. The example as currently formulated describes a sex offender convicted in 1990 and released following imprisonment in 2007, and says that the sex offender is subject to SORNA's requirements. In *Reynolds,* the Supreme Court held that SORNA's requirements did not apply to sex offenders with pre-SORNA convictions prior to the Attorney General's exercise of the authority under 34 U.S.C. 20913(d) to specify SORNA's applicability to those offenders. 565 U.S. at 434–35. It follows that SORNA's requirements did not apply to such sex offenders before the Attorney General's original issuance of 28 CFR 72.3 on February 28, 2007. Example 1 in § 72.3 might be misunderstood as suggesting the contrary, *i.e.,* that a sex offender with a pre-SORNA conviction released from imprisonment at any time in 2007 was immediately subject to SORNA's requirements. Hence, to avoid any possible inconsistency or apparent inconsistency with the Supreme Court's decision in *Reynolds,* the rule changes the example by substituting a later year for 2007.

Section 72.4—Where Sex Offenders Must Register

Section 72.4 tracks SORNA's express requirement that a sex offender must register and keep the registration current in each jurisdiction in which the sex offender resides, is an employee, or is a student, and must also initially register in the jurisdiction in which the offender was convicted if that jurisdiction differs from the jurisdiction of residence. *See* 34 U.S.C. 20913(a); 73 FR at 38061–62.

Section 72.5—How Long Sex Offenders Must Register

Section 72.5 sets out SORNA's requirements regarding the duration of registration. SORNA classifies sex offenders into three ''tiers,'' based on the nature and seriousness of their sex offenses and their histories of recidivism. *See* 34 U.S.C. 20911(2)–(4); 73 FR at 38052–54. The tier in which a sex offender falls affects how long the offender must continue to register under SORNA. The required registration periods are generally 15 years for a tier I sex offender, 25 years for a tier II sex offender, and life for a tier III sex offender. *See* 34 U.S.C. 20915(a); 73 FR at 38068. Paragraph (a) in § 72.5 reproduces these requirements.

Paragraph (a) of § 72.5 provides an exception ''when the sex offender is in custody or civilly committed,'' incorporating in substance an express proviso appearing in SORNA, 34 U.S.C. 20915(a). The exception and proviso mean that SORNA does not require a sex offender to carry out its processes for registering or updating registrations during subsequent periods of confinement, *e.g.,* when imprisoned because of conviction for some other offense following his release from imprisonment for the sex offense. This reflects that ''the SORNA procedures for keeping up the registration . . . generally presuppose the case of a sex offender who is free in the community'' and that ''[w]here a sex offender is confined, the public is protected against the risk of his reoffending in a more direct way, and more certain means are available for tracking his whereabouts.'' 73 FR at 38068. However, registration jurisdictions may see incremental value in requiring sex offenders to carry out their processes for registering and updating registrations during subsequent confinement and are free to do so, though SORNA does not require it.

The proviso relating to custody or civil commitment does not pertain to or limit SORNA's requirement that initial registration is to occur while the sex offender is still imprisoned following conviction for the predicate sex offense. *See* 34 U.S.C. 20913(b)(1), 20919(a). Rather, as indicated above, it affects a sex offender's registration obligations under SORNA if he is later reincarcerated after his release. The proviso relating to custody or civil commitment also does not mean that the running of the SORNA registration period is suspended during such subsequent confinement, and does not otherwise affect the commencement or duration of a sex offender's registration period under SORNA.

For example, consider a sex offender, released in 2010 from imprisonment for a sex offense conviction, whom SORNA requires to register for 25 years as a tier II sex offender, and suppose the sex offender is subsequently convicted during the registration period for committing a robbery and imprisoned for three years for the latter offense. SORNA's registration requirement for that sex offender terminates in 2035, although he was incarcerated for three years of the 25-year SORNA registration period. Sex offenders should keep in mind, however, that their registration jurisdictions are free to impose more

extensive requirements than SORNA, including longer registration periods. Hence, the basic registration period under the law of a jurisdiction in which such a sex offender is registered may be longer than 25 years. And even if the basic registration period under the jurisdiction's law is the same as the 25 years required by SORNA, the jurisdiction may choose not to credit the three years the sex offender spent in prison for the robbery towards the running of the registration period under state law. *See* 73 FR at 38032–35, 38046, 38068. Expiration of the SORNA registration period accordingly does not obviate the need for sex offenders to check with registration jurisdictions whether they remain subject to registration requirements under the jurisdictions' laws.

As provided in paragraph (b) of § 72.5, the registration period under SORNA begins to run upon release from imprisonment following a sex offense conviction, or at the time of sentencing for a sex offense where imprisonment does not ensue. *See* 73 FR at 38068. The sex offender's release from imprisonment, which marks the start of the registration period for an incarcerated sex offender, may occur later than the end of the sentence imposed for the sex offense itself. For example, suppose that a sex offender is convicted for a fatal sexual assault upon a victim, resulting in a sentence of three years of imprisonment for the sexual assault and a concurrent or consecutive sentence of 25 years of imprisonment for murder. Or consider a case in which a sex offender is sentenced to three years of imprisonment for a sexual assault and at a later time he is sentenced to 25 years of imprisonment for an unrelated murder, while still imprisoned for the sex offense. Or suppose that a sex offender is already serving a 25-year prison term for an unrelated murder, when he is sentenced to three years of imprisonment for a sexual assault. In all such cases, the registration period under SORNA starts to run when the sex offender actually completes his imprisonment and is released. It does not start to run while the sex offender is still imprisoned but has completed the portion of the sentence attributable to the sex offense.

This conclusion follows from the general design and specific requirements of SORNA's registration procedures. SORNA provides that incarcerated sex offenders must initially register ''before completing a sentence of imprisonment with respect to the [registration] offense.'' 34 U.S.C. 20913(b)(1). SORNA further states that the correlative responsibilities of registration officials in effecting the initial registration are to be carried out ''shortly before release of the sex offender from custody.'' *Id.* 20919(a); *see* 73 FR at 38063 (explaining requirement to register shortly before release from custody). Thereafter, sex offenders must ''keep the registration[s] current'' for specified periods of time, depending on their ''tier[s].'' 34 U.S.C. 20915(a). In light of these provisions, the registration period is logically understood as being framed at the start by the release from custody and at the end by the termination of the specified time period.

Considering specifically cases in which a sex offender is serving an aggregate prison term for multiple crimes, 34 U.S.C. 20913(b)(1) requires registration ''before completing a sentence of imprisonment *with respect to* the offense giving rise to the registration requirement.'' (Emphasis added). It does not require registration ''before completing a sentence of imprisonment *for* the offense giving rise to the registration requirement.'' The broader ''with respect to'' language is best understood to mean that the relevant prison term under section 20913(b)(1) is not the specific sentence imposed for the predicate sex offense alone, but rather is the full related sentence of imprisonment, including any prison time imposed for other crimes. The corresponding language in section 20919(a) supports this understanding, requiring initial registration of the sex offender ''shortly before release of the sex offender from custody.'' This language does not signify that initial registration is to occur when the sex offender is about to complete the portion of an aggregate sentence attributable specifically to the sex offense, though the sex offender will remain in custody because he is serving additional time for another offense or offenses. Rather, by its terms, section 20919(a) contemplates that initial registration will occur shortly before the sex offender is actually released, and section 20913(b)(1) must be understood in the same way, because section 20913(b)(1) and section 20919(a) describe the same transaction (initial registration) from different perspectives.

For example, consider the case of a sex offender convicted and sentenced for a fatal sexual assault, resulting in a three-year prison term for the sexual assault and a concurrent or consecutive 25-year sentence for murder. Suppose that the sexual assault involved was a sexual contact offense against an adult victim, resulting in the classification of the sex offender as a tier I sex offender and a registration period of 15 years. *See* 34 U.S.C. 20911(2)–(4), 20915(a)(1). If the registration period started to run at the end of the first three years of the sex offender's incarceration, then the 15-year registration period would expire long before the sex offender's release, because of the extension of his imprisonment by the murder sentence. This result would be at odds with section 20919(a)'s direction that sex offenders are to be initially registered ''shortly before release . . . from custody,'' because the sex offender's registration obligation under SORNA would be a thing of the past by that time, and also with the requirements under sections 20913 and 20915(a)(1) that the sex offender register and keep the registration current for 15 years, because his registration period would be over before he registered in the first place.

In addition to the inconsistency with the statutory provisions discussed above, starting the running of the registration period upon the conclusion of the portion of a sentence attributable to the registration offense would result in arbitrary differences in registration requirements, depending on fortuities in the structuring of criminal sentences or their descriptions in judgments. For example, considering again the case of a fatal sexual assault, suppose that the resulting sentence involves a three-year prison term for the sexual assault, followed by a consecutive 25-year prison term for murder. As discussed above, the assumed 15-year registration period for the sexual assault would then run out long before the sex offender's release, and he would never have to register at all. But suppose the sentence is cast instead as a 25-year prison term for murder, followed by a consecutive three-year prison term for the sexual assault. The completion of the prison term for the sexual assault would then coincide with the sex offender's release from prison, and he would have to register and keep the registration current for 15 years. Because the ordering of the sexual assault and murder sentences has no relevance to the public safety purposes served by sex offender registration, the discrepancy between the two cases as to resulting registration requirements would be irrational. For this reason as well, the registration period under SORNA starts to run when the sex offender is actually released, and not at an earlier time upon completion of the portion of an aggregate sentence specifically attributable to the predicate sex offense.

By way of comparison, an offender's term of post-imprisonment supervised release for a sex offense does not start to run until he is released from prison,

including in cases in which the offender's release is delayed by his serving additional prison time for another offense or offenses. This is not unfair or illogical; it rationally reflects the nature of supervision as a measure designed for overseeing and managing offenders following their release. While sex offender registration differs from supervision in being a non-punitive, civil regulatory measure, *see, e.g., Smith,* 538 U.S. at 92–106; *Felts,* 674 F.3d at 605–06, it is likewise concerned with the post-release treatment of sex offenders in the community. Hence, as with periods of supervision, it is rational for an offender's registration period for a sex offense to begin to run when he is released from prison, including in cases in which the offender's release is delayed by his serving additional prison time for other criminal conduct. This reflects the nature of registration as a measure designed for tracking and monitoring sex offenders following their release.

The principle that the registration period under SORNA commences on release also applies to cases in which the sex offender is not imprisoned for the sex offense per se but is imprisoned because of conviction for another offense. For example, suppose that a sex offender is convicted of sexually assaulting and robbing a victim, resulting in a sentence of probation for the sexual assault and a sentence of five years of imprisonment for the robbery. Considering the relevant statutory provisions, section 20913(b)(2) makes applicable an alternative time for initial registration—three business days after sentencing—only ''if the sex offender is not sentenced to a term of imprisonment.'' Correspondingly, section 20919(a) provides for initial registration immediately after sentencing, rather than shortly before release from custody, only ''if the sex offender is not in custody.'' These provisions, by their terms, do not apply to a sex offender who remains in custody, though on the basis of an offense other than the predicate sex offense. Hence, cases of this nature must fall under the requirement of sections 20913(b)(1) and 20919(a) to effect initial registration shortly before the sex offender's release, and the consequences are the same as in the cases discussed above involving aggregate prison terms for the registration offense and other crimes. Where the sex offender receives a non-incarcerative sentence for the registration offense and a prison term for another offense, the registration period starts upon the sex offender's release, so that once registered and out in the community he must keep the registration current for the full registration period specified in 34 U.S.C. 20915, and not just for a truncated period reduced by his incarceration for another offense.

In terms of underlying policy, registration is by definition concerned with tracking sex offenders in the community following their release. *See* 73 FR at 38044–45. The tiers and the associated registration periods under SORNA reflect categorical legislative judgments as to how long sex offenders should be tracked following release for public safety purposes. These judgments do not come into play until the sex offender is released. When that happens may be affected by many factors—such as the length of the prison term the sex offender receives for the sex offense; whether the sex offender makes parole (in a state system having parole) or gets good-conduct credit; whether the jurisdiction adopts an early release program because of prison crowding; and whether the sex offender gets additional prison time because of sentencing for other offenses, related or unrelated to the sex offense.

Whatever the reasons may be, it is logical to start a post-release tracking regime—*i.e.,* registration—when the sex offender is actually released. Initial registration is to occur ''shortly before'' that, as 34 U.S.C. 20919(a) requires, ''in light of the underlying objectives of ensuring that sex offenders have their registration obligations in mind when they are released, and avoiding situations in which registration information changes significantly between the time the initial registration procedures are carried out and the time the offender is released.'' 73 FR at 38063.

Hence, the registration period under SORNA starts to run when a sex offender is released from imprisonment, and not at an earlier time when the specific sentence for the registration offense has been served, if the two times differ. This follows from the features of the statutory provisions discussed above, from the absurdities entailed by a different interpretation, and from the basic character of registration as a post-release tracking measure. To the extent that there might be any uncertainty or argument to the contrary, the Attorney General in this rule exercises his authority under 34 U.S.C. 20912(b) to interpret and implement SORNA's provisions affecting the duration of registration in the manner stated.

Paragraph (c) in § 72.5 sets out SORNA's reduction of its registration period for certain sex offenders who maintain a ''clean record'' in accordance with statutory standards. The specific ''clean record'' conditions are that the sex offender not be convicted of any felony or any sex offense, successfully complete any period of supervision, and successfully complete an appropriate sex offender treatment program (certified by a registration jurisdiction or the Attorney General). The SORNA registration period is reduced by five years for a tier I sex offender who maintains a clean record for 10 years, and reduced to the period for which the clean record is maintained for a tier III sex offender required to register on the basis of a juvenile delinquency adjudication who maintains a clean record for 25 years. *See* 34 U.S.C. 20915(a), (b); 73 FR at 38068–69.

Section 72.6—Information Sex Offenders Must Provide

Section 72.6 sets out the registration information sex offenders must provide. Much of the specified information is expressly required by SORNA, *see* 34 U.S.C. 20914(a)(1)–(7), and the remainder reflects SORNA's direction that sex offenders must provide ''[a]ny other information required by the Attorney General,'' *id.* 20914(a)(8).

In general terms, the required information comprises (i) name, birth date, and Social Security number; (ii) remote communication identifiers (including email addresses and telephone numbers); (iii) information about places of residence, non-residential lodging, employment, and school attendance; (iv) international travel; (v) passports and immigration documents; (vi) vehicle information; and (vii) professional licenses. By providing basic information about who a sex offender is, where he is, how he gets around, and what he is authorized to do, these requirements implement SORNA and further its public safety objectives.

Paragraph (a)(1) of § 72.6 requires that a sex offender provide his name, including any alias, which is an express SORNA requirement. *See* 34 U.S.C. 20914(a)(1); 73 FR at 38055.E0.

Paragraph (a)(2) of § 72.6 requires a sex offender to provide date of birth information, a requirement the Attorney General has adopted in the SORNA Guidelines and this rule because date of birth information is regularly utilized as part of an individual's basic identification information and hence is of value in helping to identify, track, and locate registered sex offenders. The paragraph requires that any date that the sex offender uses as his or her purported date of birth must be provided, in addition to the actual date of birth, because sex offenders may, for example,

provide false date of birth information in seeking employment that would provide access to children or other potential victims. *See* 73 FR at 38057.

Paragraph (a)(3) of § 72.6 requires that a sex offender provide his Social Security number, which is an express SORNA requirement. *See* 34 U.S.C. 20914(a)(2). The paragraph further requires provision of any number that a sex offender uses as his purported Social Security number. The Attorney General has adopted the latter requirement—already appearing in the SORNA Guidelines in 2008—because sex offenders may, for example, attempt to use false Social Security numbers in seeking employment that would provide access to children or other potential victims. *See* 73 FR at 38055.

Paragraph (b) of § 72.6 requires a sex offender to provide all remote communication identifiers that he uses in internet or telephonic communications or postings, including email addresses and telephone numbers. A provision of the Keeping the internet Devoid of Sexual Predators Act of 2008 (KIDS Act), Public Law 110–400, directed the Attorney General to use the authority under paragraph (7) of 34 U.S.C. 20914(a) [now designated paragraph (8)] to require sex offenders to provide internet identifiers. The Attorney General has previously exercised that authority to require the specified information in the SORNA Guidelines. *See* 34 U.S.C. 20916(a); 73 FR at 38055; 76 FR at 1637. The Attorney General has exercised the same authority to require telephone numbers—a requirement also already appearing in the SORNA Guidelines—for a number of reasons, including facilitating communication between registration personnel and sex offenders, and addressing the potential use of telephonic communication by sex offenders in efforts to contact or lure potential victims. *See* 73 FR at 38055.

Paragraph (c)(1) of § 72.6 requires a sex offender to provide residence address information or other residence location information if the sex offender lacks a residence address. Providing residence address information is an express SORNA requirement. *See* 34 U.S.C. 20914(a)(3). In the SORNA Guidelines, and now in this rule, the Attorney General has adopted the requirement to provide other residence location information for sex offenders who do not have residence addresses, such as homeless sex offenders or sex offenders living in rural areas that lack street addresses, because having this type of location information serves the same public safety purposes as knowing the whereabouts of sex offenders with definite residence addresses. *See* 73 FR at 38055–56, 38061–62.

Paragraph (c)(2) of § 72.6 requires a sex offender to provide information about temporary lodging while away from his residence for seven or more days. In the SORNA Guidelines, and now in this rule, the Attorney General has adopted this requirement because sex offenders may reoffend at locations away from the places in which they have a permanent or long-term presence, and indeed could be encouraged to do so to the extent that information about their places of residence is available to the authorities but information is lacking concerning their temporary lodgings elsewhere. The benefits of having this information include facilitating the successful investigation of crimes committed by sex offenders while away from their normal places of residence and discouraging sex offenders from committing crimes in such circumstances. *See* 73 FR at 38056.

Paragraph (c)(3) of § 72.6 requires a sex offender to provide employer name and address information, or other employment location information if the sex offender lacks a fixed place of employment. Providing employer name and address information is an express SORNA requirement. *See* 34 U.S.C. 20914(a)(4). The Attorney General has adopted, in the SORNA Guidelines and this rule, the requirement to provide other employment location information for sex offenders who work but do not have fixed places of employment—*e.g.,* a long-haul trucker whose ''workplace'' is roads and highways throughout the country, a self-employed handyman who works out of his home and does repair or home improvement work at other people's homes, or a person who frequents sites that contractors visit to obtain day labor and works for any contractor who hires him on a given day. The Attorney General has adopted this requirement because knowing where such sex offenders are in the course of employment serves the same public safety purposes as knowing the whereabouts of sex offenders who work at fixed locations. *See* 73 FR at 38056, 38062.

Paragraph (c)(4) of § 72.6 requires a sex offender to provide the name and address of any place where the sex offender is or will be a student, an express SORNA requirement. *See* 34 U.S.C. 20914(a)(5); 73 FR at 38056–57, 38062.

Paragraph (d) of § 72.6 requires a sex offender to provide information about intended travel outside of the United States. This is an express SORNA requirement, added by International Megan's Law. *See* 34 U.S.C. 20914(a)(7); Public Law 114–119, sec. 6(a)(1). A related provision in § 72.7(f) of this rule requires sex offenders to report international travel information at least 21 days in advance. Exercising the general authority under paragraph (8) of 34 U.S.C. 20914(a) [then designated paragraph (7)] to expand the required range of registration information, the Attorney General initially adopted these requirements in the SORNA Supplemental Guidelines, *see* 76 FR at 1637–38, even before the enactment of International Megan's Law, for a number of reasons:

(i) Realizing SORNA's public safety objectives requires that registered sex offenders be effectively tracked as they leave and return to the United States, and that other sex offenders who enter the United States be identified, so that domestic registration and law enforcement authorities know about the sex offenders' presence in the United States and can ensure that they register while here as SORNA requires. To that end, SORNA directs the Attorney General to establish and maintain a system for informing relevant registration jurisdictions about persons entering the United States whom SORNA requires to register. *See* 34 U.S.C. 20930. Sections 72.6(d) and 72.7(f) of this rule are part of that system, requiring registered sex offenders to inform their registration jurisdictions about travel abroad, including information that encompasses both their departure from and return to the United States. Beyond this direct benefit, learning about sex offenders' entry into the United States may depend on notice from the authorities of the countries they come from—authorities who may expect reciprocal notice about sex offenders traveling to their countries from the United States. Having U.S. sex offenders inform their registration jurisdictions of travel abroad provides information that is used by U.S. authorities, including the U.S. Marshals Service and INTERPOL Washington-U.S. National Central Bureau, to notify the authorities in the destination countries about sex offenders traveling to their areas. These foreign authorities may in return advise U.S. authorities about sex offenders traveling to the United States from their countries, facilitating the notification of domestic registration jurisdictions about the sex offenders' presence that section 20930 contemplates. *See* 73 FR at 38066; 76 FR at 1637.

(ii) Sex offenders traveling abroad may remain subject in some respects to U.S. jurisdiction, *e.g.,* because a sex offender intends to go to an overseas

U.S. military base or to work as or for a U.S. military contractor in another country. In such cases, the intended travel of the sex offender may implicate the same public safety concerns in relation to communities abroad for which the United States has responsibility as it does in relation to communities within the United States. *See* 73 FR at 38067; 76 FR at 1637–38.

(iii) More broadly, for a sex offender disposed to reoffend, it may be attractive to travel to foreign countries where law enforcement is weaker (or perceived to be weaker), where sexually trafficked children or other vulnerable victims may be more readily available, and where the registration and notification measures to which the sex offender is subject in the United States are inoperative. The United States does not wish to export the public safety threat posed by its sex offenders to other countries. Requiring sex offenders in the United States to inform their registration jurisdictions about international travel provides a basis for notifying foreign authorities in the destination countries, which helps to reduce the resulting risks. If these sex offenders do reoffend in other countries, the resulting human harm to victims is no less because it occurs in a foreign country, and the United States' image and foreign relations interests may be adversely affected as well. Sex offenders from the United States who commit sex offenses in other countries may be subject to prosecution under various Federal laws, which reflect the United States' policy of, and commitment to, combating the commission of crimes of sexual abuse and exploitation internationally as well as domestically. *See, e.g.,* 18 U.S.C. 1591, 2251(c), 2260, 2423. Consistent tracking of international travel by sex offenders helps to deter and prevent such crimes, and to facilitate their investigation if they occur.

Beyond creating a general requirement to report travel outside of the United States at least 21 days in advance, the SORNA Supplemental Guidelines authorized the requirement of more definite information about international travel plans. 76 FR at 1638 (additional directions may be issued by the SMART Office ''concerning the information to be required in sex offenders' reports of intended international travel, such as information concerning expected itinerary, departure and return dates, and means and purpose of travel''); *see* Notice of International Travel, *https://smart.ojp.gov/sorna/notice-international-travel* (providing such directions). Section 72.6(d) in this rule specifically directs sex offenders traveling abroad to report information regarding any anticipated itinerary, dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination countries and address or contact information therein, and means and purpose of travel. More detailed information of this type is needed because notice only that a sex offender intends to travel somewhere outside of the United States at some time three weeks or more in the future would be inadequate to realize the objectives of international tracking of sex offenders—objectives that include, as discussed above, notification as appropriate of U.S. and foreign authorities in destination countries for public safety purposes, preventing and detecting the offenders' commission of sex offenses in other countries, and reliably tracking sex offenders as they leave and enter the United States for purposes of enforcing registration requirements. Requiring the specified information concerning international travel is justified by its value in furthering these objectives. *See* 73 FR at 38066–67; 76 FR at 1634, 1637–38.

Congress endorsed these objectives and the stated conclusion in International Megan's Law, whose purposes include ''[t]o protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism, by providing advance notice of intended travel by registered sex offenders outside the United States to the government of the country of destination [and] requesting foreign governments to notify the United States when a known sex offender is seeking to enter the United States.'' Public Law 114–119; *see* 162 Cong. Rec. H390–94 (Feb. 1, 2016) (explanation in House floor debate on passage). As noted above, the measures adopted by International Megan's Law in support of its international notification system include an express requirement that sex offenders report intended international travel, making this requirement a permanent feature of SORNA that exists independently of regulatory action. *See* 34 U.S.C. 20914(a)(7); Public Law 114–119, sec. 6(a)(1).

Section 72.6(d) in this rule follows the new SORNA travel information provision added by International Megan's Law, which states that sex offenders must provide ''[i]nformation relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.'' 34 U.S.C. 20914(a)(7). A sex offender must report all anticipated information in these categories in relation to both the United States and destination countries as the language of § 72.6(d) makes clear. For example, a sex offender who is leaving the United States must report any anticipated date and place of departure from the United States, and also any anticipated date and place of return to the United States if the sex offender expects to return. Likewise, with respect to each foreign country to be visited, the sex offender must report any anticipated date and place of arrival in that country and any anticipated date and place of departure from that country.

Paragraph (e) of § 72.6 requires a sex offender to provide information concerning any passport or passports he has, and concerning documents establishing his immigration status if he is an alien. The passports referenced in the paragraph include passports of all types and nationalities, not just U.S. passports. Where the sex offender has multiple passports, as may occur, for example, in cases involving dual citizenship, the paragraph's reference to ''each passport'' the sex offender has means that the sex offender must report all of his passports. The Attorney General has included information about passports and immigration documents as required registration information in the SORNA Guidelines and in this rule because having this type of information in the registries serves various purposes. These include locating and apprehending registrants who may attempt to leave the United States after committing new sex offenses or registration violations, facilitating the tracking and identification of registrants who leave the United States but later reenter while still required to register, *see* 34 U.S.C. 20930, and crosschecking the accuracy and completeness of other types of information that registrants are required to provide—*e.g.,* if immigration documents show that an alien registrant is in the United States on a student visa but the registrant fails to provide school attendance information as required by 34 U.S.C. 20914(a)(5). *See* 73 FR at 38056.

Paragraph (f) of § 72.6 requires a sex offender to provide information concerning any vehicle owned or operated by the sex offender, information concerning the license plate number or other registration number or identifier for the vehicle, and information as to where the vehicle is habitually kept. In part, the paragraph reflects the express SORNA requirement

in 34 U.S.C. 20914(a)(6) that a sex offender provide ''[t]he license plate number and a description of any vehicle owned or operated by the sex offender.'' This includes, in addition to vehicles registered to the sex offender, any vehicle that the sex offender regularly drives, either for personal use or in the course of employment. *See* 73 FR at 38057. The remainder of the paragraph reflects the Attorney General's requirement (previously adopted in the SORNA Guidelines) of additional vehicle-related information that serves similar purposes or may be useful to help prevent flight, facilitate investigation, or effect an apprehension if the sex offender commits new offenses or violates registration requirements. *See id.*

Paragraph (g) of § 72.6 requires a sex offender to provide information concerning all licensing of the offender that authorizes him to engage in an occupation or carry out a trade or business. The Attorney General has adopted this requirement, initially in the SORNA Guidelines and now in this rule, because information of this type (i) may be helpful in locating a registered sex offender if he absconds, (ii) may provide a basis for notifying the responsible licensing authority if the offender's conviction of a sex offense may affect his eligibility for the license, and (iii) may be useful in crosschecking the accuracy and completeness of other information the offender is required to provide—*e.g.,* if the sex offender is licensed to engage in a certain occupation but does not provide name or place of employment information as required by 34 U.S.C. 20914(a)(4) for such an occupation. *See* 73 FR at 38056.

Section 72.7—How Sex Offenders Must Register and Keep the Registration Current

SORNA requires sex offenders to register and keep the registrations current in jurisdictions in which they reside, work, or attend school. Section 72.7 sets out the procedures for doing so, addressing the timing requirements for registering and updating registrations, the jurisdictions to which changes in registration information must be reported, and the means for reporting such changes. In general terms, the section requires (i) initial registration before release from imprisonment, or within three business days after sentencing if the sex offender is not imprisoned; (ii) periodic in-person appearances to verify and update the registration information; (iii) reporting of changes in name, residence, employment, or school attendance; (iv) reporting of intended departure or termination of residence, employment, or school attendance in a jurisdiction; (v) reporting of changes relating to remote communication identifiers, temporary lodging information, and vehicle information; (vi) reporting of international travel; and (vii) compliance with a jurisdiction's rules if a sex offender has not complied with the normal time and manner specifications for carrying out a SORNA requirement.

The requirements articulated in this section in part appear expressly in SORNA and in part reflect exercises of the powers SORNA confers on the Attorney General to further specify its requirements. The authorities relied on include the following:

SORNA directs the Attorney General to issue rules and guidelines to ''interpret and implement'' its provisions, which include the basic requirement that each sex offender must ''register . . . and keep the registration current.'' 34 U.S.C. 20912(b), 20913(a). Previously in the SORNA Guidelines, *see* 73 FR at 38062–67, and now in this rule, the Attorney General interprets his authority to ''interpret and implement'' SORNA as including the authority to articulate a comprehensive, gap-free set of procedural requirements for registering and updating registrations. Authority of this nature is needed to implement SORNA in conformity with the legislative objective of protecting the public from sex offenders by establishing a comprehensive national system for their registration. 34 U.S.C. 20901. Beyond the public safety need, this understanding of section 20912(b) ''takes Congress to have filled potential lacunae'' in SORNA in a manner consistent with fair notice concerns, empowering the Attorney General to eliminate any ''vagueness and uncertainty'' regarding how sex offenders are to comply with SORNA's registration requirements. *Reynolds,* 565 U.S. at 441–42.

The Attorney General's authority to interpret and implement SORNA includes in particular the authority to adopt additional specifications regarding the time and manner in which its requirements must be carried out. For example, SORNA expressly requires that sex offenders must appear in person to report changes of name, residence, employment, and student status within three business days of such changes. 34 U.S.C. 20913(c). But SORNA does not expressly require the reporting within a particular timeframe of changes relating to other types of registration information that also bear directly and importantly on the identification, tracking, and location of sex offenders. These include remote communication identifiers (such as email addresses), temporary lodging information, international travel information, and vehicle information, as described in § 72.6(b), (c)(2), (d), and (f) of this rule. Absent a requirement that changes in these types of information be reported promptly, the information in the registries about these matters could become seriously out of date, which would in turn impair SORNA's basic objective of effectively tracking and locating sex offenders in the community following their release. *See* 73 FR at 38044–45, 38066–67. The Attorney General accordingly has adopted definite timing requirements for reporting changes in these types of information, previously in the guidelines for SORNA implementation, and now in § 72.7(e)–(f) in this rule.

Adopting such rules reflects an exercise of the Attorney General's authority to ''interpret and implement'' SORNA, 34 U.S.C. 20912(b), and more specifically to interpret and implement SORNA's requirement that sex offenders must ''keep the registration current,'' *id.* 20913(a). While the heading of subsection (c) of section 20913 is ''[k]eeping the registration current,'' the heading only signifies that the subsection sets out an updating rule for the most basic types of registration information. It does not signify that nothing more can be required to keep the registration current. The contrary is evident from section 20915(a), which specifies the duration of required registration under SORNA. Section 20915(a) uses the same terminology, stating that a sex offender ''shall keep the registration current'' for the relevant period of time. Obviously, in providing that a sex offender must ''keep the registration current'' for a specified period, section 20915(a) defines the period of time during which a sex offender must continue to comply with all of SORNA's requirements, given the absence of any other provision in SORNA specifying how long sex offenders must comply with its various requirements. Among other consequences, this means that sex offenders must appear in person periodically to verify and update their registration information, as required by section 20918, for the specified period of time—not just that they must report changes in name, residence, employment, and school attendance, as provided in section 20913(c), for the specified period of time. That consideration alone demonstrates that section 20913(c) does not exhaust SORNA's requirements for ''keep[ing] the registration current.''

Regarding other matters, such as changes in registration information relating to remote communication identifiers, temporary lodging, vehicles, and international travel, the Attorney General has understood the authority to interpret and implement SORNA's requirement to keep the registration current as including the authority to adopt specific time and manner requirements for the reporting of such changes. Congress ratified this understanding in the KIDS Act. In that Act, Congress provided that (i) ''[t]he Attorney General, using the authority provided in [34 U.S.C. 20914(a)(8)], shall require that each sex offender provide to the sex offender registry those internet identifiers the sex offender uses or will use'' and (ii) ''[t]he Attorney General, using the authority provided in [34 U.S.C. 20912(b)], shall specify the time and manner for keeping current information required to be provided under this section.'' 34 U.S.C. 20916(a)–(b). Notably, Congress did not find it necessary to make new grants of authority to the Attorney General for these purposes and instead directed the Attorney General to utilize the pre-existing authorities under SORNA to require internet identifier information and specify the time and manner for keeping it current. This confirms that the section 20912(b) authority includes the authority to adopt additional time and manner requirements in the rules and guidelines the Attorney General issues.

SORNA directs sex offenders to provide for inclusion in the sex offender registry several expressly described types of registration information and, in addition, ''[a]ny other information required by the Attorney General.'' *Id.* 20914(a)(8). The section 20914(a)(8) authority underlies the specification of required types of registration information in § 72.6 in this rule beyond those expressly set forth in section 20914(a)(1)–(7). The section 20914(a)(8) authority also provides an additional, independent legal basis for various requirements in § 72.7, including a number of timing rules it incorporates.

In relation to some types of required registration information under this rule, which may be based wholly or in part on the exercise of the Attorney General's authority under section 20914(a)(8), a timing requirement is inherent in the nature of the information that must be reported. This is true of the requirement under § 72.7(d) to report if a sex offender will be commencing residence, employment, or school attendance elsewhere or will be terminating residence, employment, or school attendance in a jurisdiction. It is likewise true of the requirement under § 72.7(f) to report intended international travel. Because these provisions constitute requirements to report present intentions regarding expected future actions, the information they require necessarily must be reported in advance of the expected actions.

Section 20914(a)(8) also provides an additional, independent legal basis for more specific timeframe requirements appearing in § 72.7 of this rule. One of these requirements is that intended international travel is to be reported at least 21 days in advance of the travel, as provided in § 72.7(f). In substance, this is a requirement that a sex offender report to the residence jurisdiction an intention to travel outside of the United States at some time 21 days or more in the future. Viewing the expected timing of the travel as an aspect of the required information, it is within the Attorney General's authority under 34 U.S.C. 20914(a)(8) to require sex offenders to provide ''[a]ny other information''—and following the adoption of section 20914(a)(7) by International Megan's Law, within the Attorney General's more specific authority under the latter provision to require ''any other . . . travel-related information.'' Essentially the same point applies to the rule's specification that sex offenders must report within three business days changes relating to certain types of registration information the Attorney General has required. Section 72.7(e) directs reporting of changes in information within that timeframe relating to remote communication identifiers, temporary lodging, and vehicles. Viewed as requirements to report the information that certain actions or occurrences have taken place within the preceding three business days, these requirements are within the Attorney General's authority under 34 U.S.C. 20914(a)(8).

Turning to another SORNA provision supporting time and manner requirements, 34 U.S.C. 20913(d) authorizes the Attorney General to specify the applicability of SORNA's requirements to sex offenders convicted before the enactment of SORNA or its implementation in a particular jurisdiction ''and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).'' The cross-referenced ''subsection (b)'' is the SORNA provision that requires sex offenders to register initially before release from imprisonment, or within three business days of sentencing if the sex offender is not imprisoned. As discussed below in connection with § 72.7(a)(2) of this rule, sex offenders released from Federal or military custody and sex offenders convicted in foreign countries generally are unable to register prior to release. The section 20913(d) authority to prescribe registration rules for sex offenders ''unable to comply with subsection (b)'' accordingly provides one of the legal bases for the alternative timing rules in § 72.7(a)(2), which direct registration by sex offenders in the affected classes within three business days of entering a jurisdiction following release.

The authorities described above—under 34 U.S.C. 20912(b), 20913(d), and 20914(a)(8)—provided the basis for the Attorney General's adoption of time and manner specifications for complying with SORNA's registration requirements in previously issued guidelines under SORNA. More recently, International Megan's Law added an express, general grant of authority to the Attorney General to make such specifications. The relevant provision is 34 U.S.C. 20914(c), which reads as follows: ''(c) TIME AND MANNER.—A sex offender shall provide and update information required under subsection (a), including information relating to intended travel outside the United States required under paragraph (7) of that subsection, in conformity with any time and manner requirements prescribed by the Attorney General.''

The cross-referenced ''subsection (a)'' is SORNA's list of all the registration information that sex offenders must provide. Hence, the new section 20914(c) requires sex offenders to comply with the Attorney General's directions regarding the time and manner for providing and updating all registration information required by SORNA. In addition to empowering the Attorney General to specify the time and manner for reporting particular types of registration information, this provision enables the Attorney General to specify the time and manner for registration. This is so because registration on the part of a sex offender consists of providing required registration information to the registration jurisdiction for inclusion in the sex offender registry. Given that the Attorney General has the authority under section 20914(c) to specify the time and manner for a sex offender's provision of each required type of registration information, it follows that the Attorney General has the authority under section 20914(c) to specify the time and manner for a sex offender's provision of the required types of information collectively, which constitutes registration under SORNA.

Paragraph (a)—Initial Registration

Paragraph (a)(1) of § 72.7 tracks SORNA's general rule that a sex offender must initially register—that is, register for the first time based on a sex offense conviction—before release from imprisonment, or within three business days of sentencing in case of a non-incarcerative sentence. *See* 34 U.S.C. 20913(b) (initial registration by sex offenders); *id.* 20919(a) (complementary duties of registration officials); 73 FR at 38062–65 (related explanation in guidelines).

Paragraph (a)(2)(i) of § 72.7 addresses the situation of sex offenders who are released from Federal or military custody or sentenced for a Federal or military sex offense. There is no separate Federal registration program for such offenders. Hence, Federal authorities cannot register these offenders prior to their release from custody or near the time of sentencing. This is in contrast to the authorities of the SORNA registration jurisdictions—the states, the District of Columbia, the five principal U.S. territories, and qualifying Indian tribes—who may register their sex offenders prior to release or near sentencing as provided in 34 U.S.C. 20913(b), 20919(a). SORNA instead enacted special provisions under which Federal correctional and supervision authorities (i) are required to inform Federal (including military) offenders with sex offense convictions that they must register as required by SORNA and (ii) must notify the (non-Federal) jurisdictions in which the sex offenders will reside following release or sentencing so that these jurisdictions can integrate the sex offenders into their registration programs. *See* 18 U.S.C. 4042(c); Public Law 105–119, sec. 115(a)(8)(C), as amended by Public Law 109–248, sec. 141(i) (10 U.S.C. 951 note); 73 FR at 38064; *see also* 18 U.S.C. 3563(a)(8); *id.* 3583(d) (third sentence); *id.* 4209(a) (second sentence) (mandatory Federal supervision condition to comply with SORNA); 34 U.S.C 20931 (requiring the Secretary of Defense to provide to the Attorney General military sex offender information for inclusion in the National Sex Offender Registry and National Sex Offender Public website).

The timing rule adopted for such situations is that sex offenders released from Federal or military custody or convicted of Federal or military sex offenses but not sentenced to imprisonment must register within three business days of entering or remaining in a jurisdiction to reside, *see* 73 FR at 38064, which parallels SORNA's normal timeframe for registering or updating a registration following changes of residence, *see* 34 U.S.C. 20913(c). Section 72.7(a)(2)(i) refers to a sex offender entering ''or remaining'' in a jurisdiction to reside because, for example, a Federal sex offender released from a Federal prison located in a state may remain in that state to reside, rather than relocating to some other state. In such a case, the three-business-day period for registering with the state runs from the time of the sex offender's release.

In terms of legal authority, the requirement of § 72.7(a)(2)(i) is supported by the Attorney General's authority to interpret and implement SORNA's requirement to register in the jurisdiction of residence, 34 U.S.C. 20912(b), 20913(a); the Attorney General's authority under section 20913(d) to prescribe rules for the registration of sex offenders who are unable to comply with section 20913(b)'s timing rule for initial registration; and the Attorney General's authority under section 20914(c) to adopt time and manner specifications for providing and updating registration information, which includes the authority to adopt time and manner specifications for registration as discussed above. Viewing a sex offender's being released from Federal or military custody and taking up residence in a jurisdiction as a change of residence, this requirement is also supportable as a direct application of section 20913(c).

Paragraph (a)(2)(ii) of § 72.7 addresses the situation of persons required to register on the basis of foreign sex offense convictions. Registration by the convicting state is not an available option under SORNA in such cases because foreign states are not registration jurisdictions under SORNA. *See* 34 U.S.C. 20911(10). Also, there may be no domestic jurisdiction in which SORNA requires such offenders to register—if they are not residing, working, or attending school in the United States at the time they are released from custody or sentenced in the foreign country—but SORNA's requirements will apply if they travel or return to the United States. The rule adopted for foreign conviction situations is that the sex offender must register within three business days of entering a domestic jurisdiction to reside, work, or attend school, *see* 73 FR at 38050–51, 38064–65, which parallels SORNA's normal timeframe for registering or updating a registration following changes of residence, employment, or student status, *see* 34 U.S.C. 20913(c).

In terms of legal authority, this requirement is supported by the Attorney General's authority to interpret and implement SORNA's requirement to register in jurisdictions of residence, employment, and school attendance, 34 U.S.C. 20912(b), 20913(a); the Attorney General's authority under section 20913(d) to prescribe rules for the registration of sex offenders who are unable to comply with section 20913(b)'s timing rule for initial registration; and the Attorney General's authority under section 20914(c) to adopt time and manner specifications for providing and updating registration information, which includes the authority to adopt time and manner specifications for registration as discussed above. Insofar as a sex offender's travel or return to the United States following a foreign conviction involves a change of residence, employment, or student status, this requirement is also supportable as a direct application of section 20913(c).

Paragraph (b)—Periodic In-Person Verification

Paragraph (b) of § 72.7 sets out the express requirement of 34 U.S.C. 20918 that sex offenders periodically appear in person in the jurisdictions in which they are required to register, allow the jurisdictions to take current photographs, and verify their registration information, with the frequency of the required appearances determined by their tiering. *See* 73 FR at 38067–68.

The second sentence of paragraph (b), exercising the Attorney General's authority under 34 U.S.C. 20912(b), interprets and implements section 20918's requirement of verifying the information in each registry to include correcting any information that is out of date or inaccurate and reporting any new registration information. With respect to most types of registration information, other provisions of § 72.7 require reporting of changes within shorter timeframes than the intervals between periodic in-person appearances for verification. Hence, a sex offender who has complied with SORNA's requirements is likely to have reported changes in most types of registration information prior to his next verification appearance. But § 72.7 does not specially address the time and manner for reporting changes in some types of registration information. *See* § 72.6(a)(2)–(3), (e), (g) (requiring as well information concerning actual and purported dates of birth and Social Security numbers, passports and immigration documents, and professional licenses). Sex offenders can

keep their registrations current with respect to the latter categories of information by reporting any changes in their periodic verifications. *See* 73 FR at 38067–68.

Paragraph (c)—Reporting of Initiation and Changes Concerning Name, Residence, Employment, and School Attendance

Paragraph (c) of § 72.7 is based on SORNA's express requirement that ''[a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to [34 U.S.C. 20913(a)] and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.'' 34 U.S.C. 20913(c); *see* 73 FR at 38065–66.

While SORNA provides a definite timeframe for reporting these changes (within three business days), specifies a means of reporting (through in-person appearance), and requires reporting of a change in ''at least 1 jurisdiction,'' it does not specify the particular jurisdiction in which each kind of change—*i.e.,* change in name, residence, employment, or school attendance—is to be reported. As discussed earlier, the Attorney General's authority under 34 U.S.C. 20912(b) to interpret and implement SORNA includes the authority to further specify the manner in which changes in registration information are to be reported where there are such gaps or ambiguities in SORNA's statutory provisions. In addition, the Attorney General now has express authority under 34 U.S.C. 20914(c) to prescribe the manner in which all required registration information is to be provided and updated. Exercising those authorities in paragraph (c) in § 72.7, the Attorney General interprets and implements the requirement of section 20913(c), and prescribes the manner in which sex offenders must provide and update information about name, residence, employment, or student status, by specifying the particular jurisdiction in which a sex offender must appear to report the changes section 20913(c) describes—in the residence jurisdiction to report a change of name or residence, in the employment jurisdiction to report a change of employment, and in the jurisdiction of school attendance to report a change in school attendance. *See* 73 FR at 38065.

For example, suppose that a sex offender resides in state A and commutes to work in State B. Pursuant to 34 U.S.C. 20913(a), the sex offender must register in both states—in State A as his residence state, and in State B as his employment state. Suppose that the sex offender changes his place of residence in State A and continues to work at the same place in State B. Logically, the sex offender should carry out his in-person appearance in State A to report his change of residence in State A, rather than in State B, where his contact with the latter state (employment) has not changed. Conversely, varying the example, suppose that the sex offender changes his place of employment from one employer to another in State B, but continues to reside in the same place in State A. The sex offender should carry out his in-person appearance in state B to report his change of employment in State B, rather than in State A, where his contact with the latter state (residence) has not changed.

These conclusions follow from the underlying policies of SORNA's in-person appearance requirements, which aim to provide opportunities for face to face encounters between sex offenders and persons responsible for their registrations in the local areas in which they will be present. Such encounters may help law enforcement personnel to familiarize themselves with the sex offenders in their areas, thereby facilitating the effective discharge of their protective and investigative functions in relation to those sex offenders, and helping to ensure that their responsibilities to track those offenders are taken seriously and carried out consistently. Likewise, from the perspective of sex offenders, face to face encounters with officers responsible for their monitoring in the local areas where they are present may help to impress on them that their identities, locations, and past criminal conduct are known to the authorities in those areas. Hence, there is a reduced likelihood of their avoiding detection and apprehension if they reoffend, and this may help them to resist the temptation to reoffend. *See* 73 FR at 38065, 38067.

These policies are furthered by sex offenders appearing in person to report changes in residence, employment, and school attendance in the jurisdictions in which the changes occur, rather than in other jurisdictions where they may be required to register, but within whose borders there has been no change in the location of the sex offender. Section 72.7(c) in the rule accordingly provides that changes in the most basic types of location information—residence, employment, school attendance—are to be reported through in-person appearances in the jurisdictions in which they occur. Section 72.7(c) also provides definiteness regarding the reporting of name changes under 34 U.S.C. 20913(c), providing that such changes are to be reported in the residence jurisdiction, as the jurisdiction in which a sex offender is likely to have his most substantial presence and contacts.

Paragraph (d)—Reporting of Departure and Termination Concerning Residence, Employment, and School Attendance

Paragraph (d) of § 72.7 requires sex offenders to inform the jurisdictions in which they reside if they will be commencing residence, employment, or school attendance in another jurisdiction or outside of the United States, and to inform the relevant jurisdictions if they will be terminating residence, employment, or school attendance in a jurisdiction. The Attorney General has previously articulated these requirements in the SORNA Guidelines. *See* 73 FR at 38065–67. These requirements are not part of the requirement under 34 U.S.C. 20913(c) to report certain changes through in-person appearances and they may be reported by any means allowed by registration jurisdictions in their discretion. *See* 73 FR at 38067.

Paragraph (d)(1) of § 72.7, relating to notice about intended commencement of residence, employment, or school attendance outside of a jurisdiction, and paragraph (d)(2), relating to notice about termination of residence, employment, or school attendance in a jurisdiction, are complementary, each applying in certain situations that may be outside the scope of the other. For example, § 72.7(d)(1) requires a sex offender to inform his residence jurisdiction if he will be starting a job in another jurisdiction, even if he will continue to reside where he has resided and will not be terminating any existing connection to the residence jurisdiction. Section 72.7(d)(2) requires a sex offender to inform a jurisdiction of his intended termination of residence, employment, or school attendance in that jurisdiction ''even if there is no ascertainable or expected future place of residence, employment, or school attendance for the sex offender.'' 73 FR at 38066.

Regarding the underlying legal authority for § 72.7(d), its informational requirements overlap with types of information 34 U.S.C. 20914(a) expressly requires sex offenders to provide, which include information as to where a sex offender ''will reside,'' ''will be an employee,'' or ''will be a student.'' *Id.* 20914(a)(3)–(5). To the extent § 72.7(d) goes beyond the registration information that SORNA expressly requires, it is a straightforward exercise of the Attorney

General's authority under 34 U.S.C. 20914(a)(8) to require any additional registration information.

Even before the enactment of International Megan's Law, the Attorney General's implementation authority under 34 U.S.C. 20912(b) was understood to include the authority to specify time and manner requirements for providing and updating registration information, as discussed above. Currently, section 20914(c) confers express authority on the Attorney General to adopt the time and manner requirements set forth in § 72.7(d)—*i.e.,* that (i) intended commencement of residence, employment, or school attendance in another jurisdiction or outside the United States is to be reported to the residence jurisdiction (by whatever means it allows) prior to any termination of residence in that jurisdiction and prior to commencing residence, employment, or school attendance in the other jurisdiction or outside of the United States; and (ii) intended termination of residence, employment, or school attendance in a jurisdiction is to be reported to the jurisdiction (by whatever means it allows) prior to the termination of residence, employment, or school attendance in the jurisdiction. Section 72.7(d)'s requirement that the intended actions or changes are to be reported prior to the termination of residence, employment, or school attendance in the relevant jurisdiction ensures that the reporting requirement applies while the sex offender is still subject to the requirement to register and keep the registration current in the jurisdiction pursuant to 34 U.S.C. 20913(a). This approach avoids any question about the validity of requiring a sex offender to provide or update information in a jurisdiction in which he is no longer required to register under SORNA.

The exercise of the authorities described above in § 72.7(d) furthers SORNA's objective of creating a ''comprehensive national system for the registration of [sex] offenders,'' 34 U.S.C. 20901, which reliably tracks sex offenders as they move away from and into registration jurisdictions. A sex offender's departure from a jurisdiction in which he is registered may eventually be discovered—*e.g.,* because he fails to appear for the next periodic verification of his registration, *see id.* 20918—even if he does not affirmatively notify the jurisdiction that he is leaving. But considerable time may elapse before that happens, leaving a cold trail for law enforcement efforts to locate the sex offender, if he does not register in the destination jurisdiction as SORNA requires.

For example, for a sex offender who decides to change his residence from one state to another, § 72.7(d) requires the sex offender to inform the state he is leaving prior to his departure, and § 72.7(c) requires him to inform the destination state within three business days of his arrival there. Under SORNA's procedures for information sharing among registration jurisdictions, the state of origin in such a case directly notifies the identified destination state. *See* 34 U.S.C. 20921(b), 20923(b)(3); 73 FR at 38065; 76 FR at 1638. If the sex offender then fails to appear and register as expected in the destination state, appropriate follow-up ensues, which may include investigative efforts by state and local law enforcement and the U.S. Marshals Service to locate the sex offender, issuance of a warrant for his arrest, and entry of information into national law enforcement databases reflecting the sex offender's status as an absconder or unlocatable. *See* 34 U.S.C. 20924; 73 FR at 38069. In the context of this system, the requirement of § 72.7(d) for a sex offender to notify the residence jurisdiction concerning his departure is an important element. It helps to ensure that agencies and officials responsible for sex offender registration and its enforcement are promptly made aware of major changes in the location of sex offenders, and thereby reduces the risk that sex offenders will disappear in the interstices between jurisdictions.

In so doing, § 72.7(d) resolves certain potential problems in the operation of SORNA's registration system following the Supreme Court's decision in *Nichols* v. *United States,* 136 S. Ct. 1113 (2016), and a similar earlier decision by the Eighth Circuit Court of Appeals, *United States* v. *Lunsford,* 725 F.3d 859 (8th Cir. 2013). *Nichols* involved a sex offender who abandoned his residence in Kansas and relocated to the Philippines, without informing the Kansas registration authorities of his departure. The issue in the case was whether Nichols had violated 34 U.S.C. 20913(c), which requires a sex offender ''not later than three business days after each change of name, residence, employment, or student status'' to ''appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes'' in the required registration information.

The Court noted that subsection (a) of section 20913 mentions three jurisdictions as possibly ''involved''—''where the offender resides, where the offender is an employee, and where the offender is a student''— which would not include the state of Kansas after Nichols had moved to the Philippines. *Nichols,* 136 S. Ct. at 1117 (quoting 34 U.S.C. 20913(a)). The Court further noted that section 20913(c) requires appearance and registration within three business days *after* a change of residence, and Nichols could not have appeared in Kansas after he left the state. *Id.* at 1117–18. The Court accordingly concluded that Nichols' failure to inform Kansas of his departure was not a violation of section 20913(c), since Kansas was no longer an ''involved'' jurisdiction in which section 20913(c) may require a sex offender to report changes in residence. *Id.* at 1118.

Applying the same reasoning to the domestic context, if a sex offender terminates his residence in a state and thereafter takes up residence in another state, he cannot violate section 20913(c) by failing to inform the state he is leaving. For, following the termination of residence in that state, it is no longer a ''jurisdiction involved'' for purposes of section 20913(c).

There is no comparable problem, however, with § 72.7(d)'s requirement that a sex offender inform a jurisdiction in which he resides of his intended departure from the jurisdiction, because § 72.7(d) does not depend on the requirements of section 20913(c). Rather, § 72.7(d) is grounded in the requirement of section 20914(a) that sex offenders provide certain information, including ''[a]ny other information required by the Attorney General,'' and the requirement of section 20914(c) that they report the required information in the ''time and manner . . . prescribed by the Attorney General.''

The Attorney General's exercise of his authorities under section 20914(a) and 20914(c) to require sex offenders to inform their registration jurisdictions that they will be going elsewhere in no way conflicts with *Nichols'* conclusion that section 20913(c) does not require such pre-departure notice of intended relocation. Section 20914(a)(8) says that sex offenders must provide ''[a]ny other information required by the Attorney General.'' The statute does not say that sex offenders must provide ''[a]ny other information required by the Attorney General, *except for information about intended departure from the jurisdiction.*'' *Nichols'* interpretation of section 20913(c) provides no basis for reading such an unstated limitation into section 20914(a)(8). Likewise, *Nichols* provides no basis for reading unstated limitations into the Attorney General's authority—now expressly granted by section 20914(c)—to prescribe time and manner requirements for providing and updating registration information, which adequately supports § 72.7(d)'s

requirement that a sex offender inform the jurisdiction in which he resides about intended departure prior to any termination of residence and before going elsewhere.

The Attorney General's adoption of the § 72.7(d) requirements is also consistent with the Supreme Court's analysis of particular arguments and issues in *Nichols.* The salient points are as follows:

First, the Court in *Nichols* noted that the predecessor Federal sex offender registration law (the ''Wetterling Act'') required a sex offender to ''report the change of address to the responsible agency in the State the person is leaving,'' while SORNA contains no comparable provision that expressly requires sex offenders to notify jurisdictions they are leaving. 136 S. Ct. at 1118 (quoting 42 U.S.C. 14071(b)(5) (2000)). However, SORNA does not attempt to articulate all the particulars of its registration requirements for sex offenders, instead authorizing the Attorney General to complete the regulatory scheme through interpretation and implementation of SORNA. *See, e.g.,* 34 U.S.C. 20912(b), 20913(d), 20914(a)(8), 20914(c). Given the extent of the Attorney General's powers under SORNA, it was not necessary for Congress to include an express provision in SORNA requiring sex offenders to notify jurisdictions they are leaving. Nor can there be any doubt that requiring such notification is now within the terms of the Attorney General's powers under SORNA, as discussed above. Indeed, 34 U.S.C. 20923(b)(3)—which provides that a jurisdiction's officials are to inform each jurisdiction ''from or to which a change of residence, employment, or student status occurs''—contemplates the Attorney General's adoption of requirements like those appearing in § 72.7(d). For if sex offenders were not required to advise the jurisdictions they leave of their departure and destination, those jurisdictions could not inform the jurisdictions ''to which'' sex offenders relocate.

Second, the Court in *Nichols* rejected an argument that a jurisdiction necessarily remains ''involved'' for purposes of section 20913(c) if the sex offender continues to appear on the jurisdiction's registry as a current resident. The Court responded that section 20913(a) gives jurisdictions where the offender resides, is an employee, or is a student as the only possibilities for an ''involved'' jurisdiction, and does not include a jurisdiction ''where the offender appears on a registry.'' 136 S. Ct. at 1118. The Court said ''[w]e decline the . . . invitation to add an extra clause to the text of § [20]913(a).'' *Id.* In contrast, § 72.7(d) in this rule does not require the addition of an extra clause to section 20913(a). It involves the exercise of the Attorney General's authorities under SORNA to include the information described in § 72.7(d) in the information that a sex offender must provide to the jurisdictions described in the actual clauses of section 20913(a)—*i.e.,* those in which he resides, is an employee, or is a student.

Third, the Court rejected an argument that Nichols was required to inform Kansas of his intended departure based on 34 U.S.C. 20914(a)(3)'s direction to sex offenders to provide information about where they ''will reside.'' The Court noted that ''§ [20]914(a) merely lists the pieces of information that a sex offender must provide if and when he updates his registration; it says nothing about whether the offender has an obligation to update his registration in the first place.'' 136 S. Ct. at 1118. In context, the Court's point was that section 20914(a)(3) just specifies a type of information sex offenders must provide, and does not say when they must provide it, so section 20914(a)(3) does not in itself require sex offenders to provide change of residence information in advance when they leave a jurisdiction. For example, without more, section 20914(a)(3) might be taken to entail that sex offenders must advise where they ''will reside'' when initially registering before release from imprisonment, *see* 34 U.S.C. 20913(b)(1), but not necessarily that they give advance notice to their registration jurisdictions of expected future residence on subsequent relocations.

However, this understanding of section 20914(a)(3) does not imply any limitation on the Attorney General's authority to require a sex offender to ''update his registration in the first place,'' *Nichols,* 136 S. Ct. at 1118, on the basis of 34 U.S.C. 20914(c), which directs that ''[a] sex offender shall provide and update information required under subsection (a) . . . in conformity with any time and manner requirements prescribed by the Attorney General.'' Nor does it imply any limitation on the Attorney General's authority under SORNA to require sex offenders to report the full range of information described in § 72.7(d). In § 72.7(d), as discussed above, the Attorney General exercises these authorities to require sex offenders to inform jurisdictions of intended departure and expected future residence prior to any termination of residence in a jurisdiction.

Finally, the Court in *Nichols* rejected an argument that Nichols had to notify Kansas of his departure on the theory that he engaged in two changes of residence—the first when he abandoned his residence in Kansas, and the second when he checked into a hotel in the Philippines. 136 S. Ct. at 1118–19. Section 72.7(d) in this rule, however, does not assume any such multiplicity in changes of residence. Rather, it establishes a freestanding requirement to inform registration jurisdictions in advance of termination of residence and commencement of intended future residence.

At the end of the *Nichols* decision, the Court noted that—considering the International Megan's Law amendments to SORNA—''[o]ur interpretation of the SORNA provisions at issue in this case in no way means that sex offenders will be able to escape punishment for leaving the United States without notifying the jurisdictions in which they lived while in this country.'' 136 S. Ct. at 1119. The Court noted the addition of a new subsection (b) to 18 U.S.C. 2250, which ''criminalized the 'knowin[g] fail[ure] to provide information required by [SORNA] relating to intended travel in foreign commerce,' '' and the addition of 34 U.S.C. 20914(a)(7), which requires sex offenders to provide information about intended international travel. 136 S. Ct. at 1119 (brackets in original) (quoting 18 U.S.C. 2250(b)(2)). The Court concluded: ''We are thus reassured that our holding today is not likely to create 'loopholes and deficiencies' in SORNA's nationwide sex-offender registration scheme.'' *Id.* (quoting *United States* v. *Kebodeaux,* 570 U.S. 387, 399 (2013)).

Section 72.7(d) in this rule similarly helps to ensure that the interpretation of 34 U.S.C. 20913(c) in *Nichols* and *Lunsford* does not create ''loopholes and deficiencies'' in the operation of SORNA's tracking system, in relation to both domestic and international relocations. For example, consider a sex offender who terminates his residence in a state without informing the state. Suppose the sex offender is later found elsewhere in the United States, but he cannot be shown to have taken up residence—or to have been employed or a student—in another jurisdiction after leaving the original state of residence. In light of *Nichols,* section 20913(c) does not require the sex offender to report his relocation to the original state because it is no longer an ''involved'' jurisdiction after he leaves, and there may be no other relevant jurisdiction in which he must report the change, *i.e.,* one in which he presently resides, is employed, or is a student. However,

with § 72.7(d) in effect, a sex offender in this circumstance will have violated 34 U.S.C. 20914(a) and (c)'s requirements to provide registration information, including ''[a]ny other information'' prescribed by the Attorney General, in the time and manner prescribed by the Attorney General. At a minimum, in the case described, the sex offender would have failed to provide the information that he is terminating his residence in the original state of residence prior to his termination of residence in that state, contravening § 72.7(d).

Hence, § 72.7(d) provides an additional safeguard against registered sex offenders simply disappearing without informing anyone about their relocation. The consequences for noncompliant sex offenders include potential prosecution by registration jurisdictions, which have been encouraged to adopt departure notification requirements similar to § 72.7(d) in their registration laws by the Attorney General's prior articulation of those requirements in the SORNA Guidelines. *See* 73 FR at 38065–66. The consequences of noncompliance with § 72.7(d) will also include potential Federal prosecution under 18 U.S.C. 2250 for violations committed under circumstances supporting Federal jurisdiction.

Sex offenders must comply both with the requirements of § 72.7(c) and with the requirements of § 72.7(d). For example, suppose a sex offender changes residence from State A to State B. It is not sufficient if (i) the sex offender complies with § 72.7(d) by telling State A that he is leaving and going to State B, but (ii) he fails to appear in State B and register there as required by § 72.7(c), and then (iii) he attempts to excuse his failure to comply with § 72.7(c) on the ground that State A could have told State B about his relocation. Likewise, it is not sufficient if the sex offender in such a case (i) complies with § 72.7(c) by registering in State B, but (ii) he fails to inform State A about the intended relocation prior to his departure, and then (iii) he attempts to excuse his failure to comply with § 72.7(d) on the ground that State B could have told State A about his relocation. As discussed above, appearance and registration by sex offenders in jurisdictions in which they commence residence, employment, or school attendance, as required by § 72.7(c), and notification by sex offenders to jurisdictions in which they terminate residence, employment, or school attendance, as required by § 72.7(d), both serve important purposes in SORNA's registration system as articulated in this rule and the previously issued SORNA guidelines. Compliance with both requirements is necessary to the seamless and effective operation of that system for the reasons explained above.

Paragraph (e)—Reporting of Changes in Information Relating to Remote Communication Identifiers, Temporary Lodging, and Vehicles

Paragraph (e) requires sex offenders to report to their residence jurisdictions within three business days changes in remote communication identifier information, temporary lodging information, and vehicle information. In terms of legal authority, as discussed earlier, these requirements are supportable on the basis of the Attorney General's authority to interpret and implement SORNA's requirement to keep the registration current, the Attorney General's authority to expand the information that sex offenders must provide to registration jurisdictions, and the Attorney General's authority to prescribe the time and manner for providing and updating registration information. *See* 34 U.S.C. 20912(b), 20913(a), 20914(a)(8), (c), 20916(b); 73 FR at 38066; 76 FR at 1637. (The SORNA Guidelines state that such changes are to be reported ''immediately'' and explain at an earlier point that ''immediately'' in the context of SORNA's timing requirements means within three business days, *see* 73 FR at 38060, 38066.) SORNA does not require that these changes be reported through in-person appearances and they may be reported by any means allowed by registration jurisdictions in their discretion. *See id.* at 38067.

Paragraph (f)—Reporting of International Travel

Paragraph (f) of § 72.7 requires sex offenders to report intended travel outside of the United States to their residence jurisdictions. The expected travel must be reported at least 21 days in advance and, if applicable, prior to any termination of residence in the jurisdiction. Reporting of information about intended international travel is an express SORNA requirement following SORNA's amendment by International Megan's Law. *See* 34 U.S.C. 20914(a)(7); Public Law 114–119, sec. 6(a). The underlying reasons for requiring reporting of international travel are explained above in connection with § 72.6(d) of this rule.

The 21-day advance notice requirement is designed to provide relevant agencies, including the U.S. Marshals Service and INTERPOL Washington-U.S. National Central Bureau, sufficient lead time for any investigation or inquiry that may be warranted relating to the sex offender's international travel, and for notification of U.S. and foreign authorities in destination countries, prior to the sex offender's arrival in a destination country. The requirement that the intended international travel be reported prior to any termination of residence in the jurisdiction—potentially an issue in cases in which the sex offender is terminating his U.S. residence and relocating to a foreign country—ensures that a SORNA violation has occurred in case of noncompliance while the sex offender is still residing in the jurisdiction and hence required by 34 U.S.C. 20913(a) to register and keep the registration current in that jurisdiction. The requirement to report intended international travel at least 21 days in advance applies in relation to all international travel, including both cases in which the sex offender is temporarily traveling abroad while maintaining a domestic residence and cases in which the sex offender is terminating his residence in the particular jurisdiction or the United States.

The rule recognizes, however, that reporting of intended international travel 21 days in advance is not possible in some circumstances. Section 72.8(a)(2) of the rule generally addresses situations in which sex offenders cannot comply with SORNA requirements because of circumstances beyond their control, and it specifically addresses inability to comply with the timeframe for reporting of international travel in Example 3 in that provision.

In terms of legal authority, the requirement to report intended international travel to the residence jurisdiction at least 21 days in advance and prior to any termination of residence is supportable as an exercise of the express authority of the Attorney General under 34 U.S.C. 20914(c), which states in part that ''[a] sex offender shall provide and update . . . information relating to intended travel outside the United States . . . in conformity with any time and manner requirements prescribed by the Attorney General.'' As discussed above, the international travel reporting requirement, including its associated timeframe requirement, is also supportable on the basis of other SORNA authorities of the Attorney General, which were relied on in SORNA guidelines preceding the addition of 34 U.S.C. 20914(a)(7), (c) by International Megan's Law. These authorities include the Attorney General's authority under 34 U.S.C. 20914(a)(8) to expand the range of

required registration information and the Attorney General's authority under 34 U.S.C. 20912(b) to issue rules to interpret and implement SORNA's requirement to keep the registration current.

Paragraph (g)—Compliance With Jurisdictions' Requirements for Registering and Keeping the Registration Current

Paragraph (g) of § 72.7 requires sex offenders to register and keep the registration current in conformity with the time and manner requirements of their registration jurisdictions, where they have not done so in the time and manner normally required under SORNA.

SORNA generally requires sex offenders to register initially before release from imprisonment or within three business days of sentencing, but it recognizes that sex offenders may be unable to comply with these requirements in some circumstances. The difficulty can arise in cases in which a jurisdiction has no provision for registering certain sex offenders as required by SORNA at the time of their release—or even no registration program at all at that time—but the jurisdiction can register them later as it progresses in its implementation of SORNA's requirements. The SORNA Guidelines provide guidance to registration jurisdictions about integrating previously excluded sex offenders into their registration programs in such circumstances and ensuring that these sex offenders fully comply with SORNA's requirements. *See* 73 FR at 38063–64; *see also Smith,* 538 U.S. 84 (application of new sex offender registration requirements to previously convicted sex offenders does not violate the constitutional prohibition on ex post facto laws).

Because the normal timeframe for initial registration under SORNA may be past in these situations, SORNA authorizes the Attorney General to prescribe rules for registration. Specifically, 34 U.S.C. 20913(d) gives the Attorney General the authority to specify the applicability of SORNA's requirements to sex offenders with pre-SORNA or pre-SORNA-implementation convictions, ''and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with'' SORNA's initial registration requirements. More broadly, as discussed above, the Attorney General's general authority under 34 U.S.C. 20912(b) to interpret and implement SORNA includes the authority to fill gaps in SORNA's time and manner requirements for registering and keeping the registration current, and 34 U.S.C. 20914(c) expressly requires sex offenders to provide and update registration information required by SORNA in the time and manner prescribed by the Attorney General.

In section 72.7(g) in this rule, the Attorney General exercises his authorities under 34 U.S.C. 20912(b), 20913(d), and 20914(c) to require sex offenders to register and keep their registrations current in the time and manner specified by their registration jurisdictions, where the sex offenders have not registered or kept the registrations up to date in the time and manner normally required by SORNA as articulated in the earlier portions of § 72.7. This requirement complements the directions to registration jurisdictions in the SORNA Guidelines about integrating previously excluded sex offenders and previously omitted SORNA requirements into their registration programs, with suitable timeframes and procedures, as the jurisdictions progress with SORNA implementation. *See* 73 FR at 38063–64. Of course sex offenders are independently required by the laws of their registration jurisdictions to comply with the jurisdictions' time and manner specifications for registering and updating their registrations. The effect of § 72.7(g) is to adopt the jurisdictions' time and manner specifications as SORNA requirements in the situations it covers.

Section 72.7(g)(1) includes four examples. The first example concerns a situation in which a state does not register sex offenders before release, but a sex offender can register soon after release in conformity with the state's procedures. The second example concerns a situation in which a jurisdiction does not register certain sex offenders at all at the time of their release or entry into the jurisdiction, but a sex offender in the excluded class becomes able to register at a later time and is directed by the jurisdiction to do so after it extends its registration requirements.

As the Supreme Court noted in *Reynolds,* SORNA, in section 20913(b), ''says that a sex offender must register before completing his prison term, but the provision says nothing about when a pre-Act offender who completed his prison term pre-Act must register. . . . Pre-Act offenders . . . might, on their own, reach different conclusions about whether, or how, the new registration requirements applied to them. A ruling from the Attorney General [under section 20913(d)], however, could diminish or eliminate those uncertainties. . . .'' 565 U.S. at 441–42. In § 72.7(g), the Attorney General exercises his authorities under sections 20912(b), 20913(d), and 20914(c) to ''eliminate those uncertainties'' in conformity with Congress's intent concerning the filling of ''potential lacunae'' in SORNA, 565 U.S. at 441–42. Section 72.7(g) fills the gaps in such cases by adopting the timing rules and procedures of the relevant registration jurisdictions. This applies in relation to sex offenders who do not register initially in conformity with SORNA because they were convicted and released before SORNA's enactment, as described by the Court in *Reynolds,* and in relation to all other sex offenders who do not register in accordance with the normal time and manner requirements under SORNA, *e.g.,* because of shortfalls in a jurisdictions' registration requirements that may later be corrected or that allow registration in some variant way.

The third example in § 72.7(g)(1) concerns a sex offender in a jurisdiction that initially has no procedure for sex offenders to periodically update registrations through verification appearances as required by SORNA, but the jurisdiction later directs the sex offender to do so after it incorporates this aspect of SORNA into its registration program. Since the periodic verification appearances required by 34 U.S.C. 20918 fall under SORNA's requirement to keep the registration current and involve updating the registration information required by SORNA, it is within the Attorney General's authority under 34 U.S.C. 20912(b) and 20914(c) to specify the time and manner for the verifications where SORNA's verification requirement or normal timeframes for verifications have not been followed. Section 72.7(g)(1) directs sex offenders to comply with the jurisdiction's requirements for periodic verification in such situations.

The fourth example in § 72.7(g)(1) concerns a sex offender who does not provide particular information within the time required by SORNA because a jurisdiction's informational requirements fall short of SORNA's requirements but are later brought into line. The example illustrates the point by reference to email addresses. As provided in § 72.6(b), sex offenders must include this information when they register and, as provided in § 72.7(e), they must report any subsequent changes within three business days. Where the normal reporting time is past when a jurisdiction decides to include a type of information in its sex offender registry,

§ 72.7(g)(1) requires sex offenders to comply with the jurisdiction's directions to provide the information at a later time.

Section 72.7(g)(2) provides that, in a prosecution under 18 U.S.C. 2250, § 72.7(g)(1) does not relieve a sex offender of the need to show an inability to comply with SORNA as an affirmative defense to liability. The situations described in § 72.7(g)(1), which may involve noncompliance with SORNA's requirements because of deficits in registration jurisdictions' requirements or procedures, overlap with situations in which a sex offender may have a defense under 18 U.S.C. 2250(c) because he was prevented from complying with SORNA by circumstances beyond his control. However, the purpose and effect of § 72.7(g)(1) are to hold sex offenders to compliance with the registration rules and procedures of registration jurisdictions in the situations it covers. Section 72.7(g) does not, in any case, relieve sex offenders of the obligation to comply fully with SORNA if able to do so or shift the burden of proof to the government to establish that a registration jurisdiction's procedures would have allowed a sex offender to register or keep the registration current in conformity with SORNA. Rather, the defense under 18 U.S.C. 2250(c) is an affirmative defense, as that provision explicitly provides, and as §§ 72.7(g)(2) and 72.8(a)(2) in this rule reiterate.

Section 72.8—Liability for Violations

Section 72.8 of the rule explains the liability of sex offenders for SORNA violations and limitations on that potential liability.

Paragraph (a)(1)—Offense

SORNA's criminal provision, 18 U.S.C. 2250, provides criminal liability for sex offenders based on SORNA violations.

Section 72.8(a)(1)(i) in the rule refers to potential criminal liability under 18 U.S.C. 2250(a). Section 2250(a) authorizes imprisonment for up to 10 years based on a knowing failure to register or update a registration as required by SORNA. Federal criminal liability may result under this provision when the violation occurs under circumstances supporting Federal jurisdiction as specified in the statute. These jurisdictional circumstances include (i) violation of SORNA by sex offenders convicted of sex offenses under Federal (including military) law, the law of the District of Columbia, Indian tribal law, or the law of a U.S. territory or possession; and (ii) travel in interstate or foreign commerce or entering, leaving, or residing in Indian country. Section 2250(a) reaches all types of SORNA violations, including failure to register or keep the registration current in each jurisdiction of residence, employment, or school attendance, as required by 34 U.S.C. 20913; failure to provide or update registration information required by 34 U.S.C. 20914; or failure to appear periodically and verify the registration information, as required by 34 U.S.C. 20918.

Section 72.8(a)(1)(ii) in the rule refers to potential criminal liability under 18 U.S.C. 2250(b), which was added by International Megan's Law. *See* Public Law 114–119, sec. 6(b). Section 2250(b) defines an offense that specifically reaches violations of SORNA's international travel reporting requirement. The provision authorizes imprisonment for up to 10 years for a sex offender who (i) knowingly fails to provide information required by SORNA relating to intended travel in foreign commerce and (ii) ''engages or attempts to engage in the intended travel in foreign commerce.'' The jurisdictional language in section 2250(b) reaches cases in which the contemplated travel is not carried out, in addition to those in which the sex offender does travel abroad. For example, consider a sex offender who (i) purchases a plane ticket to a foreign destination but (ii) fails to report the intended international travel as required by SORNA and (iii) does not actually leave the country because the unreported travel is detected by the authorities who arrest him at the airport. The attempted travel in foreign commerce provides a sufficient jurisdictional basis for Federal prosecution under section 2250(b).

Section 72.8(a)(1)(iii) in the rule explains the condition for liability under 18 U.S.C. 2250(a)–(b) that the defendant ''knowingly'' fail to comply with a SORNA requirement. The ''knowingly'' limitation ensures that sex offenders are not held liable under section 2250 for violations of registration requirements they did not know about. However, this does not require knowledge that the requirement is imposed by SORNA. State sex offenders, for example, are likely to be instructed in the registration process regarding many of the registration requirements appearing in SORNA, which are widely paralleled in state registration laws, such as the need to report changes in residence, employment, internet identifiers, and vehicle information; the need to report intended international travel; and the need to appear periodically to update and verify registration information. The acknowledgment forms obtained from sex offenders in registration often provide a means of establishing their knowledge of the registration requirements in later prosecutions for violations. *See* 76 FR at 1634–35, 1638. But sex offenders may not be informed that the registration requirements they are subject to are imposed by a particular Federal law, SORNA. This does not impugn the fairness or propriety of holding sex offenders liable under 18 U.S.C. 2250 for knowingly violating a registration requirement that is in fact imposed by SORNA, so long as they are aware of an obligation from some source to comply with the requirement. *See, e.g., United States* v. *Elkins,* 683 F.3d 1039, 1050 (9th Cir. 2012); *United States* v. *Whaley,* 577 F.3d 254, 261–62 (5th Cir. 2009). Section 72.8(a)(1)(iii) makes these points about 18 U.S.C. 2250's knowledge requirement in the rule.

Paragraph (a)(2)—Defense

Subsection (c) of 18 U.S.C. 2250 provides an affirmative defense to liability under certain conditions where uncontrollable circumstances prevented a sex offender from complying with SORNA, so long as the sex offender complied as soon as the preventing circumstances ceased. Section 72.8(a)(2) in the rule reproduces this affirmative defense provision and provides examples of its operation.

Registration is a reciprocal process, involving the provision of registration information by sex offenders, and the registration jurisdiction's acceptance of the information for inclusion in the sex offender registry. The circumstances preventing compliance with SORNA under section 2250(c) accordingly may be a registration jurisdiction's failure or refusal to carry out the reciprocal role needed to effect registration, or the updating of a registration, as required by SORNA.

Example 1 in § 72.8(a)(2) illustrates this type of situation, describing a case in which a sex offender cannot appear and report an inter-jurisdictional change of residence within three business days because the office with which he needs to register will not meet with him for a week. The case implicates both 34 U.S.C. 20913(a)'s requirement that a sex offender register in each jurisdiction in which he resides and 34 U.S.C. 20913(c)'s requirement that sex offenders report changes of residence within three business days. These provisions' net effect is that a sex offender establishing residence in a new jurisdiction must register there but with a three-business-day grace period. In the

case described, 18 U.S.C. 2250(c) would excuse the failure to report within the three-business-day timeframe. However, the inability to meet section 20913(c)'s specific timeframe does not obviate the need to comply with section 20913(a)'s requirement to register in each state of residence. Nothing prevents the sex offender from complying with this registration requirement once the office is willing to meet with him, so he will need to appear and carry out the registration at the appointed time in order to have the benefit of the 18 U.S.C. 2250(c) defense.

Example 2 in § 72.8(a)(2) also illustrates a situation in which the circumstance preventing compliance with SORNA is a failure by the registration jurisdiction to carry out a necessary reciprocal role. The specific situation described in the example is a state's refusal to register sex offenders based on the offense for which the sex offender was convicted. For example, SORNA requires registration based on conviction for child pornography possession offenses, *see* 34 U.S.C. 20911(7)(G), but some states that have not fully implemented SORNA's requirements in their registration programs may be unwilling to register a sex offender on the basis of such an offense. Section 2250(c)'s excuse of the failure to register terminates if the state subsequently becomes willing to register the sex offender, because the circumstance preventing compliance with SORNA no longer exists. However, liability based on a continuing failure by the sex offender to comply with SORNA in such a case—following a change in state policy or practice allowing compliance—depends on the sex offender's becoming aware of the change since, as discussed above, 18 U.S.C. 2250 does not impose liability for violation of unknown registration obligations. *Cf.* 73 FR at 38063–64 (direction to registration jurisdictions to instruct sex offenders about new or additional registration duties in connection with SORNA implementation).

Example 3 in § 72.8(a)(2) describes a situation in which the circumstance preventing compliance with SORNA relates to the situation of the sex offender rather than the registration jurisdiction. The second sentence of § 72.7(f) in the rule requires in part that a sex offender report intended international travel 21 days in advance, which he cannot do if he does not anticipate a trip abroad that far in advance. In such a case, as described in the example, 18 U.S.C. 2250(c) would excuse a sex offender's failure to report the travel 21 days in advance. *Cf.* 76 FR at 1638 (''[R]equiring 21 days advance notice may occasionally be unnecessary or inappropriate. For example, a sex offender may need to travel abroad unexpectedly because of a family or work emergency.''). However, inability to comply with the 21-day timeframe in a particular case does not prevent a sex offender from otherwise complying with SORNA's requirements to inform the residence jurisdiction about intended international travel, appearing in 34 U.S.C. 20914(a)(7) and in §§ 72.6(d) and 72.7(f) in this rule. Hence, once the intention to travel exists, the sex offender must inform the registration jurisdiction to avoid liability under 18 U.S.C. 2250.

Paragraph (b)—Supervision Condition

Section 72.8(b) recounts that, for sex offenders convicted of Federal offenses, compliance with SORNA is a mandatory condition of probation and supervised release. *See* 18 U.S.C. 3563(a)(8), 3583(d) (third sentence). Violation of this condition may result in revocation of release. *See* 18 U.S.C. 3565(a)(2), 3583(e)(3). Section 72.8(b) also notes that compliance with SORNA is a mandatory condition of parole for sex offenders convicted of Federal offenses, *see* 18 U.S.C. 4209(a) (second sentence), a requirement of narrow application given the abolition of parole in Federal cases, except for offenses committed before November 1, 1987.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the purposes of that Act because the regulation only articulates SORNA's registration requirements for sex offenders.

Executive Orders 12866 and 13563—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review,'' section 1(b), Principles of Regulation, and Executive Order 13563, ''Improving Regulation and Regulatory Review.'' The regulation expands part 72 of title 28 of the Code of Federal Regulations to provide a concise and comprehensive statement of what sex offenders must do to comply with SORNA's requirements, following express requirements appearing in SORNA and previous exercises of authority SORNA grants to the Attorney General to interpret and implement SORNA. The justification of these requirements as means of furthering SORNA's objectives is explained in the preamble to this regulation and in previous SORNA-related documents, including the rulemaking entitled ''Applicability of the Sex Offender Registration and Notification Act,'' 75 FR 81849 (final rule), 72 FR 8894 (interim rule); the SORNA Guidelines, 73 FR 38030; and the SORNA Supplemental Guidelines, 76 FR 1630. The Office of Management and Budget has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget.

The Department of Justice expects that the rule will not entail new costs and will result in a number of benefits. For registration jurisdictions, there are no new costs because their requirements under SORNA continue to be those articulated in the previously issued SORNA guidelines. Likewise, for sex offenders, the requirements articulated in the rule either appear expressly in SORNA or have previously been articulated by the Attorney General in the SORNA guidelines. The procedures by which sex offenders register will continue to depend on the registration processes of the jurisdictions that register them, which will not be made more time-consuming or expensive or otherwise changed by this rule.

In terms of benefits, the rule will provide in one place a clear, concise, and comprehensive statement of sex offenders' registration requirements under SORNA. This will reduce any expenditure by sex offenders of time or money required for inquiry with state or Federal authorities or others to resolve uncertainties, or required in attempting to comply with perceived registration requirements under SORNA that go beyond the requirements the Attorney General has actually specified. The clarity provided by this rule will make it easier for sex offenders to determine what SORNA requires them to do and thereby facilitate compliance with SORNA.

There are also expected benefits for the government. As the preamble explains, the rule's comprehensive articulation of SORNA's registration requirements in regulations addressed to sex offenders will provide a secure basis for Federal prosecution of knowing violations of any of SORNA's requirements. It will resolve specific problems that have arisen in past litigation or can be expected to arise in future litigation if not clarified and resolved by this rule, thereby avoiding

the expenditure of litigation resources on these matters. As discussed in the preamble, previously or potentially litigated matters this rule elucidates include such issues as the starting point and duration of registration periods under SORNA, the applicability of SORNA's requirements to all sex offenders regardless of when they were convicted, the particular jurisdictions in which sex offenders are required to report changes in registration information, the requirement that relocating sex offenders notify a registration jurisdiction prior to departure, the time frame for reporting intended international travel, the mens rea (state of mind) requirement for violation of SORNA's criminal provision (18 U.S.C. 2250), and the contours of the impossibility defense under that provision.

As explained in the existing SORNA guidelines, SORNA aims to prevent the commission of sex offenses, and to bring the perpetrators of such offenses to justice more speedily and reliably, by enabling the authorities to better identify, track, and monitor released sex offenders and by informing the public regarding the presence of released sex offenders in the community. *See* 73 FR at 38044–45. Hence, by facilitating the enforcement of, and compliance with, SORNA's registration requirements, and enhancing the basis for public notification, the rule is expected to further SORNA's public safety objectives and reduce the time and resources required in achieving these objectives.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the states, on the relationship between the national Government and the states, or on the distribution of power and responsibilities among the various levels of government. There has been substantial consultation with state officials regarding the interpretation and implementation of SORNA. The previously issued SORNA Guidelines and SORNA Supplemental Guidelines articulate the requirements for implementation of the SORNA standards by states and other jurisdictions in their sex offender registration and notification programs, requirements that are not changed by this regulation's provision of a separate statement of the registration obligations of sex offenders under SORNA. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995. This rule adds provisions to part 72 of title 28 of the Code of Federal Regulations that articulate SORNA's registration requirements for sex offenders, including where, when, and how long sex offenders must register, what information they must provide, and how they must keep their registrations current. The Attorney General has previously addressed these matters and has resolved them in the same way in the SORNA Guidelines, appearing at 73 FR 38030, and in the SORNA Supplemental Guidelines, appearing at 76 FR 1630. Those previously issued sets of guidelines determine what state, local, and tribal jurisdictions must do to achieve substantial implementation of the SORNA standards in their registration programs. Reiteration of some of these requirements in a concise set of directions to sex offenders in this rule will not change what jurisdictions need to do to implement SORNA or affect their costs in doing so.

Congressional Review Act

This rule is not a ''major rule'' as defined by the Congressional Review Act, 5 U.S.C. 804(2). The Department of Justice will submit the report required by 5 U.S.C. 801 to each House of Congress and the Comptroller General.

List of Subjects in 28 CFR Part 72

Crime, Information, Law enforcement, Prisoners, Prisons, Probation and parole, Records.

Accordingly, for the reasons stated in the preamble, amend chapter I of title 28 of the Code of Federal Regulations by revising part 72 to read as follows:

PART 72—SEX OFFENDER REGISTRATION AND NOTIFICATION

Sec.

72.1 Purpose.
72.2 Definitions.
72.3 Applicability of the Sex Offender Registration and Notification Act.
72.4 Where sex offenders must register.
72.5 How long sex offenders must register.
72.6 Information sex offenders must provide.
72.7 How sex offenders must register and keep the registration current.
72.8 Liability for violations.

Authority: 34 U.S.C. 20901–45; Pub. L. 109–248, 120 Stat. 587; Pub. L. 114–119, 130 Stat. 15.

§ 72.1 Purpose.

(a) This part specifies the registration requirements of the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20901 *et seq.,* and the scope of those requirements' application. The Attorney General has the authority to specify the requirements of SORNA and their applicability as provided in this part pursuant to provisions of SORNA, including 34 U.S.C. 20912(b), 20913(d), and 20914(a)(8), (c).

(b) This part does not preempt or limit any obligations of or requirements relating to sex offenders under other Federal laws, rules, or policies, or under the laws, rules, or policies of registration jurisdictions or other entities. States and other governmental entities may prescribe registration requirements and other requirements, with which sex offenders must comply, that are more extensive or stringent than those prescribed by SORNA.

§ 72.2 Definitions.

All terms used in this part have the same meaning as in SORNA.

§ 72.3 Applicability of the Sex Offender Registration and Notification Act.

The requirements of SORNA apply to all sex offenders. All sex offenders must comply with all requirements of that Act, regardless of when the conviction of the offense for which registration is required occurred (including if the conviction occurred before the enactment of that Act), regardless of whether a jurisdiction in which registration is required has substantially implemented that Act's requirements or has implemented any particular requirement of that Act, and regardless of whether any particular requirement or class of sex offenders is mentioned in examples in this regulation or in other regulations or guidelines issued by the Attorney General.

Example 1 to § 72.3. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2009. The sex offender is subject to the requirements of SORNA and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction

in which the sex offender resides, is an employee, or is a student.

Example 2 to § 72.3. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under SORNA to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

§ 72.4 Where sex offenders must register.

A sex offender must register, and keep the registration current, in each jurisdiction in which the offender resides, is an employee, or is a student. For initial registration purposes only, a sex offender must also register in the jurisdiction in which convicted if that jurisdiction is different from the jurisdiction of residence.

§ 72.5 How long sex offenders must register.

(a) *Duration.* A sex offender has a continuing obligation to register and keep the registration current (except when the sex offender is in custody or civilly committed) for the following periods of time:

(1) 15 years, if the offender is a tier I sex offender;

(2) 25 years, if the offender is a tier II sex offender; and

(3) The life of the offender, if the offender is a tier III sex offender.

(b) *Commencement.* The registration period begins to run:

(1) When a sex offender is released from imprisonment following conviction for the offense giving rise to the registration requirement, including in cases in which the term of imprisonment is based wholly or in part on the sex offender's conviction for another offense; or

(2) If the sex offender is not sentenced to imprisonment, when the sex offender is sentenced for the offense giving rise to the registration requirement.

(c) *Reduction.* If a tier I sex offender has maintained for 10 years a clean record, as described in 34 U.S.C. 20915(b)(1), the period for which the sex offender must register and keep the registration current under paragraph (a) of this section is reduced by 5 years. If a tier III sex offender required to register on the basis of a juvenile delinquency adjudication has maintained a clean record, as described in 34 U.S.C. 20915(b)(1), for 25 years, the period for which the sex offender must register and keep the registration current under paragraph (a) of this section is reduced to the period for which the clean record has been maintained.

§ 72.6 Information sex offenders must provide.

Sex offenders must provide the following information for inclusion in the sex offender registries of the jurisdictions in which they are required to register:

(a) *Name, date of birth, and Social Security number.* (1) The name of the sex offender, including any alias used by the sex offender.

(2) The sex offender's date of birth and any date that the sex offender uses as his purported date of birth.

(3) The Social Security number of the sex offender and any number that the sex offender uses as his purported Social Security number.

(b) *Remote communication identifiers.* All designations the sex offender uses for purposes of routing or self-identification in internet or telephonic communications or postings, including email addresses and telephone numbers.

(c) *Residence, temporary lodging, employment, and school attendance.* (1) The address of each residence at which the sex offender resides or will reside or, if the sex offender has no present or expected residence address, other information describing where the sex offender resides or will reside with whatever definiteness is possible under the circumstances.

(2) Information about any place in which the sex offender is staying when away from his residence for seven or more days, including the identity of the place and the period of time the sex offender is staying there.

(3) The name and address of any place where the sex offender is or will be an employee or, if the sex offender is or will be employed but with no fixed place of employment, other information describing where the sex offender works or will work with whatever definiteness is possible under the circumstances.

(4) The name and address of any place where the sex offender is a student or will be a student.

(d) *International travel.* Information relating to intended travel outside the United States, including any anticipated itinerary, dates and places of departure from, arrival in, or return to the United States and each country visited, carrier and flight numbers for air travel, destination country or countries and address or other contact information therein, and means and purpose of travel.

(e) *Passports and immigration documents.* Information about each passport the sex offender has and, if the sex offender is an alien, information about any document or documents establishing the sex offender's immigration status, including passport or immigration document type and number.

(f) *Vehicle information.* The license plate number and a description of any vehicle owned or operated by the sex offender, including watercraft and aircraft in addition to land vehicles. If a vehicle has no license plate but has some other type of registration number or identifier, then the registration number or identifier must be provided. Information must also be provided as to where any vehicle owned or operated by the sex offender is habitually parked, docked, or otherwise kept.

(g) *Professional licenses.* Information concerning all licensing of the sex offender that authorizes the sex offender to engage in an occupation or carry out a trade or business.

§ 72.7 How sex offenders must register and keep the registration current.

(a) *Initial registration*—(1) *In general.* Except as provided in paragraph (a)(2) of this section, a sex offender must register before release from imprisonment following conviction for the offense giving rise to the registration requirement, or, if the sex offender is not sentenced to imprisonment, within three business days after being sentenced for that offense.

(2) *Special rules for certain cases.* The following special requirements apply:

(i) *Federal and military offenders.* A sex offender who is released from Federal or military custody, or who is convicted for a Federal or military sex offense but not sentenced to imprisonment, must register within three business days of entering or remaining in a jurisdiction to reside following the release or sentencing.

(ii) *Foreign convictions.* A sex offender required to register on the basis of a conviction in a foreign country must register within three business days of entering any jurisdiction in the United States to reside, work, or attend school.

(b) *Periodic in-person verification.* A sex offender must appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which the offender is required to register. In carrying out the required verification of information in each registry, the sex offender must correct any information that has changed or is otherwise inaccurate and must report any new registration information. A sex offender must appear

in person for these purposes not less frequently than—

(1) Each year, if the offender is a tier I sex offender;

(2) Every six months, if the offender is a tier II sex offender; and

(3) Every three months, if the offender is a tier III sex offender.

(c) *Reporting of initiation and changes concerning name, residence, employment, and school attendance.* A sex offender who enters a jurisdiction to reside, or who resides in a jurisdiction and changes his name or his place of residence in the jurisdiction, must appear in person in that jurisdiction and register or update the registration within three business days. A sex offender who commences employment or school attendance in a jurisdiction, or who changes employer, school attended, or place of employment or school attendance in a jurisdiction, must appear in person in that jurisdiction and register or update the registration within three business days.

(d) *Reporting of departure and termination concerning residence, employment, and school attendance.* (1) A sex offender residing in a jurisdiction must inform that jurisdiction (by whatever means the jurisdiction allows) if the sex offender will be commencing residence, employment, or school attendance in another jurisdiction or outside of the United States. The sex offender must so inform the jurisdiction in which he is residing prior to any termination of residence in that jurisdiction and prior to commencing residence, employment, or school attendance in the other jurisdiction or outside of the United States.

(2) A sex offender who will be terminating residence, employment, or school attendance in a jurisdiction must so inform that jurisdiction (by whatever means the jurisdiction allows) prior to the termination of residence, employment, or school attendance in the jurisdiction.

(e) *Reporting of changes in information relating to remote communication identifiers, temporary lodging, and vehicles.* A sex offender must report within three business days to his residence jurisdiction (by whatever means the jurisdiction allows) any change in remote communication identifier information, as described in § 72.6(b), temporary lodging information, as described in § 72.6(c)(2), and any change in vehicle information, as described in § 72.6(f).

(f) *Reporting of international travel.* A sex offender must report intended travel outside the United States, including the information described in § 72.6(d), to his residence jurisdiction (by whatever means the jurisdiction allows). The sex offender must report the travel information to the jurisdiction at least 21 days in advance of the intended travel and, if the sex offender is terminating his residence in the jurisdiction, prior to his termination of residence in the jurisdiction.

(g) *Compliance with jurisdictions' requirements for registering and keeping the registration current.* (1) A sex offender who does not comply with a requirement of SORNA in conformity with the time and manner specifications of paragraphs (a) through (f) of this section must comply with the requirement in conformity with any applicable time and manner specifications of a jurisdiction in which the offender is required to register.

Example 1 to paragraph (g)(1). A sex offender convicted in a state does not initially register before release from imprisonment, as required by 34 U.S.C. 20913(b)(1) and paragraph (a)(1) of this section, because the state has no procedure for pre-release registration of sex offenders. Instead, the state informs sex offenders that they must go to a local police station within seven days of release to register. The sex offender must comply with the state's requirements for initial registration, *i.e.,* the offender must report to the police station to register within seven days of release.

Example 2 to paragraph (g)(1). A sex offender does not register when he is released from custody, or does not register upon entering a jurisdiction to reside as required by 34 U.S.C. 20913(c) and paragraph (c) of this section, because the jurisdiction, at the time, does not register sex offenders based on the offense for which he was convicted. The jurisdiction later sends the sex offender a notice advising that it has extended its registration requirements to include sex offenders like him and directing him to report to a specified agency within 90 days to register. The sex offender must report to the agency to register within the specified timeframe.

Example 3 to paragraph (g)(1). A sex offender registers as required when released from imprisonment or upon entering a jurisdiction to reside, but the jurisdiction has no procedure for sex offenders to appear periodically in person to update and verify the registration information as required by 34 U.S.C. 20918 and paragraph (b) of this section. The jurisdiction later sends the sex offender a notice advising that it has adopted a periodic verification requirement and directing the sex offender to appear at a designated time and place for an initial update meeting. The sex offender must appear and update the registration as directed.

Example 4 to paragraph (g)(1). A sex offender does not report his email address to the jurisdiction in which he resides when he initially registers, or within three business days of a change as required by paragraph (e) of this section, because email addresses are not among the information the jurisdiction accepts for inclusion in its registry. The jurisdiction later notifies the sex offender that it has extended the registration information it collects to include email addresses and directs him to send a reply within a specified time that provides his current email address. The sex offender must comply with this direction.

(2) In a prosecution under 18 U.S.C. 2250, paragraph (g)(1) of this section does not in any case relieve a sex offender of the need to establish as an affirmative defense an inability to comply with SORNA because of circumstances beyond his control as provided in 18 U.S.C. 2250(c) and § 72.8(a)(2).

§ 72.8 Liability for violations.

(a) *Criminal liability*—(1) *Offense.* (i) A sex offender may be liable to criminal penalties under 18 U.S.C. 2250(a) if the sex offender—

(A) Is required to register under SORNA;

(B)(*1*) Is a sex offender as defined for the purposes of SORNA by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(*2*) Travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(C) Knowingly fails to register or update a registration as required by SORNA.

(ii) A sex offender may be liable to criminal penalties under 18 U.S.C. 2250(b) if the sex offender—

(A) Is required to register under SORNA;

(B) Knowingly fails to provide information required by SORNA relating to intended travel in foreign commerce; and

(C) Engages or attempts to engage in the intended travel in foreign commerce.

(iii) As a condition of liability under 18 U.S.C. 2250(a)–(b) for failing to comply with a requirement of SORNA, a sex offender must have been aware of the requirement he is charged with violating, but need not have been aware

that the requirement is imposed by SORNA.

(2) *Defense.* A sex offender may have an affirmative defense to liability, as provided in 18 U.S.C. 2250(c), if uncontrollable circumstances prevented the sex offender from complying with SORNA, where the sex offender did not contribute to the creation of those circumstances in reckless disregard of the requirement to comply and complied as soon as the circumstances preventing compliance ceased to exist.

Example 1 to paragraph (a)(2). A sex offender changes residence from one jurisdiction to another, bringing into play SORNA's requirement to register in each jurisdiction where the sex offender resides and SORNA's requirement to appear in person and report changes of residence within three business days. *See* 34 U.S.C. 20913(a), (c). The sex offender attempts to comply with these requirements by contacting the local sheriff's office, which is responsible for sex offender registration in the destination jurisdiction. The sheriff's office advises that it cannot schedule an appointment for him to register within three business days but that he should come by in a week. The sex offender would have a defense to liability if he appeared at the sheriff's office at the appointed time and registered as required. The sex offender's temporary inability to register and inability to report the change of residence within three business days in the new residence jurisdiction was due to a circumstance beyond his control—the sheriff office's refusal to meet with him until a week had passed—and he complied with the requirement to register as soon as the circumstance preventing compliance ceased to exist.

Example 2 to paragraph (a)(2). A sex offender cannot register in a state in which he resides because its registration authorities will not register offenders on the basis of the offense for which the sex offender was convicted. The sex offender would have a defense to liability because the state's unwillingness to register sex offenders like him is a circumstance beyond his control. However, if the sex offender failed to register after becoming aware of a change in state policy or practice allowing his registration, the 18 U.S.C. 2250(c) defense would no longer apply, because in such a case the circumstance preventing compliance with the registration requirement would no longer exist.

Example 3 to paragraph (a)(2). A sex offender needs to travel to a foreign country on short notice—less than 21 days—because of an unforeseeable family or work emergency. The sex offender would have a defense to liability for failing to report the intended travel 21 days in advance, as required by § 72.7(f), because it is impossible to report an intention to travel outside the United States before the intention exists. However, if the sex offender failed to inform the registration jurisdiction (albeit on short notice) once he intended to travel, 18 U.S.C. 2250(c) would not excuse that failure, because the preventing circumstance—absence of an intent to travel abroad—would no longer exist.

(b) *Supervision condition.* For a sex offender convicted of a Federal offense, compliance with SORNA is a mandatory condition of probation, supervised release, and parole. The release of such an offender who does not comply with SORNA may be revoked.

Dated: November 29, 2021.

Merrick B. Garland,

Attorney General.

[FR Doc. 2021–26420 Filed 12–7–21; 8:45 am]

BILLING CODE 4410–18–P

FEDERAL REGISTER

Vol. 86 Wednesday,

No. 233 December 8, 2021

Part V

Library of Congress

Copyright Office

37 CFR Parts 201, 220, 222, et al.

Copyright Claims Board: Active Proceedings and Evidence; Proposed Rule

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201, 220, 222, 225, 226, 227, 228, 229, 230, 231, 232, and 233

[Docket No. 2021–8]

Copyright Claims Board: Active Proceedings and Evidence

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office is issuing a notice of proposed rulemaking to establish procedures governing active proceedings before the Copyright Claims Board and post-determination procedures. The proposed rule provides requirements regarding procedural practice, scheduling, conferences, discovery, written testimony, hearings, settlement, smaller claims, default and failure to prosecute, records, post-determination procedures, and conduct of parties. The Office intends to initiate a subsequent rulemaking regarding law student representation.

DATES: Initial written comments must be received no later than 11:59 p.m. Eastern Time on February 7, 2022. Written reply comments must be received no later than 11:59 p.m. Eastern Time on February 22, 2022.

ADDRESSES: For reasons of Government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting comments are available on the Copyright Office website at *https://copyright.gov/rulemaking/case-act-implementation/active-proceedings/*. If electronic submission of comments is not feasible due to lack of access to a computer or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Megan Efthimiadis, Assistant to the General Counsel, by email at *meft@copyright.gov,* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

On December 27, 2020, the President signed into law the Copyright Alternative in Small-Claims Enforcement (''CASE'') Act of 2020.[1] The CASE Act directs the Copyright Office to establish the Copyright Claims Board (''CCB''), a voluntary, alternative forum to federal court for parties to seek resolution of copyright disputes that have a low economic value (''small copyright claims'').[2] The CCB's creation does not displace or limit a party's ability to bring small copyright claims in federal court, but rather provides a streamlined and cost-effective alternative forum to decide those claims.[3] The CCB has authority to hear copyright infringement claims, claims seeking a declaration of non-infringement, and misrepresentation claims under section 512(f) of title 17.[4] Participation in the CCB is voluntary for all parties,[5] and all determinations are non-precedential.[6] Congress directed that the CCB begin operations by December 27, 2021, though the Register may, for good cause, extend that deadline by not more than 180 days.[7]

The CASE Act directs the Register of Copyrights to establish the regulations by which the CCB will conduct its proceedings, subject to the provisions of chapter 15 and relevant principles of law under title 17.[8] On March 26, 2021, the Copyright Office published a notification of inquiry (''NOI'') inviting public comment on various aspects of the CCB's operations, which the Office noted would be established through a series of rulemakings.[9] The Office has issued two previous notices[10] and one final rule[11] related to CCB procedures. In this notice, the Office proposes procedures related to conducting an active proceeding, post-determination review, smaller claims, and the conduct of parties. The Office will issue additional proposed rules related to CCB proceedings in one or more subsequent rulemakings.

II. Proposed Rule

A. Management of Parties

1. Joinder

The CASE Act provides that a claim or counterclaim shall be dismissed without prejudice if the CCB determines that it is unsuitable for determination due to a failure to join a necessary party.[12] The statute does not define or otherwise address procedures governing necessary parties. One comment proposed that the Office adopt Rules 19 and 20 of the Federal Rules of Civil Procedure (''FRCP''), which speak to joinder of parties, to CCB proceedings.[13] The Office has determined, however, that permitting joinder of third parties could significantly alter the nature of a proceeding and consequently could impact the notice provided to parties in some cases—for example, where a respondent declined to exercise its right to opt out based on its understanding of the parties and scope of the proceeding. Instead, the Office proposes that existing parties who believe that a necessary third party has not been joined should raise this issue with the CCB by filing a short letter setting forth the basis of such belief. After any other party already in the proceeding has an opportunity to file an opposing letter, the CCB will evaluate the alleged deficiency and, if it determines that a necessary party has not been joined, it will dismiss the proceeding without prejudice as unsuitable. The claimant may refile its claim with the necessary party included.

The proposed rule also provides that a necessary third party may file a request to intervene with the CCB. Each party must then file a response stating whether the party agrees that the proposed intervenor is a necessary party and provide the basis for that position. The CCB will evaluate the request and may hold a conference with all parties

[1] Public Law 116–260, sec. 212, 134 Stat. 1182, 2176 (2020).

[2] *See, e.g.,* H.R. Rep. No. 116–252, at 18–20 (2019); S. Rep. No. 116–105, at 7–8 (2019). Note, the CASE Act legislative history cited is for H.R. 2426 and S. 1273, the CASE Act of 2019, a bill nearly identical to the CASE Act of 2020. *See* H.R. 2426, 116th Cong. (2019); S. 1273, 116th Cong. (2019). In developing the CASE Act, Congress drew on model legislation in the Office's 2013 policy report, *Copyright Small Claims, https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf* (''*Copyright Small Claims*''). Congress also incorporated the Office's report and supporting materials into the statute's legislative history. H.R. Rep. No. 116–252, at 19; S. Rep. No. 116–105, at 2.

[3] H.R. Rep. No. 116–252, at 17; S. Rep. No. 116–105, at 2–3, 9.

[4] 17 U.S.C. 1504(c)(1)–(3). The CCB cannot issue injunctive relief, but can require that an infringing party cease or mitigate its infringing activity in the event such party agrees and the agreement is reflected in the proceeding's record. *Id.* at 1504(e)(2)(A)(i), (e)(2)(B). This provision also applies to parties making knowing material misrepresentations under section 512(f). *Id.* at 1504(e)(2)(A)(ii).

[5] *See id.* at 1504(a); H.R. Rep. No. 116–252, at 17, 21; S. Rep. No. 116–105, at 3, 11.

[6] H.R. Rep. No. 116–252, at 21–22, 33; S. Rep. No. 116–105, at 14.

[7] Public Law 116–260, sec. 212(d), 134 Stat. at 2199.

[8] 17 U.S.C. 1506(a)(1).

[9] 86 FR 16156 (Mar. 26, 2021). Comments received in response to the March 26, 2021 NOI are available at *https://www.regulations.gov/document/COLC-2021-0001-0001/comment.* References to these comments are by party name (abbreviated where appropriate), followed by ''Initial NOI Comments'' or ''Reply NOI Comments,'' as appropriate.

[10] 86 FR 53897 (Sept. 29, 2021); 86 FR 49273 (Sept. 2, 2021).

[11] 86 FR 46119 (Aug. 18, 2021).

[12] 17 U.S.C. 1506(f)(3).

[13] Am. Intell. Prop. L. Ass'n (''AIPLA'') Initial NOI Comments at 7.

and the third party requesting intervention. If the CCB determines that the intervening party is not a necessary party, it will deny the request and the proceeding will continue with the original parties. If the CCB determines that the intervening party is a necessary party, it will permit the intervening party to join the proceeding, as long as no other party opposes the intervention. A party opposing the intervention of a necessary party will not need to provide reasons for its opposition. If any party opposes the intervention, the proceeding will be dismissed without prejudice. The proposed rule thus permits a necessary party to be joined only if all parties agree.

The Office welcomes any comments as to whether the statute permits joinder of parties as outlined in the proposed rule and the appropriateness of the procedures proposed herein.

2. Dismissal

Under the statute, a claimant may elect to voluntarily dismiss a claim, respondent, or proceeding by written request at any time before a respondent files a response to the claim.[14] Similarly, a counterclaimant may elect to voluntarily dismiss a counterclaim by written request before the claimant files a response to the counterclaim.[15] Upon receipt of such a written request, the CCB shall dismiss the claim or counterclaim, as the case may be, without prejudice.[16]

The statute is not explicit as to whether a party may voluntarily withdraw a claim or counterclaim after a response to it has been filed. The Office's proposed rule addresses this scenario and provides that, if a written request to withdraw a claim or a counterclaim is received after the response has been filed, the CCB will dismiss the claim or counterclaim with prejudice, unless all parties have entered into a written stipulation that the claim or counterclaim will be dismissed without prejudice or unless the CCB determines the dismissal should be without prejudice in the interests of justice. This procedure provides a mechanism for a claimant or counterclaimant to unilaterally withdraw a claim after a response has been served, which furthers the statutory goal of providing a voluntary forum for the resolution of claims.[17] The proposed rule also protects the interests of a responding party, who has invested time and resources into the proceeding, and is in line with the FRCP.[18] The Office welcomes comments on the advisability of including a procedure for unilaterally withdrawing a claim or counterclaim after the response has been served and whether resulting dismissals should be with or without prejudice. To the extent commenters believe that such dismissals typically should be with prejudice, the Office invites comment on whether the CCB should be able to dismiss a case without prejudice if the circumstances show that such action is in the interests of justice.

The proposed rule also provides that a written request to withdraw a claim or counterclaim should include a brief statement signed by the party seeking dismissal. In addition, it provides that claims or counterclaims that are voluntarily withdrawn before a response is filed may be dismissed with prejudice if all parties agree in a written stipulation that is filed with the CCB. This option is intended to facilitate early settlement negotiations. Voluntary dismissal will not impact any other claims or counterclaims in the proceeding.

3. Default and Failure To Prosecute

i. Default Determinations

The CCB may enter a default determination in an active proceeding where the respondent ''has failed to appear or has ceased participating in the proceeding.'' [19] The statute empowers the Office to establish additional requirements that must be met before the CCB may issue a default determination.[20] The legislative history notes that the statute ''establishes a strong presumption against default judgments'' and provides greater protections against default than those available in federal court proceedings.[21] The Office accordingly believes it is important to have safeguards against defaults where possible, and to ensure that parties are given adequate notice before a default can be issued.

To obtain a default determination, the claimant must still ''submit relevant evidence and other information in support of the claimant's claim and any asserted damages,'' even where the respondent has failed to appear or has ceased participating.[22] The CCB then will evaluate the evidence, along with any other requested submissions, and determine whether the materials provided are sufficient to support a finding in the claimant's favor and, if so, any appropriate relief and damages.[23] If the CCB then determines that a default determination is appropriate, it must prepare the determination and provide a written notice to the respondent through all known addresses, including email addresses, and provide the respondent thirty days to file a submission in opposition to the default determination.[24] The CCB must consider a timely response from the respondent, ''and, after allowing the other parties to address such submissions, [shall] maintain, or amend its proposed determination as appropriate, and the resulting determination shall not be a default determination.'' [25] If the respondent fails to respond to the notice, the CCB ''shall proceed to issue the default determination,'' although the CCB may later vacate such determination ''in the interests of justice.'' [26] A federal court may also vacate the default determination ''if it is established that the default . . . was due to excusable neglect.'' [27]

The Office requested comments concerning ''any issues that should be considered relating to a respondent's default, including but not limited to regulations regarding proof of damages in default proceedings.'' [28] Some commenters urged the Office to adopt regulations designed to reduce the risk of the CCB becoming a ''default judgment mill.'' [29] Suggestions included regulations concerning the specific form of evidence a claimant must produce in support of a damages claim,[30] or a presumption against or even a prohibition on statutory damages awards in cases of default.[31] The Office is concerned, however, that regulations that increase the claimant's burden in proving damages or circumscribe the kinds of damages available in the case of a default beyond what is already provided in the statute could incentivize respondents to avoid engaging with CCB proceedings due to the perception that the claimant is not likely to be able to prove or to be awarded significant damages. This could increase, not reduce, the risk that the CCB would be perceived as a default

[14] 17 U.S.C. 1506(q)(1).

[15] *Id.* at 1506(q)(2).

[16] *Id.* at 1506(q)(1)–(2).

[17] H.R. Rep. No. 116–252, at 17.

[18] Fed. R. Civ. P. 41.

[19] 17 U.S.C. 1506(u).

[20] *Id.*

[21] H.R. Rep. No.116–252, at 24.

[22] 17 U.S.C. 1506(u)(1).

[23] *Id.*

[24] *Id.* at 1506(u)(2).

[25] *Id.* at 1506(u)(3).

[26] *Id.* at 1506(u)(4).

[27] *Id.* at 1508(c)(1)(C).

[28] 86 FR at 16162 (citing H.R. Rep. No. 116–252, at 24).

[29] Authors All. Initial NOI Comments at 7; Engine Initial NOI Comments at 8–9.

[30] AIPLA Initial NOI Comments at 7; Ben Vient Initial NOI Comments at 4.

[31] Engine Initial NOI Comments at 9; Univ. of Mich. Libr. Initial NOI Comments at 3.

judgment mill. The proposed rule accordingly does not include such provisions.

Commenters also urged the Office to adopt regulations ensuring that the claimant's submissions are carefully scrutinized, that service was effective,[32] and that the CCB considers any applicable defenses.[33] Others opposed a regulation allowing claimants to move for a default determination, rather than providing the CCB with exclusive authority to initiate default proceedings.[34] The Office appreciates these comments and has endeavored to establish a multistep process designed to make default less likely through the use of built-in safeguards encouraging respondents to engage in the process, while also considering the interests of claimants.

The Office, as allowed but not required under section 1506(u), has proposed a notice system with extra safeguards to avoid defaults where possible. Under the proposed rule, where there has been a missed deadline or requirement, the CCB, following a party's request or on its own initiative, may issue a notice, which will be delivered by mail and to known email addresses for the respondent or counterclaim respondent, explaining that failure to participate may result in the CCB entering a default determination against that party. This notice will explain the meaning and consequences of a default determination and provide the respondent with thirty days from the notice to cure the missed deadline or requirement. If the respondent has not re-engaged by curing the missed deadline or otherwise responding to the notice within fifteen days into the thirty-day window, the CCB will send a second notice to the respondent that re-attaches the first notice and reminds the respondent that it must cure the missed deadline or requirement by the thirty-day deadline.

If the respondent cures the missed deadline or requirement within the thirty-day window, the proceeding will resume and the CCB will issue a revised scheduling order, if necessary. If the respondent fails to cure the missed deadline but otherwise responds with an indication of an intent to re-engage in the proceeding, the CCB will consider the response and may either provide the respondent with additional time to cure the missed deadline, or may proceed with the default process, to avoid, for instance, a respondent continually taking extensions on deadlines without permission and only acting when defaults are issued. If the respondent fails to cure the missed deadline or requirement within the thirty-day window and does not otherwise request and receive additional time to cure the missed deadline, the CCB may proceed with the default process by requiring the claimant to submit evidence in support of a default determination. Such evidence shall take the form of the direct written testimony that the claimant ordinarily would put forward prior to a determination on the merits, and the CCB may request additional evidence that the claimant has within its possession. The CCB will then consider such evidence, taking into account any meritorious defenses that the respondent may have had, and determine whether the evidence is sufficient to support a finding in favor of the claimant. If so, the CCB will determine the appropriate relief and damages, if any, and prepare a proposed default determination that includes the CCB's finding in favor of the claimant, the damages awarded, if any, and the dismissal of any counterclaims asserted by the respondent. The CCB will provide written notice to the respondent of the default determination and its legal significance, and attach the proposed default determination and provide the respondent with thirty days from the notice to respond.

If the respondent responds to this default determination notice by providing evidence in opposition, the CCB will review the respondent's submissions and may request additional information, including written testimony. If the respondent indicates an intent to re-engage in the proceeding, but does not submit timely evidence, the CCB will have the discretion to either grant additional time to submit evidence or proceed with issuing the default determination. The claimant will have an opportunity to respond to any submissions from the respondent, and the CCB, in its discretion, may elect to hold a hearing. After considering any additional evidence or other information provided by the parties, the CCB will either maintain or amend its proposed determination. As the CCB will then have considered evidence from both parties, the resulting final determination will not be classified as a default determination. The effect of this classification is that the resulting final determination may not be challenged as a default determination in a federal district court pursuant to 17 U.S.C. 1508(c). The respondent may, however, seek reconsideration as outlined in 17 U.S.C. 1506(w) and the accompanying regulations in part 230 of title 37.

If the respondent fails to respond to the notice of pending default determination, the CCB will issue the determination as a final determination. The respondent may challenge the default determination in federal court within ninety days of its issuance or, provided that it has not yet initiated proceedings in federal court, may submit a request to the CCB that the default determination be vacated. The claimant will have an opportunity to respond to this request, and both parties will follow the general procedures for reconsideration requests with respect to their submissions. The CCB may then vacate the default determination if it finds that vacating the determination is in the interests of justice.

The statute does not speak to the disposition of a proceeding where the claimant's evidence is insufficient to support a finding in its favor. Under the proposed rule, if the CCB determines that the claimant's evidence is insufficient, it will dismiss the proceeding without prejudice. The Office believes that this approach is appropriate given that the claimant may have been unable to sufficiently gather supporting evidence through discovery due to the default of the respondent. A dismissal with prejudice thus could unfairly penalize a claimant and reward a defaulting respondent.

While the statute is generally designed to be lenient and to avoid defaults, in order to avoid abuse of the system, the proposed rule permits the CCB, in its discretion, to proceed with the default process without issuing the two notices described above, and to move forward with requiring the claimant to submit evidence in support of a default determination if a respondent misses a third deadline in a proceeding without good cause. This provision is aimed at encouraging timely participation and preventing respondents from repeatedly using the default provisions as a backdoor extension for deadlines. The Office appreciates any comments concerning whether such a provision is advisable, and whether there are any other

[32] Motion Picture Ass'n, Recording Indus. Ass'n of Am. & Software and Info. Ass'n of Am. (''MPA, RIAA & SIIA'') Initial NOI Comments at 16; Ryan Fountain Initial NOI Comments at 2.

[33] Engine Initial NOI Comments at 9.

[34] Copyright Alliance, Am. Photographic Artists, Am. Soc'y for Collective Rights Licensing, Am. Soc'y of Media Photographers, The Authors Guild, CreativeFuture, Digital Media Licensing Ass'n, Graphic Artists Guild, Indep. Book Pubs. Ass'n, Music Creators N. Am., Nat'l Music Council of the United States, Nat'l Press Photographers Ass'n, N. Am. Nature Photography Ass'n, Prof. Photographers of Am., Recording Academy, Screen Actors Guild-Am. Fed. of Television and Radio Artists, Soc'y of Composers & Lyricists, Songwriters Guild of Am. & Songwriters of N. Am. (''Copyright Alliance, et al.'') Reply NOI Comments at 16–17.

appropriate and effective methods for preventing abuse of the default process.

ii. Failure To Prosecute

The statute establishes a procedure whereby proceedings may be dismissed due to the failure of a claimant to complete service or to otherwise participate in the proceeding. Under the statute, the CCB will dismiss a respondent or an entire proceeding, as is applicable, without prejudice where a claimant does not complete service on one or more respondents within ninety days of the CCB approving the claim.[35] Once a proceeding becomes active, if a claimant (including a counterclaimant) fails to meet one or more deadlines or requirements set forth in the CCB's scheduling order without justifiable cause, the CCB may dismiss the claims after providing the claimant with written notice and a thirty-day period to respond and cure the missed deadline.[36] If the claimant does not comply, the CCB, after considering any response the claimant provides other than actually complying with the requirements of the missed deadline, may dismiss the claims.[37] As with default determinations, the CCB may subsequently vacate a dismissal ''in the interests of justice,'' [38] and a federal court may vacate the determination ''if it is established that the default or failure was due to excusable neglect.'' [39]

The Office solicited comments concerning regulations governing a claimant's failure to prosecute its claims. One commenter suggested that the regulations permit a respondent to move for dismissal for failure to prosecute,[40] while others opposed such a regulation.[41]

The proposed rule concerning a claimant's failure to complete service creates a distinction between necessary parties and non-necessary parties. If a claimant fails to timely serve a respondent whose participation is not necessary to adjudicate the claims against other parties, the CCB will dismiss that respondent from the proceeding without prejudice, and the proceeding will continue against any remaining respondents. On the other hand, if a claimant fails to timely serve a respondent who is a necessary party, the CCB will dismiss the proceeding without prejudice. If the claimant does not timely serve each and every respondent, the CCB will dismiss the proceeding without prejudice.

The proposed rule pertaining to a claimant's failure to prosecute generally mirrors the provisions regarding a respondent's default. Under the proposed rule, at the request of a party or on its own initiative, the CCB may issue a notice to the claimant, which will be delivered by mail and to all known email addresses for the claimant, that failure to prosecute may result in the CCB issuing a determination dismissing the claimant's claims. This notice will explain the legal effects of such a determination and provide the claimant with thirty days to cure the missed deadline or requirement. If the claimant has not re-engaged fifteen days into this thirty-day window, the CCB will send a second notice to the claimant that re-attaches the first notice and reminds the claimant that it must cure the missed deadline or requirement by the thirty-day deadline.

If the claimant cures the missed deadline or requirement within the thirty-day window, the proceeding will resume and the CCB will issue a revised scheduling order, if necessary. If the claimant fails to cure the missed deadline but otherwise responds with an indication of an intent to re-engage in the proceeding, the CCB will consider the response and may either provide the claimant with additional time to cure the missed deadline or requirement, or may proceed with issuing a determination dismissing the claims. If the claimant fails to cure the missed deadline or requirement within the thirty-day window and does not otherwise request and receive additional time to cure the missed deadline, the CCB will issue a determination dismissing the claims. Such a dismissal will be with prejudice and may include an award of attorneys' fees and costs, if appropriate. As with a default determination, the claimant may challenge the determination in federal court within ninety days of its issuance or, provided that it has not yet initiated proceedings in federal court, may submit a request to the CCB that the determination be vacated. The respondent will have an opportunity to respond to this request, and both parties will follow the general procedures for reconsideration requests with respect to their submissions. The CCB may then vacate the determination in the interests of justice.

The Office welcomes any comments concerning the proposed rules concerning a claimant's failure to proceed and specifically, whether they strike the proper balance between the rights and interests of a respondent and a claimant.

4. Conduct of Parties

The statute contains several provisions that are designed to deter and address improper conduct from parties in proceedings before the CCB. These include provisions authorizing the CCB to penalize bad-faith conduct by awarding costs and attorneys' fees, and to bar repeat bad-faith actors from initiating proceedings before the CCB for a period of twelve months.[42]

i. Bad-Faith Conduct

Under the statute, the CCB may award reasonable costs and attorneys' fees where it determines that ''a party pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact, . . . unless inconsistent with the interests of justice.'' [43] Such an award is typically limited to $5,000, but where the party appeared *pro se,* the award may only include costs and is capped at $2,500.[44] The award may be increased beyond the statutory limit ''in extraordinary circumstances'' where there is a demonstrated ''pattern or practice of bad faith conduct.'' [45] The statute also authorizes the CCB to bar a party from initiating claims for a period of twelve months if it determines that the party engaged in certain bad-faith conduct more than once in a twelve-month period.[46] If it reaches such a determination, the CCB must also dismiss without prejudice any pending proceedings that were commenced by the bad-faith actor, except that dismissal of any active proceeding requires the written consent of the respondent.[47]

In response to the NOI, commenters suggested that the Office create a streamlined process or standardized forms to report bad-faith conduct [48] and publish a list of bad-faith actors who have been barred from using the CCB.[49] Commenters also recommended that the Office establish rules preventing copyright ''trolls'' from abusing the

[35] 17 U.S.C. 1506(v)(1).

[36] *Id.* at 1506(v)(2).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 1508(c)(1)(C).

[40] Amazon Initial NOI Comments at 8.

[41] Copyright Alliance, et al. Reply NOI Comments at 16–17.

[42] 17 U.S.C. 1506(y)(2).

[43] *Id.*

[44] *Id.* at 1506(y)(2)(A).

[45] *Id.* at 1506(y)(2)(B).

[46] *Id.* at 1506(y)(3).

[47] *Id.*

[48] Amazon Reply NOI Comments at 4; Amazon Initial NOI Comments at 11–12; Copyright Alliance, et al. Initial NOI Comments at 42.

[49] Copyright Alliance, et al. Reply NOI Comments at 20; Comput. & Comms's Indus. Assoc. & internet Assoc. (''CCIA & IA'') Initial NOI Comments at 7–8.

CCB.[50] One commenter suggested that the regulations include a mechanism, similar to Anti-SLAPP motions,[51] whereby a respondent can make an early motion to dismiss a bad-faith claim.[52]

The proposed rule makes both parties and party representatives subject to various bad-faith conduct provisions. Under the proposed rule, the CCB will review, as part of its determination of an award of costs or attorneys' fees, whether a party or its representative engaged in bad-faith conduct. The Office has defined ''bad-faith conduct'' consistent with the statute, and the rule clarifies that such conduct may occur at any time during a proceeding. At any point prior to determination, the CCB may order a party or its representative to show cause why certain conduct does not constitute bad-faith conduct. The party or representative will have three days to file a response.

A party may also raise allegations of bad-faith conduct. To do so, the party must file a letter describing the alleged conduct, attaching any relevant exhibits, and seeking a conference. The accused party has seven days in which to file a response if it wishes. After reviewing the parties' submissions, the CCB must either make a finding that no bad-faith conduct occurred or schedule a conference to address the request. The CCB will consider the parties' letters, any arguments on the issue, and the accused party's behavior in other CCB proceedings in the preceding twelve months in determining whether to award attorneys' fees and costs. If the CCB determines that an award of attorneys' fees and costs is appropriate, the award will be included in the final determination and will be in accordance with the allowable amounts set forth in the statute.

The proposed rule also provides that a party or representative who engages in bad-faith conduct on more than one occasion within a twelve-month period will be barred from initiating claims before the CCB for a period of twelve months. The CCB must dismiss any pending proceedings brought by a party who engaged in repeated bad-faith conduct within the requisite time period. In its discretion, the CCB may also bar a representative from participating further in any claims pending before the CCB, after consideration of any hardship to parties represented by that person. If a representative is barred from further representing a party in a pending claim, the CCB will consider requests from that party asking the Board to provide additional time or a stay of the pending action to allow that party to find other representation. As with the proposed rule pertaining to bad-faith conduct within a proceeding, allegations of multiple instances of bad-faith conduct may be raised either by the CCB at any point during a proceeding through an order to show cause or by a party at any point after a proceeding has been initiated. A party may raise such allegations through a letter which describes the instances of bad-faith conduct, attaches relevant exhibits, and requests a conference. A respondent will not waive the ability to opt out of the proceeding if it raises allegations of bad-faith conduct with the CCB prior to the expiration of the period to opt out. The accused party will have an opportunity to respond, regardless of whether the allegations are raised by the CCB or another party.

After reviewing the parties' submissions, the CCB will either make a finding that no bad-faith conduct occurred or hold a conference to address the allegations. The CCB will consider the parties' letters, any arguments on the issue, and the accused party's behavior in other proceedings before the CCB. If an accused party has been subject to an award of attorneys' fees or costs by the CCB due to bad-faith conduct at any point in the prior twelve months, then that will be considered an additional instance of bad-faith conduct for purposes of establishing the bar on initiating claims. However, the CCB may also consider other evidence of bad-faith conduct by the accused party, even if such conduct ultimately did not result in a formal finding or an award of attorneys' fees or costs. For example, the CCB may consider instances in which the accused party filed claims that were found to be noncompliant, or bad-faith proceedings that were initiated by the accused party where the respondent opted out. If the CCB determines that the accused party has engaged in bad-faith conduct on more than one occasion in a twelve-month period, the CCB will issue a written determination that provides that the accused party will be barred from initiating claims before the CCB for twelve months and, where the bad-faith actor is a party and not a representative, that any pending proceedings commenced by the party be dismissed without prejudice, with the exception that the dismissal of active proceedings requires the written consent of the respondent in those proceedings.

The proposed rule does not provide for the publication of a list of bad-faith actors who have been barred from initiating proceedings, as some commenters suggested, because the Office believes that such a list would be unduly harsh, especially for non-attorneys. The CCB will, however, make certain records and findings related to bad-faith conduct public, so that parties are able to identify patterns of bad-faith conduct and bring them to its attention. The Copyright Claims Attorneys will be positioned to identify parties who, notwithstanding being barred from initiating proceedings, do so anyway in spite of a bar and will classify such proceedings as noncompliant. The Office welcomes any other comments concerning the proposed rules for bad-faith conduct, including whether there should be publication of a list of bad-faith actors.

ii. Attorney Conduct

The Office also requested comments regarding the adoption of regulations pertaining to the conduct of attorneys, such as whether to prohibit attorneys who have been suspended from practicing law from participating in CCB proceedings and whether to adopt rules addressing such issues as conduct and discipline, duties of candor, fraud prevention, and, if necessary, sanction, suspension, exclusion, or censure.[53] Commenters generally agreed on the advisability of such regulations. Some commenters suggested that the CCB should have the ability to bar or suspend attorneys who engage in bad-faith conduct,[54] and some suggested that the CCB should report such attorneys to their respective bar associations.[55] Several commenters agreed that disbarred, suspended, or sanctioned attorneys should not be permitted to practice before CCB.[56] Other suggestions were to have the CCB establish rules of professional conduct[57] as well as requirements that attorneys representing

[50] Elec. Frontier Found. (''EFF'') Initial NOI Comments at 3; John Boushka Initial NOI Comments at 1.

[51] Anti-SLAPP statutes are laws designed to deter strategic lawsuits against public participation (''SLAPP''), that is, lawsuits that have the primary purpose of suppressing legitimate criticism or opposition. Such statutes set forth a special form of motion practice, referred to as an ''Anti-SLAPP motion,'' that permits the early dismissal of such lawsuits. *See, e.g., DC Comics* v. *Pac. Pictures Corp.,* 706 F.3d 1009, 1013 (9th Cir. 2013) (discussing California Anti-SLAPP statute).

[52] Gordon Fiermark Initial NOI Comments at 1.

[53] 86 FR 16164–65.

[54] CCIA & IA Initial NOI Comments at 7.

[55] *Id.;* MPA, RIAA & SIIA Initial NOI Comments at 21.

[56] Am. Bar Ass'n Intell. Prop. L. Sec. (''ABA–IPL'') Reply NOI Comments at 8–9; Google Initial NOI Comments at 2; Univ. of Mich. Libr. Initial NOI Comments at 7.

[57] Univ. of Mich. Libr. Initial NOI Comments at 7.

a party identify themselves; an attorney appearance include a representation that the attorney is a member of a bar in good standing; and an attorney who is aware of bad-faith behavior committed by another attorney inform the CCB.[58]

The proposed rule requires attorneys or other representatives to file a notice of appearance that consists of the name of the case, the attorney's bar number (where one exists) in a state in which the attorney has been admitted to practice, the case number, the person on whose behalf the appearance is made, and the attorney or representative's contact information, including email address and telephone number. Attorneys or other representatives must file a similar notice when withdrawing an appearance. Except for law student representatives, attorneys must be a member in good standing of a state, the District of Columbia, or a United States territory or commonwealth bar. Attorneys and representatives must file a statement under penalty of perjury that they are currently qualified and authorized to represent the party on whose behalf they have appeared.

As some comments suggested, the proposed rule prohibits attorneys or representatives who have been disbarred by any court from representing parties before the CCB. If an attorney in an active or pending proceeding is disbarred after a notice of appearance is made, the attorney must report the disbarment to the CCB and withdraw representation. The proposed rule does not prohibit disbarred attorneys or representatives from representing themselves *pro se* where they are a party in a proceeding.

The proposed rule also makes clear that attorneys and representatives who appear before the CCB have a duty of candor and impartiality toward the CCB and a duty of fairness towards opposing parties and counsel. The proposed rule does not establish independent rules of professional conduct. Instead, the CCB will look to the District of Columbia's rules of professional conduct and the rules in the jurisdiction in which the representative practices in determining whether an attorney or representative has breached these duties.

The proposed rule empowers the CCB to bar attorneys or representatives who violate any of these standards of conduct, or are otherwise found to be engaging in bad-faith conduct, from representing parties before the CCB for twelve months. The Office agrees with commenters that such a provision is advisable, and believes the Register has the authority under section 1506(a)(1) to prescribe regulations governing the conduct of attorneys in proceedings before the CCB. Such authority would seem to necessarily include the ability to temporarily bar attorneys from appearing before the CCB. Furthermore, the statute expressly authorizes a twelve-month bar for parties who engage in repeated bad-faith conduct,[59] and defines the term ''party'' to include ''the attorney of a party, as applicable.''[60] The Office invites comments concerning the CCB's authority to discipline or bar attorneys or representatives in this way and whether there are any other methods available to the CCB that should be considered.

5. Limitation on Cases

The statute provides the Office with the option of establishing regulations to limit the number of proceedings a party may bring each year ''in the interests of justice and the administration of the Copyright Claims Board.''[61] Congress explained that this power ''functions as both a docket management tool . . . and as protection against abusive conduct.''[62] In the NOI, the Office indicated its expectation that it would exercise this authority, subject to re-evaluation after the CCB is able to determine the size of its workload.[63]

The Office sought public comment relating to the initial limitation of the permitted number of proceedings a claimant may file each year.[64] Commenters were generally supportive of a limit on the number of claims a party may bring in a year, and suggested limits that ranged from two to four hundred cases.[65] A few commenters opposed a limit due to concerns that it would disproportionately disadvantage claimants who hold copyrights in many works[66] or that a strict limitation would run the risk of being arbitrary and capricious.[67] One commenter suggested a similar restriction be imposed on firms and agents, prohibiting them from representing more than one claim per client per year.[68] Other commenters suggested certain exemptions from the limitation, including for counterclaims,[69] for proceedings where a respondent ultimately opts out or that otherwise do not become active,[70] and for organizations acting on behalf of multiple rights holders.[71] One commenter suggested that the Office consider the financial situation of the claimant and the market price of the infringed work in determining the limit.[72]

Upon consideration of these comments, the Office has proposed a requirement that a party may file no more than ten proceedings in any twelve-month period. The Office believes this limit will help to ensure that the CCB is able to effectively manage its docket, particularly given that the Office has not proposed an upper limit on the total number of proceedings that may be pending before the CCB, as discussed further below. The Office also seeks to avoid the possibility that proceedings may be overwhelmed by just a few claimants. A private attorney or law firm may represent a claimant in no more than forty proceedings in any twelve-month period. A proceeding will count toward this limitation as soon as it is filed, regardless of how it is resolved (*e.g.,* even if it is found noncompliant or unsuitable, is voluntarily dismissed, or is dismissed due to a respondent's opt out). However, amendments to a claim or the filing of counterclaims will not count toward this limit. Any action taken for the sole purpose of avoiding this limitation will constitute bad-faith conduct under the proposed rule. At this time, the proposed rule does not limit the maximum number of total proceedings that may be filed before the CCB by all parties combined.

The proposed rule also provides the CCB with the ability to impose a temporary limitation on the number of proceedings that may be pending before it or the number of proceedings that a party or representative may have pending before the CCB in a twelve-month period. Such a limitation would remain in place for a period that may not exceed six months in the absence of a notice and comment rulemaking. This

[58] Copyright Alliance, et al. Initial NOI Comments at 42.

[59] 17 U.S.C. 1506(y).

[60] *Id.* at 1501(3)(B).

[61] *Id.* at 1504(g).

[62] H.R. Rep. No. 116–252, at 31.

[63] 86 FR 16164.

[64] *Id.*

[65] CCIA & IA Initial NOI Comments at 6 (10 cases); Copyright Alliance, et al. Initial NOI Comments at 41 (20 cases for first year, with discretion to permit more cases for good cause and in interests of justice); Davis Jr. & Luce Initial NOI Comments at 3 (two cases seeking damages over $2500); George LaBonty Initial NOI Comments at 1; Univ. of Mich. Initial NOI Comments at 6–7 (10–12 cases); Verizon Initial NOI Comments at 6–7 (four cases).

[66] MPA, RIAA & SIIA Initial NOI Comments at 19–20.

[67] Science Fiction and Fantasy Writers of Am. Reply NOI Comments at 6.

[68] Verizon Initial NOI Comments at 6–7.

[69] Copyright Alliance, et al. Initial NOI Comments at 41.

[70] *Id.* at 41–42; MPA, RIAA & SIIA Initial NOI Comments at 20.

[71] Copyright Alliance, et al. Initial NOI Comments at 41.

[72] Niskanen Center Initial NOI Comments at 5.

provision is intended to enable the CCB to react quickly in the event that it is inundated with more claims than it is able to handle. Claimants confronted with a potential statute of limitations issue because of the moratorium may file a claim accompanied by a declaration under penalty of perjury attesting that the statute of limitations will expire during the stay and setting forth facts in support of that conclusion. If the CCB determines that the statute of limitations likely will expire during the stay based on the facts set forth in the declaration, the CCB will hold the claim in abeyance and conduct its compliance review of the claim after the end of the moratorium.

The Office welcomes any comments as to whether these limitations strike the proper balance between the interests of the parties and the efficient management of the CCB's work.

B. Management of Proceedings

1. Applicability of Federal Rules of Civil Procedure and Federal Rules of Evidence

The statute includes a general prohibition on formal motion practice, subject to certain exceptions, but permits parties to make various ''requests.'' [73] The statute also sets forth the types of evidence that the CCB may consider in a proceeding—namely, relevant documentary and other nontestimonial evidence as well as relevant testimonial evidence submitted under penalty of perjury.[74] The statute does not otherwise speak to the applicability of the FRCP and the Federal Rules of Evidence (''FRE'').

The Office solicited comments regarding whether it should adopt any provisions of the FRCP in areas relevant to the CCB's operations, potentially with modifications to simplify them and make them more accessible.[75] The Office received several comments on this issue with wide-ranging recommendations on the applicability of the Federal Rules to CCB proceedings. Commenters suggested additional models to look to beyond the Federal Rules [76] and recommended specific provisions that they thought the CCB should adopt, such as those regarding initial status conferences [77] and mechanisms for summary dismissal of unsuitable claims.[78] Several commenters agreed that CCB proceedings should be more flexible and permissive than federal proceedings,[79] especially with respect to the admission of evidence.[80] Some commenters emphasized that the CCB should make use of standardized forms, as opposed to the more customized approach to submissions in federal court proceedings.[81]

The Office agrees with commenters that CCB proceedings should be more flexible and permissive than federal court proceedings. Similarly, and especially given the lack of need to worry about confusing a jury, and the desire not to force unsophisticated parties to learn the rules of evidence, the Board will be more flexible in accepting evidence than a strict adherence to the FRE would require.[82] Accordingly, the proposed rule makes clear that the CCB is not bound by the FRCP or the FRE and that citations by parties to the FRCP and FRE will only be considered to the extent they are persuasive.

2. Scheduling Order

The statute provides that the CCB will issue a scheduling order, which may be amended in the interests of justice, specifying the deadlines in a proceeding upon confirmation that it has become an active proceeding.[83] The CCB may also hold conferences to address case management or discovery issues.[84]

Under the proposed rule, the required scheduling order will include deadlines for the filing of the respondent's response to the claim (including any counterclaims); the date and time of a pre-discovery conference; deadlines for service upon other parties of responses to the CCB's standard interrogatories and standard production of document requests; other discovery deadlines; the deadline for requests for leave to seek additional discovery; the date of the close of discovery; the date and time of a post-discovery conference; and the deadline for the filing of written testimony. The proposed rule does not set forth specific timeframes for each of these deadlines so that the CCB has flexibility to assess the pace of proceedings and the need for docket management.

The proposed rule also provides that the CCB may hold additional conferences beyond the pre-discovery conference and the post-discovery conference on its own initiative or at the request of any party. All such conferences will be held virtually. The proposed rule also permits the CCB to amend the initial scheduling order as needed. The Office invites comments as to whether any other deadlines should be included in the initial scheduling order.

The proposed rule contemplates that one or more Officers will hold all conferences. The Office observes, however, that proceedings could be streamlined and made more efficient if Copyright Claims Attorneys are permitted to hold conferences that do not involve the resolution of a dispute and instead relate to logistical, scheduling, or other non-substantive matters. Accordingly, the Office solicits comments as to whether it has the authority to permit such conferences to be held by Copyright Claims Attorneys rather than Officers.

3. Amending Pleadings

While the statute does not speak to amended pleadings, the Office proposes a rule that would generally prohibit a claimant from making substantive changes without another review by the Copyright Claims Attorneys, or after the time for a respondent to opt out has expired.[85] Under the proposed rule, a claimant may freely amend its claim once as a matter of course before the claim is served by filing the proposed amendment for a compliance review.[86] If the compliance review by the Copyright Claims Attorney already has been completed at the time of the proposed amendment, it must be submitted for a new review by a Copyright Claims Attorney to ensure that the claim as modified is compliant.

A claimant seeking to amend a claim during the opt-out period may do so only with the CCB's leave. To seek such leave, the claimant must submit a short letter to the CCB that sets forth the reasons for the amendment. The CCB will freely grant leave to amend a claim if justice so requires, after considering whether the basis for the amendment should have been reasonably known to the claimant before the claim was served, along with any other relevant considerations. If the CCB grants leave for the amendment, it must still be submitted for a compliance review by a

[73] 17 U.S.C. 1506(m).

[74] *Id.* at 1506(o).

[75] 86 FR 16168.

[76] ACUS Initial NOI Comments at 1–3.

[77] AIPLA Initial NOI Comments at 6.

[78] LCA Reply NOI Comments at 4.

[79] AIPLA Initial NOI Comments at 8.

[80] *Id.;* Copyright Alliance, et al. Initial NOI Comments at 22.

[81] AIPLA Initial NOI Comments at 1; Copyright Alliance, et al. Initial NOI Comments at 21–22; Vient Initial NOI Comments at 4.

[82] The CASE Act provides that the Board CCB may consider various forms of evidence and that ''such evidence may be admitted without application of formal rules of evidence.'' 17 U.S.C. 1506(o).

[83] *Id.* at 1506(k).

[84] *Id.* at 1506(l).

[85] *See* Fed. R. Civ. Pro. 15.

[86] A detailed explanation of the compliance review can be found in the Office's notice of proposed rulemaking on initiation of CCB proceedings. *See* 86 FR 53898–99.

Copyright Claims Attorney. If the Copyright Claims Attorney determines that the amended claim is compliant, the claimant must serve the amended claim on the respondent within fourteen days. Once the claimant serves the amended claim, the period for the respondent to opt out will begin anew, and it will have sixty days to determine whether to opt out of the proceeding.

If a party seeks to amend a pleading after the opt-out period has expired, it may only do so with the leave of the CCB. If the CCB grants such leave, the amendment still must be submitted for a compliance review. To make a request to amend a pleading after service, the party must submit a short letter to the CCB, and any opposing parties will be provided with an opportunity to object or to state that they do not object. The CCB will freely grant leave as justice so requires, after considering whether permitting amendment would prejudice any party or unduly delay the proceeding, and whether the party seeking amendment reasonably should have known of the basis for an amendment earlier. Responses to amended pleadings must be made within the later of the time remaining to respond to the original pleading or within twenty-one days of the CCB's issuance of notification that the amended pleading is compliant.

In proposing this approach, the Office seeks to ensure that the respondent knows the nature and scope of a claim before the opt-out period expires. In other words, the Office wishes to avoid scenarios where amendments substantially change the nature of the proceeding after the opt-out decision has been made. At the same time, the Office believes it is appropriate to permit certain amendments after service, especially where an obvious typographical error has been made. The Office seeks comments concerning these issues and the proper mechanisms for allowing amendments after service of a pleading while preserving the purpose of the opt-out provision.

4. Consolidation

The statute is silent concerning whether claims may be consolidated where they involve identical parties or identical facts and circumstances, or severed where they involve disparate claims. In line with the suggestion of one commenter,[87] the proposed rule provides that the CCB may consolidate active proceedings that involve the same parties or that arise out of the same facts and circumstances for purposes of conducting discovery, submitting evidence, or holding hearings, but not for purposes of CCB determinations and any damages award. Regarding severance, Copyright Claims Attorneys likely will, in the ordinary course, be able to identify during their review process instances where multiple claims involving disparate facts and circumstances have been asserted, and can require that the claimant separate out such disparate claims. The proposed rule also permits the CCB to sever proceedings with respect to some or all parties, claims, and issues where it becomes evident that a single proceeding includes distinct claims involving disparate facts and circumstances that would be inappropriate to resolve in a single proceeding.

Unlike the rule on consolidation, claims that have been severed will be treated together for purposes of damages, so that the cumulative amount of damages awarded in the severed proceedings cannot exceed the maximum damages under the statute for one proceeding. The CCB may dismiss one of the severed proceedings if it finds it to be unsuitable, while allowing the remaining proceeding or proceedings to continue.

The CCB may consolidate or sever proceedings either on its own or at the request of a party, provided that all affected parties receive reasonable notice and an opportunity to be heard. A party seeking consolidation or severance must submit a short letter to the CCB, setting forth the basis for the request, seeking a conference between the CCB and parties from each affected case, and, in the case of a consolidation, providing the docket numbers of each affected proceeding. Parties opposed to the consolidation or severance may file a response objecting to the request. The CCB will consider whether consolidation or severance is necessary and balance the necessity for such action with the timeliness of the request and any undue prejudice that may result.

The Office is interested in public comments concerning the advisability of these proposals. In particular, the Office seeks input as to whether the proposed rule that consolidated proceedings will remain separate for purposes of determinations and damages could be used to evade the statutory caps on damages awards in CCB proceedings, and whether, despite the proposed rule against a party taking actions to avoid case filing limitations, the proposed rule concerning severance could enable parties to evade the limitation on the number of proceedings filed by a single party if a party was able to make disparate claims against various respondents in a single claim filing, all of which should not have been filed together, and then attempt to treat all those claims as one filing even if later severed.

5. Settlement

The statute empowers Officers to facilitate the settlement between parties of claims and counterclaims.[88] It also permits some or all of the parties, at any point in an active proceeding, to request a settlement conference with an Officer. Parties may also jointly submit a settlement agreement, which may be adopted in the CCB's final determination.[89] Congress was clear that the statute ''reflects an intent to encourage compromise and settlement'' and is ''designed to promote compromise,'' as further reflected by the requirement that at least one of the Officers have experience with alternative dispute resolution.[90]

The proposed rule provides that the CCB will encourage voluntary settlement and will, at a minimum, discuss the appropriateness of holding a settlement conference as part of the pre-discovery and post-discovery conferences. At any point in an active proceeding, some or all parties may jointly request a settlement conference with an Officer either orally at a conference or in writing. If the request is made in writing, it must indicate which other parties, if any, join in the request. The party or parties may request a stay of the proceeding while settlement discussions are ongoing. Any opposing party may submit a response letter objecting to the settlement conference or the stay. Stays will be at the CCB's discretion. If no party objects, the CCB will schedule a settlement conference. If one or more party objects, the CCB may still schedule a conference with some or all of the parties, after considering the basis for the objection and whether any claims or counterclaims may be resolved if the CCB holds a conference with only the consenting parties in attendance.

Three days prior to the settlement conference, each participating party must submit a position statement by email to the Officer presiding over the settlement conference, which can be provided to the other parties by agreement, and may include a limited number of exhibits, to facilitate the settlement discussions. The CCB may

[87] Science Fiction and Fantasy Writers of Am. Initial NOI Comments at 6.

[88] 17 U.S.C. 1503(a)(1)(F).

[89] *Id.* at 1506(r).

[90] 17 U.S.C. 1502(b)(3)(iii); H.R. Rep. No. 116–252, at 24.

issue an order staying the proceedings for a period of up to thirty days at the time the conference is scheduled, during or following the conference, or at the request of the parties. Such a stay may be extended at the request of the parties, provided that they are participating in ongoing settlement discussions. If settlement discussions have not been successful at the time the stay (or an extension thereof) expires, the CCB will issue an amended scheduling order.

If settlement discussions are successful and some or all of the parties have reached a resolution, the parties may notify the CCB that they wish to dismiss some or all of the claims or counterclaims and may also include in their request for a dismissal that the CCB adopt some or all of the settlement terms in the final determination. The CCB will dismiss any claims or counterclaims covered by the settlement agreement with prejudice (unless the parties have agreed otherwise) and will adopt any requested settlement terms into the final determination, unless the CCB determines that they are clearly unconscionable.

The Office invites any comments concerning whether there are any other regulations that should be adopted to facilitate settlement between the parties. In particular, the Office seeks input on whether the CCB should be able to order a settlement conference where it sees possible benefit to holding a conference even where one or more parties object. The Office also seeks comment regarding the participation of Officers in settlement conferences. Under the statute, a determination must be reached by ''the majority of the Copyright Claims Board,'' [91] which suggests that an Officer who participates in a settlement conference must also participate in the determination. The Office notes that in the federal litigation system, there are varying approaches within the district courts [92] regarding who should preside over settlement conferences. Some allow district judges to preside over such conferences,[93] while others prefer the use of magistrate judges,[94] outside neutrals,[95] or some combination thereof.[96] The Office recognizes the possibility that a separation between the Officer who presides over a settlement conference and the Officers who serve as the ultimate decision-makers could further encourage participation in voluntary settlement negotiations, and seeks comments assessing the likelihood that parties will engage in settlement when the Officer who presides over the settlement conference will also be involved in the final determination. The Office is also interested in comment regarding any statutory authority for the recusal of the settlement conference Officer from a proceeding, only to terminate the recusal if the two remaining Officers fail to agree on a determination, and whether parties could stipulate to such a recusal and to abide by a decision issued by only the Officers not involved in settlement discussions.

6. Smaller Claims

The statute directs the Office to establish regulations concerning claims in which the total damages sought by the claimant do not exceed $5,000, exclusive of attorneys' fees and costs. These smaller claims are to be considered and determined by not fewer than one Officer. Such determinations will have the same effect as a determination issued by the full CCB.[97] The legislative history states that such proceedings should ''have the same procedural protections of any other claim before the Copyright Claims Board,'' other than that they may be heard by a single Officer.[98]

The Office solicited comments concerning procedures for such ''smaller claims,'' including regulations that would increase the efficiency of such proceedings while retaining the CCB's standard procedural protections.[99] Several commenters suggested that there be a strong presumption against discovery in smaller claims proceedings.[100] Other suggestions included that only Officers with substantial experience with copyright infringement claims be permitted to preside over smaller claims proceedings; [101] that respondents should receive the same protections available to defendants in federal litigation; [102] and that claimants should be required to indicate as part of the initial claim whether they are seeking $5,000 or less in damages.[103] The legislative history suggested that the Office could consider delaying rulemaking concerning smaller claims proceedings until it has an opportunity to evaluate its ordinary procedures and caseload in practice.[104] The Office has considered this suggestion and has decided to institute smaller claims procedures at the outset in order to provide an option of an increasingly streamlined process for claims of $5,000 or less. The Office believes that providing such a process will provide benefits in terms of efficiency and simplicity to parties and may enable the CCB to handle more claims than it otherwise could.

Under the proposed rule, a claimant may either request consideration under the smaller claims procedures at the time of filing or amend its request any time prior to service of the claim. When the claimant seeks to amend its choice after the compliance review but before service, the CCB must issue a new initial notice reflecting the change, so that the notice served on the respondent states that the proceeding will be conducted under the rules for smaller claims. However, once the claimant chooses the smaller claims procedures and completes service, that decision may not be reversed without the consent of the other parties and leave of the CCB.

Smaller claims proceedings will be heard by one Officer, who will be assigned on a rotating basis at the CCB's discretion. Discovery in smaller claims proceedings will be limited to the standard interrogatories, requests for admission, and the standard production of document requests provided by the CCB, as discussed further below. The presiding Officer shall not consider any requests for additional discovery, and expert testimony will be prohibited in smaller claims proceedings, since any benefits of additional discovery or expert testimony are unlikely to outweigh the costs and delays that they may cause. The assigned Officer will issue a determination based solely on the written testimony and without holding a hearing prior to issuing a determination.

The Office welcomes comments concerning the proposed rule for smaller claims and whether it strikes a proper balance between streamlining

[91] 17 U.S.C. 1506(t).

[92] Department of Justice, ''ADR in the Federal District Courts'' (Mar. 2016), *https://www.justice.gov/archives/olp/file/827536/download.*

[93] *See, e.g.,* D. Nev. L. Civ. R. 16.5; E.D. Mich. L. Civ. R. 16.3.

[94] *See, e.g.,* D. Ariz. L. Civ. R. 83.10; D. Colo. L. Civ. R. 16.6.

[95] *See, e.g.,* U.S. District Court for the Southern District of New York, ''Mediation Program Procedures,'' at 10 (July 2020); N.D. Ca. L. ADR R. 2–5.

[96] *See, e.g.,* E.D. Va. L. Civ. R. 83.6.

[97] 17 U.S.C. 1506(z).

[98] H.R. Rep. No. 116–252, at 17.

[99] 86 FR 16162–63.

[100] Copyright Alliance, et al. Reply NOI Comments at 17; AIPLA Initial NOI Comments at 7; Copyright Alliance, et al. Initial NOI Comments at 29; MPA, RIAA & SIAA Initial NOI Comments at 17.

[101] Copyright Alliance, et al. Initial NOI Comments at 29.

[102] Google Initial NOI Comments at 2.

[103] MPA, RIAA & SIAA Initial NOI Comments at 16–17.

[104] S. Rep. No. 116–105, at 8.

the process while providing the procedural protections available to other claims before the CCB.

7. Records and Publication

Under the statute, each final determination of the CCB will be made available on a publicly accessible website.[105] The Office is also directed to establish regulations related to the publication of other records and information concerning CCB determinations.[106] The Office previously indicated that it had requested the provision of an electronic filing and case management system from the Library of Congress' Office of the Chief Information Officer, which would provide capabilities comparable to existing case management systems operated by other courts and tribunals.[107] The Office sought comments concerning public access to CCB records and proceedings, as well as certification of records and determinations.[108] Several commenters agreed that access to determinations and other filings should be publicly available, but information provided during the course of discovery should not be made available.[109] Other commenters argued that there should be a presumption of public access to CCB filings,[110] and that access should be free.[111] A few commenters requested that the CCB make available statistics related to CCB proceedings.[112]

The Office recognizes that the CCB shares characteristics of both court and ADR proceedings.[113] Just as some litigants prefer arbitration in part because the records in such proceedings are not made available to the public, some claimants and respondents may prefer that access to their filings in CCB proceedings be limited. Such a feature might, in fact, play a role in some parties' determinations whether to file a claim with the CCB or whether to opt out of a CCB proceeding. Moreover, CCB determinations are not precedential, and therefore the public interest in such proceedings is arguably less compelling than it is in judicial proceedings.[114] The proposed rule seeks to balance public access with the confidentiality interests of the parties. It provides that the official written record of a CCB proceeding will consist of the parties' submissions and documents issued by the CCB. Members of the public may inspect the available official written record through the electronic filing system, with the exception of any materials that have been designated as confidential by the parties. The Office welcomes comment on whether there should be additional safeguards for parties to mutually agree to withdraw certain types of records from public view.

The proposed rule also addresses other issues related to public access to CCB proceedings and documents. The CCB may, in its discretion, make a transcript of a hearing using available technology or a court reporter. The Office anticipates that, in general, the CCB will use standard speech to text transcript technology that is available with the CCB's videoconferencing system. At the request of a party, the CCB may designate an official reporter to record and/or transcribe a hearing. The requesting party or parties will be responsible for paying the reporter for the cost of the official transcript directly. The Office welcomes comment regarding whether such informal raw transcripts, which may contain various errors, should be added to the official record. Attendance at CCB hearings will be limited to the parties and their representatives, except with leave of the CCB. Requests for leave to attend a CCB hearing must be made in writing. To certify a CCB record, the Office proposes to utilize preexisting services through its Records Research and Certification Section.

C. Discovery

The statute allows limited discovery in CCB proceedings. Discovery may include ''the production of relevant information and documents, written interrogatories, and written requests for admission,'' as established by Office regulations.[115] The CCB has the discretion to approve, upon a showing of good cause, requests for additional relevant discovery on a limited basis.[116] The CCB also may request specific information and documents from parties, consistent with the interests of justice.[117] In addition, the CCB may issue a protective order to protect confidential materials at the request of a party and for good cause.[118] The CCB is empowered to apply an adverse inference concerning disputed facts against a party who fails to timely provide relevant discovery materials in response to a proper request, after providing that party with notice and an opportunity to respond.[119]

Congress provided for limited discovery in CCB proceedings to ''ensure that the proceedings are streamlined and efficient.'' [120] As explained in the Office's *Copyright Small Claims* report, discovery in federal courts is the ''primary reason for the length of federal court litigation'' and is associated with ''often substantial costs and potential for abuse by exploitative litigants.'' [121] Consistent with this goal, the Office proposes a period of limited discovery involving the use of standard CCB-issued interrogatories and standard CCB-issued document requests, and allowing parties to serve limited requests for admission. Requests for additional discovery may be granted for good cause shown. While the CCB may consider requests for expert witnesses, such requests will be disfavored.

---

[105] 17 U.S.C. 1506(t)(3).

[106] *Id.*

[107] 86 FR 16163.

[108] *Id.*

[109] ABA–IPL Reply NOI Comments at 7; Copyright Alliance, et al. Initial NOI Comments at 38; MPA, RIAA & SIIA Initial NOI Comments at 19.

[110] EFF Initial NOI Comments at 4; Univ. of Mich. Initial NOI Comments at 5.

[111] Internet Archive Initial NOI Comments at 3.

[112] Engine Initial NOI Comments at 9; Univ. of Mich. Initial NOI Comments at 5.

[113] *See* 17 U.S.C. 1502(b)(9) (providing that the CCB is housed in the Copyright Office); *id.* at 1509(b) (providing that a CCB proceeding qualifies as an alternative dispute resolution process for purposes of referral by district courts).

[114] *See, e.g.,* 5 U.S.C. 574 (requiring communications provided to a neutral during federal alternative dispute resolution be held confidential unless one of four statutory exceptions apply).

[115] 17 U.S.C. 1506(n).

[116] *Id.*

[117] *Id.* at 1506(n)(1).

[118] *Id.* at 1506(n)(2).

[119] *Id.* at 1506(n)(3).

[120] 86 FR 16162.

[121] *Copyright Small Claims* at 13.

1. Protective Orders

The Office solicited comments related to the issuance of protective orders and the CCB's handling of confidential information, including whether the CCB should adopt a standard model protective order.[122] Commenters overwhelmingly endorsed the idea of a standard protective order established at the initiation of discovery, similar to the procedures used by the Trademark Trial and Appeal Board (''TTAB'').[123] Some commenters argued that an ''Attorneys' Eyes Only'' level of confidentiality would be inappropriate, as many parties likely will be proceeding *pro se.*[124] Others, however, believed that such a designation for commercially sensitive information would be advisable.[125]

The Office agrees with the suggestion of providing a standard protective order to be issued at the request of any party. Under the proposed rule, once requested by any party, this order will govern all discovery material exchanged over the course of the proceeding, and will provide that discovery material received from another party may only be used in connection with the proceeding and must be returned or disposed of at the conclusion of the proceeding. The parties may negotiate customized protective orders that include additional protections for highly sensitive materials. Customized protective orders must be approved by the CCB, and a request for deviation from the standard protective order must explain the need for such deviation.

The standard protective order will provide a single tier of confidentiality. To promote public access and minimize the number of sealed filings, the proposed rule prohibits the bulk marking of documents as ''confidential'' and mandates that confidentiality designations be made on a document-by-document basis.

Confidential discovery materials, or any discussions thereof, may be submitted to the CCB in redacted form or filed under seal. If a document is filed under seal as part of written testimony, a redacted version of the document must be included in the public record. The proposed rule also requires the redaction of certain personally identifiable information from public filings, regardless of whether the discovery material has been marked confidential.

2. Interrogatories

Commenters favored a limit on the number of interrogatories permitted.[126] One comment suggested that the CCB promulgate a standard set of interrogatories tailored to particular categories of claims, with the option to add a limited number of additional questions of each party's choosing.[127] Another comment suggested that parties be permitted to propound additional interrogatories beyond an initial limited number upon a showing of good cause.[128]

The Office has reviewed these suggestions and proposes that, absent leave, interrogatories in CCB proceedings be limited to a standard set that is provided by the CCB through the its website. These standard interrogatories will, in all cases, solicit information related to witnesses, individuals with knowledge of the claims and defenses, relevant agreements between the parties, damages, and a description of relevant documents. The CCB will also promulgate standard interrogatories specifically tailored to the type of claims at issue. For example, a party asserting an infringement claim or responding to a non-infringement claim will respond to standard interrogatories that solicit information pertaining to the allegedly infringed work's copyright registration, ownership, publication history, and creation, along with the basis of the party's belief that the opposing party's activities constitute infringement, the discovery of the alleged infringement, and any attempts to cause the infringement to be ceased or mitigated. A party responding to an infringement claim or asserting a non-infringement claim will respond to standard interrogatories that solicit information pertaining to the ownership, publication history, and creation of the allegedly infringing work, along with information pertaining to the party's defenses, any continued use of the allegedly infringing work, and any revenues or profits directly attributable to the allegedly infringing work.

A party asserting a misrepresentation claim under 17 U.S.C. 512(f) will respond to standard interrogatories that solicit information pertaining to the notification or counter notification, the identity of and any relevant communications with the internet service provider in question or with others, the basis for the party's belief that the notification or counter notification contained a misrepresentation, and any harm caused by the alleged misrepresentation. A party responding to a 512(f) misrepresentation claim will respond to standard interrogatories that solicit information pertaining to the basis for its defenses and any relevant communications with the internet service provider in question or with others.

Under the proposed rule, parties have an obligation to update their interrogatory responses, and serve these updated responses on the other parties, as soon as possible following the discovery of relevant new or updated information.

The Office welcomes any comments concerning the standard interrogatories set forth in the proposed rule and is specifically interested in any comments concerning any other categories of information the standard interrogatories should cover.

3. Requests for Admission

Commenters favored similar limits on the number of requests for admission that may be served in CCB proceedings.[129] Under the proposed rule, parties may serve requests for admission on each other party concerning the facts, the application of law to facts, opinions about either, or the genuineness of documents. The Office proposes that the content of requests for admission be left to the discretion of parties rather than making use of standard forms. Requests for admission must be separately stated in numbered paragraphs, and responses are due thirty days after service. Matters admitted will be treated as conclusively established, unless the CCB permits an admission to be withdrawn or amended on request and for good cause shown. If a matter is not admitted, a party must specifically deny it or state in detail why the party cannot admit or deny it. Any denial must fairly respond to the substance of the request, and an answer may specify that part of the request is admitted and then state what is denied. A party may assert lack of knowledge or information in response to a request, but

[122] 86 FR 16162.

[123] ABA–IPL Reply NOI Comments at 6; Spotify Reply NOI Comments at 3; AIPLA Initial NOI Comments at 7; Amazon Initial NOI Comments at 7–8; Copyright Alliance, et al. Initial NOI Comments at 27; MPA, RIAA, SIIA Initial NOI Comments at 14–15.

[124] Copyright Alliance, et al. Reply NOI Comments at 16; MPA, RIAA & SIIA Initial NOI Comments at 14–15.

[125] Spotify Reply NOI Comments at 3; Amazon Reply NOI Comments at 6.

[126] Copyright Alliance, et al. Initial NOI Comments at 23; Amazon Initial NOI Comments at 6–7; MPA, RIAA & SIAA Initial NOI Comments at 12.

[127] Copyright Alliance, et al. Initial NOI Comments at 23.

[128] MPA, RIAA & SIAA Initial NOI Comments at 12.

[129] *Id.;* Amazon Initial NOI Comments at 6–7; CCIA & IA Initial NOI Comments at 4–5.

only with a representation that the party made a reasonable inquiry in attempting to answer the request, but that the information it knows or can readily obtain is insufficient to enable it to admit or deny the information in the request.

While this rule is modeled after the FRCP,[130] the Office proposes a few important modifications. First, the number of requests for admissions without leave of the CCB is limited to ten, and the rule makes explicit that compound requests are barred. In addition, in contrast to the FRCP, if a party fails to timely respond to a request for admission, the matter asserted is not automatically admitted. However, the CCB in its discretion may deem it admitted pursuant to its power to apply adverse inferences with respect to discovery violations under 17 U.S.C. 1506(n)(3).

The Office welcomes public input into this proposed provision, specifically whether there should be any further limitations on the subject matter of the requests for admission and whether the proposed rule strikes the proper balance in adapting the FRCP for *pro se* parties.

4. Production of Documents

Several commenters suggested that the regulations pertaining to the production of documents be drafted so to avoid the production of large amounts of electronically stored information (''ESI''),[131] as this is a common feature of federal court litigation that significantly increases the costs and burdens on the parties during discovery. These commenters suggested that the regulations make clear that ESI productions must be limited to what is available through searches that a layperson can reasonably handle and should not require the retention of a discovery vendor.[132] One comment also suggested that the regulations prohibit ''document dumps'' of large amounts of irrelevant or duplicative materials.[133]

The Office agrees with these suggestions. Under the proposed rule, the CCB will provide standard document production requests that will be available on its website. As with the standard interrogatories, these document requests will always involve certain common categories—such as documents the party is likely to use in support of its claims or defenses, documents the party is aware of which conflict with its claims or defenses, and documents related to damages—as well as document requests specific to the type of claim at issue. A party asserting infringement or responding to a non-infringement claim will be required to produce a copy of the allegedly infringed work and allegedly infringing material (if applicable and available to the claimant), agreements related to the works at issue, ownership of the allegedly infringed work, pertinent documents where the allegedly infringed work is a derivative work, documents related to the allegedly infringing work, and documents relating to attempts to cause the alleged infringement to be ceased or mitigated. A party responding to an infringement claim or asserting a non-infringement claim will be required to produce a copy of the allegedly infringing material, agreements related to the works at issue, documents related to the creation of the allegedly infringing material, documents pertaining to the allegedly infringed material, and documents relating to any revenues and profits directly attributable to the allegedly infringing material. With respect to section 512(f) misrepresentation claims, parties will be required to produce a copy of the notification or counter notification at issue, communications with the relevant internet service provider or others related to the notification or counter notification, and documents pertaining to the truth or falsity of any representations made in the notification or counter notification.

In responding to document requests, each party must conduct a reasonable search for responsive documents within its possession or under its control, including in the files of its agents, employees, representatives, or others acting on its behalf. Responsive documents may include ESI. In line with commenters' suggestions, however, a reasonable search of ESI shall not exceed manual searches that are easily accomplished by a layperson and need not include searches that require the assistance of third parties, such as a document vendor. Responses to document requests that include large amounts of irrelevant or duplicative material will constitute bad-faith conduct. Under the proposed rule, a party has an obligation to disclose the existence of any responsive materials that are no longer in its possession and explain why they are no longer in its possession. A party also has an obligation to supplement its production as soon as practicable if it later finds responsive documents.

The Office solicits comments as to this proposed rule. The Office is specifically interested in any comments related to whether the proposed rule will sufficiently limit the scope and size of document productions in CCB proceedings. The Office welcomes any suggestions pertaining to mechanisms for further limiting the scope of productions, as well as any other categories of relevant documents that should be included in the standard document production requests.

5. Disputes and Sanctions

The proposed rule requires parties to attempt to resolve discovery disputes in good faith without involving the CCB, a principle found in the FRCP.[134] Parties must meet and confer, at least through a phone call, to attempt to reach a resolution prior to raising a discovery dispute with the CCB. If such an attempt fails, a party seeking discovery may file a short letter describing the dispute and seeking a conference with the CCB, and an opposing party will have an opportunity to file a response prior to the conference. The CCB may then hold a conference and issue an order resolving the dispute either during or following the conference and, if applicable, set a deadline for compliance.

If the party fails to timely comply, the party seeking discovery may send a notice to the allegedly noncompliant party that provides an additional ten days to comply. If the allegedly noncompliant party still fails to comply, the party seeking discovery may request that the CCB impose sanctions. This request may be no longer than ten pages, plus supporting documents, and the opposing party will have an opportunity to file a response. The CCB may hold a conference to address the request for sanctions and will impose sanctions in its sole discretion and upon good cause shown where the opposing party is found to be noncompliant with the CCB's discovery order. The sanctions imposed by the CCB may include an adverse inference against the noncompliant party regarding the facts directly related to the disputed discovery. The proposed rule provides that the CCB may also consider imposing sanctions when awarding attorneys' fees and costs during a final determination.

The Office is interested in comments concerning whether this proposed rule strikes the proper balance between the interests and rights of the respective

[130] Fed. R. Civ. Pro. 36.

[131] Copyright Alliance, et al. Initial NOI Comments at 25–26; MPA, RIAA & SIIA Initial NOI Comments at 13–14.

[132] Copyright Alliance, et al. Initial NOI Comments at 25–26; MPA, RIAA & SIIA Initial NOI Comments at 13–14.

[133] Copyright Alliance, et al. Initial NOI Comments at 26.

[134] Fed. R. Civ. Pro. 37.

parties. The Office is also interested in comments concerning whether it has the authority to issue any monetary sanctions specifically related to a discovery dispute.

D. Evidence

The statute sets out specific categories of evidence that the CCB may consider in making a determination: Documentary and other nontestimonial evidence, sworn written testimony, and oral testimony taken at a hearing.[135] In exceptional cases, expert witness testimony or other types of testimony may be permitted for good cause shown.[136] Testimony may be admitted without application of formal rules of evidence.[137] The Office solicited comment regarding applicable standards for evidence and received comments suggesting that the CCB look to outside sources for establishing evidence standards, such as immigration courts[138] and the Copyright Royalty Board (''CRB'').[139]

The proposed rule for evidentiary standards is modeled after the CRB's rule,[140] as applicable. The Office proposes adopting the general standard of accepting all evidence that is relevant and not unduly repetitious or privileged, as well as the CRB's standards for testimony and objections at hearings. In addition, the proposed rule clarifies the role of FRE 401 and 403, and reserves the CCB's right to discount or exclude evidence with serious credibility issues. It also establishes that only documentary evidence submitted during the written testimony phase may be introduced at a hearing, except evidence required during cross-examination or redirect examination. The Office has not incorporated the CRB's provision requiring that physical copies of evidentiary materials be provided to all parties, due to the online nature of CCB proceedings.[141] Similarly, due to the nature of CCB proceedings, the Office also does not incorporate the CRB's standards regarding the introduction of studies and analyses.

The proposed rule further provides that testifying witnesses at hearings must take an oath or affirmation prior to their testimony. Parties may conduct direct examination, cross-examination, and redirect examination, but the CCB may limit the number of witnesses who testify or the scope of the questioning. Parties will be entitled to raise objections to evidence during the hearing, and the Board will consider those objections if based on valid reasoning, even if not based on the technical rules of evidence.

E. Written Testimony

The CCB is barred from instituting formal motion practice except that it ''may request or permit parties to make submissions addressing relevant questions of fact or law, or other matters, including matters raised *sua sponte* by the Officers, and offer responses thereto.''[142] The CCB is further allowed to hear various ''requests'' from the parties.[143] As part of its broad flexibility to regulate CCB proceedings,[144] the Office proposes a process of written testimony at the close of discovery that establishes the legal and factual basis for the dispute. The Office intends that this process may establish the entire record for the CCB's consideration and that hearings will be held at the CCB's discretion and as set forth below.

A claimant or counterclaimant begins the process by submitting written direct testimony in support of its claim or counterclaim. Any party subsequently responding to that claim shall file written response testimony thirty days following service of the direct testimony. Finally, the original claimant or counterclaimant may, but is not required to, file written reply testimony fourteen days following service.

Direct and responsive testimony comprises documentary evidence, witness statements, and party statements. Documentary evidence consists of non-testimonial evidence sponsored by a witness with knowledge of its contents and authenticity, unless the document was produced by an opposing party. Such evidence must have been served on the opposing parties, and accompanied by a numbered document list that briefly describes each document included. Witness statements consist of sworn written testimony, from non-expert witnesses unless leave for experts has been granted, testifying to factual information based on the witness's personal knowledge, and sponsoring certain documents in the document list. A party statement is a brief statement of no more than twelve double-spaced pages that sets forth a party's position as to key facts, the law, and damages. For a claimant, such damages information includes whether it is seeking statutory or actual damages and any profits of an alleged infringer. For a respondent, such information includes whether it would voluntarily agree to an order stopping it from engaging in activities found unlawful;[145] such an agreement may be taken into account by the CCB in determining damages. Both elections may be changed prior to a final determination, and a respondent's agreement to an injunction will not be considered in any way when reviewing liability. Reply testimony may only include new documentary evidence and witness statements to the extent that they are required to contradict or rebut evidence presented by the opposing party in its response.

F. Hearings

In the course of a proceeding, the CCB may conduct hearings.[146] Hearings on the merits may be held as long as there are no fewer than two Officers to ''receive oral presentations on issues of fact or law from parties and witnesses to a proceeding.''[147] These hearings, whenever possible, are to be carried out online or by phone, ''except that, in cases in which physical or other nontestimonial evidence material to a proceeding cannot be furnished to the Copyright Claims Board through available telecommunications facilities, the [Board] may make alternative arrangements . . . that do not prejudice any other party to the proceeding.''[148] The hearing must be noted in the record and transcribed.

The Office proposes that a hearing not be required at the close of written testimony, but may be held at the CCB's discretion, and may be convened on the CCB's own initiative or upon a request from any party for a hearing. A party need not give detailed reasons for its request for a hearing, but the request must be included in a party statement submitted during the written testimony phase. Once the hearing has been conducted, no additional testimony or evidence may be submitted, except as set forth in post-determination proceedings.

The Office understands that while alternative arrangements may be made for the submission of material physical or nontestimonial evidence that cannot be furnished virtually, the statute appears to require virtual hearings.[149] However, the Office is interested in providing a mechanism for in-person

[135] 17 U.S.C. 1506(o).

[136] *Id.*

[137] *Id.* at 1506(o)(2).

[138] AIPLA Initial NOI Comments at 8.

[139] Copyright Alliance, et al. Initial NOI Comments at 22.

[140] 37 CFR 351.10.

[141] *Id.* at § 351.10(d).

[142] 17 U.S.C. 1506(m)(2).

[143] *Id.* at 1506(m)(1).

[144] *Id.* at 1506(a)(1), 1510(a)(1).

[145] *Id.* at 1504(e)(2).

[146] *Id.* at 1503(a)(1)(E).

[147] *Id.* at 1506(p).

[148] *Id.* at 1506(c)(2).

[149] *Id.*

hearings in the circumstance where such a hearing is requested by all parties and all parties can attend. The Office welcomes comments regarding this provision and whether the statute can be read to allow in-person hearings when requested by all parties and where all parties can attend.

G. Post-Determination Proceedings

After a determination is rendered, the CCB may reconsider it for clear error of law or fact upon request of a party.[150] If reconsideration is denied, the Register of Copyrights may review the CCB's decision upon request of a party to determine whether there was an abuse of discretion in denying reconsideration.[151] The Office requested comment on both post-determination proceedings, and proposes regulations as further set forth below.

1. Request for Reconsideration

The CCB's determinations are subject to reconsideration or amendment by the CCB itself, if a party submits a written request within thirty days of the final determination.[152] After providing other parties an opportunity to address the request for reconsideration, the CCB shall either deny the request or issue an amended final determination.[153] The request should not merely repeat previous arguments made before the CCB, and the CCB will not accept new evidence unless a party demonstrates through clear and convincing evidence that the evidence was not available in the exercise of reasonable diligence prior to the submission of written testimony. After the requesting party sets forth the purported error that it believes was material to the outcome or a technical mistake, the non-requesting party has the opportunity to respond or otherwise oppose the points made. The Office proposes that responses to requests for reconsideration be filed within twenty-one days after service of a request for reconsideration, and that each party's brief may be no more than twelve double-spaced pages. The Office has not included a provision for a reply to the response by the requesting party before the CCB renders a decision, as the statute contemplates only ''an opportunity [for other parties] to address [the] request.'' [154]

2. Register's Review

Where the CCB denies a party's request for reconsideration of a final determination in whole or in part, that party can request that the Register review the determination. Such review ''shall be limited to consideration of whether the Copyright Claims Board abused its discretion in denying reconsideration of the determination.'' [155] A request must be accompanied by ''a reasonable filing fee,'' to be established by regulation.[156] After other parties have had an opportunity to address the reconsideration request, the Register must either ''deny the request for review, or remand the proceeding to the Copyright Claims Board for reconsideration of issues specified in the remand and for issuance of an amended final determination.'' [157] The Office sought public input on any issues relating to the Register's review, including regulatory standards for the substance of a request, a reasonable filing fee, and post-review procedures.[158]

Under the proposed rule, a party may request the Register's review within 30 days of a denial of a request for reconsideration. The request must identify what the requesting party believes to be the CCB's abuse of discretion in denying the request for reconsideration and must be accompanied by a filing fee. The Office proposes that responses be filed within twenty-one days after service of a request for Register's review, following procedures similar to those set forth above with regard to a request for reconsideration filed with the CCB. Only evidence that was previously submitted to the CCB as part of written testimony, at a hearing, or in response to a specific request for evidence from the CCB may be submitted as part of the Register's review process.

The statute provides ''[i]f the Copyright Claims Board denies a party a request for reconsideration of a final determination, . . . that party may . . . request review.'' [159] This provision is silent as to the non-requesting party's ability to request the Register's review if it loses the reconsideration request. That seems to suggest that only a party who has unsuccessfully requested reconsideration by the CCB may seek Register review, but not the non-requesting party, even where the request was successful and the determination is amended. Accordingly, the Office has not included a provision for the non-moving party to request review of an amended final determination. The Office invites comment on this issue, as well as the appropriateness of allowing the party which did not seek reconsideration, but which now finds itself on the losing end of the matter, to seek reconsideration of an amended final determination (*i.e.,* reconsideration of the reconsideration) without relitigating issues the CCB has already considered.

Finally, the Office proposes a $300 fee to request the Register's review. In setting this fee, the Office finds that the fee applicable to a second request for reconsideration of a denial of registration provides a useful analogue. When the Registration Program refuses to register a work, the applicant has two opportunities to request reconsideration. The first request is considered within the Registration Program. Second requests are considered by the Register or her designee, the General Counsel, and a third senior member of the Office.[160] The fee for a second reconsideration is $700,[161] though the actual cost for providing the service is $4,471.[162] The Office anticipates that the Register's review of a CCB determination will operate in a similar manner and will necessarily involve the time and expertise of the Register and senior staff. Setting the fee at $300 reasonably reflects the narrower scope of review under this procedure as compared to registration requests for reconsideration and, in combination with the proposed filing fee for initiating a claim,[163] complies with the statutory ceiling of $402.[164]

List of Subjects

37 CFR Part 201

Copyright, General provisions.

37 CFR Part 220

Claims, Copyright, General.

37 CFR Part 222

Claims, Copyright.

[150] *Id.* at 1506(w).

[151] *Id.* at 1506(w), (x).

[152] *Id.* at 1506(w).

[153] *Id.*

[154] *Id.* at 1506(x).

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] 86 FR 16164.

[159] 17 U.S.C. 1506(x).

[160] *See generally* U.S. Copyright Office, *Compendium of U.S. Copyright Practices,* ch. 1700 (3d ed. 2021).

[161] 37 CFR 201.3(d)(4)(ii).

[162] Booz Allen Hamilton, *2017 Fee Study Report* 2, 26 (2017), *https://www.copyright.gov/rulemaking/feestudy2018/fee_study_report.pdf.*

[163] *See* 86 FR 53905 (proposed 37 CFR 201.3(g)(1)).

[164] 17 U.S.C. 1501(c) (setting the sum total of filing fees as no less than $100 and no more than the cost of filing an action in a district court of the United States). The statutory fee for filing suit in a federal district court is $350, 28 U.S.C. 1914(a), and an additional fee of $52 is charged as an administrative fee by the Judicial Conference of the United States. *Id.*

37 CFR Part 225

Claims, Copyright.

37 CFR Part 226

Claims, Copyright.

37 CFR Part 227

Claims, Copyright.

37 CFR Part 228

Claims, Copyright.

37 CFR Part 229

Claims, Copyright.

37 CFR Part 230

Claims, Copyright.

37 CFR Part 231

Claims, Copyright.

37 CFR Part 232

Claims, Copyright.

37 CFR Part 233

Claims, Copyright.

Proposed Regulations

For the reasons stated in the preamble, the U.S. Copyright Office proposes to further amend chapter II, subchapters A and B, of title 37 Code of Federal Regulations, as proposed to be amended at 86 FR 53897 (September 29, 2021), as follows:

Subchapter A—Copyright Office and Procedures

PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

Section 201.10 also issued under 17 U.S.C. 304.

■ 2. In § 201.3, revise the first column heading in table 4 to paragraph (g) and add paragraph (g)(3) to read as follows:

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Section and the Copyright Claims Board.

* * * * *

(g) * * *

TABLE 4 TO PARAGRAPH (g)

Copyright claims board fees	Fees ($)
* * * * * *	*
(3) Filing fee for review of a final CCB determination by the Register	300

Subchapter B—Copyright Claims Board and Procedures

■ 3. Revise part 220 to read as follows:

PART 220—GENERAL PROVISIONS

Sec.

220.1 Definitions.
220.2 Authority and functions.
220.3 Handbook.
220.4 Timing.

Authority: 17 U.S.C. 702, 1510.

§ 220.1 Definitions.

For purposes of this subchapter:

(a) A claim becomes an *active proceeding* when the claimant has filed proof of service and the respondent has not, within the sixty day opt-out period, submitted an opt-out notice to the Copyright Claims Board.

(b) *Bad-faith conduct* occurs when a party pursues a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact. Such conduct may occur at any point during a proceeding, including before a proceeding becomes an *active proceeding.*

(c) A *default determination* is a *final determination* issued as part of the default procedures set forth in 17 U.S.C. 1506(u) when the respondent does not participate in those procedures.

(d) A *final determination* is a decision that concludes an *active proceeding* before the Board and is binding only on the participating parties. A final determination generally assesses the merits of the claims in the proceeding, except when issued to dismiss a claimant's claims for failure to prosecute.

(e) *Standard interrogatories* are written questions provided by the Board that a party in an *active proceeding* must answer as part of discovery.

(f) An *initial notice* means the notice of a proceeding that accompanies a claim or counterclaim in a Copyright Claims Board proceeding as described in 17 U.S.C. 1506(g).

(g) A *second notice* means the notice of a proceeding sent by the Copyright Claims Board as described in 17 U.S.C. 1506(h).

(h) *Standard production of document requests* are written requests provided by the Board requiring a party to provide documents, other information, or tangible evidence as part of discovery in an *active proceeding.*

§ 220.2 Authority and functions.

The Copyright Claims Board (''Board'') is an alternative forum to Federal court in which parties may voluntarily seek to resolve certain copyright-related claims regarding any category of copyrighted work, as provided in chapter 15 of title 17 of the United States Code. The Board's proceedings are governed by title 17 of the United States Code and the regulations in this subchapter.

§ 220.3 Handbook.

The Copyright Claims Board may issue a handbook explaining the Board's practices and procedures. The handbook may be viewed, downloaded, or printed from the Board's website. The handbook will not override any existing statute or regulation.

§ 220.4 Timing.

When the start or end date for calculating any deadline set forth in this subchapter falls on a weekend or a Federal holiday, the start or end date shall be extended to the next Federal workday. Any document subject to a deadline must be either submitted to the electronic filing system by 11:59 p.m. Eastern Time on the date of the deadline or dispatched by the date of the deadline.

PART 222—PROCEEDINGS

■ 4. The authority citation for part 222 continues to read as follows:

Authority: 17 U.S.C. 702, 1510.

■ 5. Add § 222.1 to read as follows:

§ 222.1 Applicability of the Federal Rules of Civil Procedure and Federal Rules of Evidence.

The rules of procedure and evidence governing proceedings before the Copyright Claims Board (''Board'') are set forth in this part. Parties may cite to the Federal Rules of Civil Procedure or the Federal Rules of Evidence (''FRE'') as persuasive authority. The Board may

consider arguments referencing the Federal Rules of Civil Procedure or FRE, but is not bound by the Federal Rules of Civil Procedure or FRE, and will only consider them to the extent that they are persuasive in the context of this subchapter.

■ 6. Add §§ 222.10 through 222.19 to read as follows:

* * * * *

Sec.

222.10 Scheduling order.
222.11 Amending pleadings.
222.12 Consolidation or severance.
222.13 Additional parties.
222.14 Written testimony on the merits.
222.15 Hearings.
222.16 Withdrawal of claims; dismissal.
222.17 Settlement.
222.18 Protective orders.
222.19 Evidence.

* * * * *

§ 222.10 Scheduling order.

(a) *Timing.* Upon confirmation that a proceeding becomes an active proceeding, the Board shall issue an initial scheduling order.

(b) *Content of initial scheduling order.* The scheduling order shall include the dates or deadlines for:

(1) Filing of a response to the claim by the respondent;

(2) A pre-discovery conference with a Copyright Claims Officer (''Officer'') to discuss case management, including discovery, and the possibility of resolving the claims and any counterclaims through settlement;

(3) Service of responses to standard interrogatories;

(4) Service of requests for admission;

(5) Service of documents in response to standard production of document requests;

(6) Requests for leave to seek additional discovery;

(7) Close of discovery;

(8) A post-discovery conference with an Officer to discuss further case management, including the need for any additional discovery, and the possibility of resolving the claims and any counterclaims through settlement; and

(9) Filing of each party's written testimony and responses, pursuant to § 222.14.

(c) *Conferences.* In addition to those identified in paragraph (b) of this section, the Board may hold additional conferences to manage the proceedings and resolve disputes, at its own election or at the request of any party. Conferences may be held by one or more Officers and shall be held virtually.

(d) *Amended scheduling order.* The Board may amend the initial scheduling order—

(1) Upon the clearance of a counterclaim by a Copyright Claims Attorney pursuant to 37 CFR 224.1(c)(1), to add a deadline for the service of a response by a claimant to a counterclaim and to amend other previously scheduled dates in the prior scheduling order;

(2) Upon request of one or more of the parties to an active proceeding submitted through the Board's electronic filing system;

(3) As necessary to adjust the schedule for conferences or hearings or the staying of any proceedings;

(4) As necessary to facilitate settlement pursuant to § 222.17; or

(5) Upon its own initiative in the interests of maintaining orderly administration of the Board's docket.

§ 222.11 Amending pleadings.

(a) *Amendments before service.* A party may freely amend its pleading once as a matter of course prior to service of its claim or counterclaim. Any claim or counterclaim that is amended shall be submitted for a compliance review by a Copyright Claims Attorney.

(b) *Amendments during the opt-out period.* A claimant seeking to amend a claim during the opt-out period may do so only with leave of the Board.

(1) *Requests for leave to amend.* To request the Board's leave, the claimant must submit a letter to the Board, no longer than five pages in length, setting forth the reasons why an amended claim is appropriate. In determining whether to grant leave to amend a pleading, the Board shall freely grant leave if justice so requires after considering whether the basis for the amendment reasonably should have been known to the claimant before the claim was served or during the time period specified in paragraph (a) of this section, along with any other relevant considerations.

(2) *Compliance review of amended claims.* If the Board grants leave to amend a claim, any amendment shall be submitted by the claimant for a compliance review by a Copyright Claims Attorney.

(3) *Time for service of the amended claim.* The claimant shall serve the amended claim on the respondent within 14 days after a Copyright Claims Attorney finds it to be compliant.

(4) *Extension of the opt-out period.* The respondent shall have 60 days from service of the amended claim to opt out of the proceeding pursuant to 37 CFR 223.1.

(c) *Non-infringement claims or defenses or misrepresentation claims.* A party asserting non-infringement or defending against a claim of infringement or misrepresentation may amend its pleading after service of its initial responses to standard interrogatories, where the party disclosed additional defenses beyond those set forth in the initial pleading. Such amendment shall be as a matter of right.

(d) *All other amendments.* In all other cases, a party may amend its pleading only with the Board's leave. If the Board grants leave, any amendment shall be submitted for a compliance review.

(1) *Time to respond.* Unless the Board orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 21 days after the Board's notification that the amended pleading is compliant, whichever is later.

(2) *Procedure for request for leave to amend.* The party seeking leave to amend must submit a short letter to the Board, no longer than five pages in length, setting forth the reasons why an amended pleading is appropriate. Any other party may file a response, no longer than five pages in length, within 14 days of the date of service of the request for leave to amend, stating its views concerning the request. No reply letters shall be permitted unless the Board grants leave.

(3) *Standard for granting leave to amend.* In determining whether to grant leave to amend a pleading, the Board shall freely grant leave if justice so requires after considering whether any other party will be prejudiced if the amendment is permitted (including the impact the amendment might have on a respondent's right to opt out of the proceeding), whether the proceedings will be unduly delayed if the amendment is permitted, and whether the basis for the amendment reasonably should have been known to the amending party before the pleading was served or during the time period specified in paragraph (a) of this section, along with any other relevant considerations.

§ 222.12 Consolidation or severance.

(a) *Consolidation.* If a claimant has multiple active proceedings against the same respondent or that arise out of the same facts and circumstances, the Board may consolidate the proceedings for purposes of conducting discovery, submitting evidence to the Board, or holding hearings. Consolidated proceedings shall remain separate for purposes of Board determinations and any damages awards.

(b) *Severance.* If a single proceeding includes distinct claims involving disparate facts and circumstances that would be difficult, time-consuming, or otherwise inappropriate to resolve in a single proceeding, the Board may sever

the proceedings with respect to some or all parties, claims, and issues. Severed proceedings shall be treated as one proceeding for purposes of statutory damages. The Board may in its discretion dismiss one of the severed proceedings as unsuitable for resolution under these regulations without dismissing other severed proceedings.

(c) *Timing.* The Board may consolidate or sever proceedings at any time upon its own authority or following consideration of a request by any party, with reasonable notice and opportunity to be heard provided to all affected parties.

(d) *Procedure.* The party seeking consolidation or severance must submit a short letter to the Board, no longer than five pages in length, setting forth the reasons for the request, requesting a conference with the Board and the parties from each affected case, and, in the case of a request for consolidation, providing the Board with the docket numbers for each affected proceeding. Parties opposing consolidation or severance may file a response letter, no longer than five pages in length, within 14 days of the date of service of the request for consolidation or severance, objecting to the request. No reply letters shall be permitted, unless the Board grants leave for a reply.

(e) *Standard for granting request.* In determining whether to grant a request to consolidate or sever, the Board shall consider whether consolidation or severance is necessary and balance that need with the timeliness of the request and whether any undue prejudice has resulted from the delay in making the request.

§ 222.13 Additional parties.

(a) *When applicable.* A necessary party is a person or entity whose absence would prevent the Board from according complete relief among existing parties, or who claims an interest related to the subject of the proceeding such that reaching a determination in the proceeding may impair or impede that person's or entity's ability to protect that interest as a practical matter, or in whose absence an existing party would be subject to a substantial risk of incurring double, multiple, or inconsistent obligations because of that interest.

(b) *Failure to join a necessary party.* At any time, any party who believes in good faith that a necessary party has not been joined may file a letter, no longer than three pages in length, notifying the Board of the failure to join the necessary party and providing the basis for such belief. An opposing party may file a response, no longer than three pages in length, within 14 days of the date of service of the letter, in opposition. If the Board determines that a necessary party has not been joined, it shall dismiss the proceeding without prejudice.

(c) *Intervention of a necessary party.* At any time, a necessary third party seeking to intervene may file a letter, no longer than three pages in length, setting forth the reasons for the request and requesting a conference with the Board. Within 14 days of the date of service request, each party to the proceeding shall file a letter, no longer than three pages in length, indicating whether it agrees that the intervening party is a necessary party, and the basis thereof, or whether it opposes the intervention. After evaluating the parties' letters, the Board may hold a conference between the parties to the proceeding and the intervening party to address the request.

(d) *Board determination.* (1) If the Board determines that the intervening party is not a necessary party, it shall deny the request and resume the proceeding, unless all parties agree that the party should be joined.

(2) If the Board determines that the intervening party is a necessary party, it shall—

(i) Permit the intervening party to join the proceeding, if no party indicated that it opposed the request to intervene; or

(ii) Dismiss the proceeding without prejudice, if any party indicated that it opposed the request to intervene.

§ 222.14 Written testimony on the merits.

(a) *Timing.* At the times specified within the scheduling order, any party asserting a claim or counterclaim shall file written direct testimony in support of that claim or counterclaim. Any party responding to a claim or counterclaim shall file written response testimony within 30 days following the date of service of written direct testimony. Any party who asserted a claim or counterclaim may file written reply testimony within 14 days following the date of service of written response testimony.

(b) *Direct and response testimony.* Written direct and response testimony shall consist of documentary evidence, witness statements, and a party statement.

(1) *Documentary evidence.* (i) Documentary evidence must be accompanied by a statement that lists each attached document and provides a brief description of each document and how it bears on a claim or counterclaim;

(ii) Each document must be sponsored by a witness with knowledge of its contents and authenticity, unless the document statement states that the document was produced by an opposing party during discovery; and

(iii) Direct or response documentary evidence shall only include documents that were served on opposing parties pursuant to the scheduling order, absent leave from the Board, which shall be granted only for good cause.

(2) *Witness statements.* A witness statement must—

(i) Be sworn under penalty of perjury by the witness;

(ii) Be detailed as to the substance of the witness's knowledge and must be organized into numbered paragraphs;

(iii) Contain only factual information based on the witness's personal knowledge and may not contain legal argument; and

(iv) Reference any documents included in the document statement that are sponsored by the witness, with a brief statement as to the basis for the witness's knowledge of the document's authenticity.

(3) *Party statement.* A party statement—

(i) Shall set forth the party's position as to the key facts, laws, and damages;

(ii) Need not have a table of contents or authorities;

(iii) Shall have a title page with the case's caption and the title of the document (*e.g.,* Party Statement of Respondent John Doe);

(iv) Shall be limited to 12 double-spaced pages, not including the title page or any signatures or certificates of service, in 12-point font or larger for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page;

(v) For a claimant or counterclaimant seeking damages, shall include a statement as to whether the party is seeking statutory damages or actual damages and any profits. This election may be changed at any time up until final determination by the Board; and

(vi) For a respondent or counterclaim respondent, may include a statement as to whether, if found liable on a claim or counterclaim, the party would voluntarily agree to an order stopping it from engaging in the activities found unlawful in the future as specified in 17 U.S.C. 1504(e)(2). Such an election may be considered in appropriate cases by the Board in determining an amount of damages, if any, pursuant to 17 U.S.C. 1504, and such election may be changed at any time up until final determination by the Board. The statement shall take the following form: ''[Claim/Counterclaim] respondent agrees that if it is found liable, it agrees to an order that it will stop the activity found to be unlawful.'' Such a statement will not be considered by the Board in any way in

making its determination as to liability, and shall be considered only as to damages.

(c) *Reply testimony.* Written reply testimony must be limited to addressing or rebutting specific evidence set forth in written response testimony. Written reply testimony may consist of documentary evidence, witness statements, and a party statement as set forth in this paragraph (c).

(1) *Documentary evidence.* In addition to the requirements of paragraph (b)(1) of this section, documentary evidence presented by a party as part of written reply testimony must be limited to documentary evidence required to contradict or rebut specific evidence that was presented in an opposing party's written response testimony and shall not include any documentary evidence previously presented as part of the submitting party's direct testimony.

(2) *Witness statements.* In addition to the requirements of paragraph (b)(2) of this section, a reply witness statement must be limited to facts not previously included in that witness's prior statement, and must be limited to facts that contradict or rebut specific evidence that was presented in an opposing party's written response testimony. The reply witness's statement must refer to any documents the reply witness is sponsoring in the same manner as set forth in paragraph (b)(2) of this section.

(3) *Party statement.* A party statement in reply must be limited to rebutting or addressing an opposing party's written response testimony and may not include any discussion of the facts, the law, or damages that was included in that party's direct party statement. A reply party statement is subject to the same formatting rules set forth in paragraph (b)(3) of this section except that it must be limited to 7 double-spaced pages, not including the title page or any signatures or certificates of service, in 12-point font or larger for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page.

(d) *Certification.* All written testimony submitted to the Board must include a certification by the party submitting such testimony that it is accurate and truthful.

(e) *Request for hearing.* Any party may include in a party statement a request for a hearing on the merits before the Board, consistent with § 222.15.

(f) *No additional filing.* Following filing of any written reply testimony, no further written testimony or evidence may be submitted to the Board, unless at the specific request of the Board, or as appropriate at a hearing on the merits ordered by the Board.

§ 222.15 Hearings.

(a) *Timing.* In any action, the Board may hold a hearing following submission of each party's written direct, response, and reply testimony if it determines that such a hearing is appropriate or advisable. The Board may decide to hold a hearing on its own initiative or after consideration of a request for a hearing from any party.

(b) *Virtual hearings.* All hearings shall be held virtually and may be recorded as deemed necessary by the Board.

(c) *Requesting a hearing.* A request for a hearing on the merits of a case must be included in a party statement, pursuant to § 222.14(e). The Board, in its sole discretion, shall choose whether to hold a hearing, and may elect to hold a hearing absent a request from a party.

(d) *Content of request.* Any request in a party statement for a hearing on the merits of a case shall consist of a short statement to the following effect: ''[Party name] requests a hearing pursuant to 37 CFR 222.14(e).'' The statement should include the reasons why the party believes the request should be granted.

(e) *Scheduling order.* When the Board determines that a hearing on the merits of a case is appropriate, it will issue an amended scheduling order setting forth the date of the hearing and deadlines for any additional evidence requested by the Board or for a pre-hearing conference, if applicable.

(f) *Close of evidence.* Following a hearing on the merits of a case, no additional written testimony or evidence may be submitted to the Board unless at the Board's specific request.

§ 222.16 Withdrawal of claims; dismissal.

A party may request to withdraw its own claim or counterclaim by filing a written request with the Board seeking withdrawal, and therefore dismissal. Such written request shall consist of a brief statement seeking dismissal and shall be signed by the party seeking the dismissal.

(a) *Before a response.* If the written request is received before a response to the claim or counterclaim is filed with the Board, the Board shall dismiss the claim or counterclaim without prejudice, unless all parties agree in a written stipulation filed with the Board that the claim or counterclaim shall be dismissed with prejudice.

(b) *After a response.* If the written request is received after a response to the claim or counterclaim is filed with the Board, the Board shall issue a final determination dismissing the claim or counterclaim with prejudice, unless the Board determines in the interests of justice that such dismissal shall be without prejudice or all parties agree in a written stipulation filed with the Board that the claim or counterclaim shall be dismissed without prejudice.

(c) *Effect of dismissal.* Dismissal of a claim or counterclaim under this section will not affect remaining claims or counterclaims in the proceeding.

§ 222.17 Settlement.

(a) *General.* The Board shall encourage voluntary settlement between the parties of any claims or counterclaims. The appropriateness of a settlement conference, at a minimum, shall be raised at the pre-discovery and post-discovery conferences set forth in § 222.10(b).

(b) *Requesting settlement conference*—(1) *Timing.* At any point in an active proceeding, some or all of the parties may jointly request a conference with an Officer to facilitate settlement discussions.

(2) *Form and content of request.* The request can be made orally at any Board conference or it can be made in writing. If made in writing, the request shall consist of a brief letter requesting a settlement conference and indicating which parties join in the request. The parties may also include in such letter a request to stay the proceedings while settlement discussions are ongoing. Granting a request for a stay shall be at the Board's discretion.

(3) *Response to request.* Any party that objects to the request for a settlement conference, or joins in the request for a settlement conference but not a request for a stay of proceedings, may file a response with the Board within seven days of the date of service of the request seeking a settlement conference. Such response shall consist of a brief letter indicating that the party objects to a settlement conference, or a stay of proceedings, and stating the basis for that objection.

(c) *Scheduling settlement conference.* If the request for a settlement conference, and any request for a stay, is jointly made among the parties, or if no party files a response within seven days of the date of service of the request, the Board shall schedule a settlement conference with all parties subject to the request. If one or more parties files a response, upon consideration of the objections and whether any claims or counterclaims may be resolved with only the consenting parties in attendance, the Board may schedule a conference with some or all parties.

(d) *Settlement proceedings.* Three days prior to a settlement conference, each party participating in the

conference shall submit a position statement to the presiding Officer by email and, when there is agreement among the parties, serve such statement on the other participating parties outside of the electronic filing system. The position statement shall be in letter form, shall not exceed five pages, including any salutations and signatures, and shall attach no more than 20 pages of exhibits, absent leave of the presiding Officer, although leave shall not be necessary should the page limit be exceeded due to an exhibit being a necessary agreement or contract. The statement must set forth:

(1) A brief overview of the facts and contentions;

(2) The relief sought, including the amount of damages, if any;

(3) Whether or to what extent the alleged wrongful conduct is currently taking place; and

(4) Any prior attempts at resolution, including any offers or counteroffers made to the other party.

(e) *Stay of proceeding.* To provide the parties with an opportunity to pursue settlement and negotiate any resulting settlement agreement, the Board in its discretion may stay the proceeding for a period of 30 days concurrently with an order scheduling a settlement conference, at the time of or following the settlement conference, or at the request of the parties. The parties may request an extension of the stay in good faith to facilitate ongoing settlement discussions. If a settlement has not been reached at the time the stay, or any extension thereof, has expired, the Board shall issue an amended scheduling order to govern the remainder of the proceeding.

(f) *Settlement agreement.* If some or all parties reach a settlement, such parties may submit to the Board a letter that they jointly wish to dismiss some or all of the claims and counterclaims. The parties may include a request that the Board adopt some or all of the terms of the settlement in its final determination.

(g) *Effect of settlement agreement.* Upon receipt of a joint request to dismiss claims due to settlement, the Board shall dismiss the claims or counterclaims contemplated by the agreement with prejudice, unless the parties have included in their request that the claims or counterclaims shall be dismissed without prejudice. If the parties have requested that the Board adopt some or all of the terms of the settlement in its final determination, the Board may issue a final determination incorporating such terms unless the Board finds them clearly unconscionable.

§ 222.18 Protective orders.

(a) *Standard protective order.* At the request of any party, the Board's standard protective order, as described in this section, shall govern all discovery material exchanged during the proceeding to protect against improper use or disclosure.

(1) *Standard of use.* Discovery material received from another party may be used only in connection with the proceeding, and all copies must be returned or disposed of within 30 days of a determination or dismissal, or within 30 days of the exhaustion of the time for any review or appeal of the Board's final determination, whichever is later.

(2) *Confidentiality.* Discovery material may be designated as ''confidential'' only if the party reasonably and in good faith believes that it consists of:

(i) Bona fide confidential financial information previously not disclosed to the public;

(ii) Bona fide confidential and non-obvious business plans, product development information, or marketing plans previously not disclosed to the public;

(iii) Any information of a truly personal or intimate nature regarding any individual not known by the public; or

(iv) Any other category of information that the Board grants leave to designate as ''confidential.''

(3) *Case-by-case basis.* Parties must make confidentiality determinations on a document-by-document basis and shall not designate as ''confidential'' all discovery material produced in bulk.

(4) *Submitting confidential information.* Confidential discovery materials, or references to or discussions of confidential discovery materials in other documents, may be submitted to the Board by either filing them under seal or redacting the confidential document. If filed under seal, the confidential document must be accompanied by a redacted copy that may be included in the public record.

(5) *Determination of confidentiality by the Board.* The Board may in its discretion remove a confidentiality designation from any material on its own initiative or upon consideration of a request from a party. Parties are expected to attempt to resolve disputes over confidentiality designations before bringing such disputes to the Board.

(b) *Custom protective orders.* Custom protective orders negotiated by the parties are disfavored. The parties may request that the Board enter a custom protective order that has been negotiated by the parties and that may provide for additional protections for highly sensitive materials. Such a request must be accompanied by a stipulation between the parties that explains the need for such a custom protective order. The Board may in its discretion decide whether to grant the parties' request for a custom protective order.

(c) *Personally identifiable information.* Regardless of whether discovery material has been designated as ''confidential,'' parties must redact social security numbers, taxpayer identification numbers, birth dates, health information protected by law, the names of any individuals known to be minors, and financial account numbers from any public filings.

§ 222.19 Evidence.

(a) *Admissibility.* All evidence that is relevant and not unduly repetitious or privileged shall be admissible. Evidence which has authentication or credibility issues will have its weight discounted accordingly. The Board reserves the right to discount evidence or not admit evidence with serious credibility issues entirely, or to request clarification from a party. The Board may apply FRE 401 and 403 in weighing evidence, but the Board is not bound by the FRE. Parties may cite to the FRE as persuasive authority when making an argument about the credibility, weight, or admissibility of a piece of evidence.

(b) *Examination of witnesses.* All witnesses testifying at a hearing before the Board shall be required to take an oath or affirmation before testifying. At a hearing, parties may conduct direct examination (substantively limited to the testimony of the witness in the written statements and an oral summary of that testimony); cross-examination (limited to matters raised on direct examination or submitted through witness statements); and redirect examination (limited to matters raised on cross-examination). The Board may limit the number of witnesses or scope of questioning.

(c) *Exhibits in hearing*—(1) *Submission.* Unless they are specifically excluded by the Board's own initiative or due to the Board's ruling on an objection raised by a party, all properly sponsored documents submitted by the parties through their statements submitted under § 222.14 shall be deemed admitted and marked as exhibits in the same order as presented through the party's document statement. To the extent additional documents are allowed by the Board at a hearing on the merits, such evidence may also be presented as exhibits to all parties and marked by the presenting party starting with the next number after the exhibits

attached to the party's document statement.

(2) *Separation of irrelevant portions.* In any large documents, relevant and material matter in an exhibit must be plainly marked to distinguish it from immaterial or irrelevant material.

(3) *Summary exhibits.* The contents of voluminous documentary evidence which cannot be conveniently examined at the hearing may be presented in the form of a chart, summary, or calculation. Absent leave of the Board, evidence supporting the summary exhibit must have been produced to the other parties in discovery and admitted as exhibits.

(d) *Objections.* Parties are entitled to raise objections to evidence during the course of the hearing and to raise an objection that an opposing party has not furnished non-privileged underlying documents.

(e) *New exhibits for use in cross-examination or redirect examination.* Exhibits not submitted as part of written testimony may be shown to a witness on cross-examination or redirect examination only for the purposes of impeachment or rehabilitation. Copies of such exhibits must be distributed to the Board and other parties before being shown, unless the Board directs otherwise.

■ 7. Part 225 is added to read as follows:

PART 225—DISCOVERY

Sec.

225.1 General practices.
225.2 Standard interrogatories.
225.3 Requests for admission.
225.4 Standard production of document requests.
225.5 Disputes and sanctions.

Authority: 17 U.S.C. 702, 1510.

§ 225.1 General practices.

This part prescribes rules pertaining to procedures for discovery conducted in proceedings before the Copyright Claims Board (''Board'').

(a) *Standard discovery practice.* Except as otherwise provided in this section, discovery in proceedings before the Board shall be limited to the methods set forth in this part and shall use the standard forms provided on the Board's website. Discovery responses and documents shall be served on the other parties, but shall not be filed with the Board unless as part of written testimony or as needed in support of other filings.

(1) *Certifications.* All discovery material exchanged among the parties or submitted to the Board must include a certification by the party submitting such material that it is accurate and truthful.

(2) *Form of requests to Board.* Requests to the Board related to discovery may be raised to the Board during a conference or by letter, as set forth in this section.

(b) *Timing of discovery.* The exchange of discovery material shall take place at the times and within the deadlines specified by the scheduling order. The Board may modify the discovery deadlines set forth in the scheduling order at the request of any party upon a showing of good cause or through its own initiative. Such requests may be made orally during a conference with the Board or by letter. Any letter requests shall be limited to two pages and shall set forth the original date of the deadline and the requested extension, provide the basis for the scheduling modification, indicate whether the other parties consent or object to the modification, and whether any other dates in the scheduling order will be affected by the modification. Any party that objects to the requested scheduling modification may file a response letter within three days of the date of service of the letter request, which shall be limited to two pages and set forth the basis for the objection.

(c) *Conferences.* The Board shall hold a pre-discovery conference and a post-discovery conference, as set forth in 37 CFR 222.10. The Board may hold additional conferences to manage discovery and resolve any disputes, at its own election or at the request of any party. Conferences may be held by one or more Copyright Claims Officers (''Officers''), with the exception of post-discovery conferences and any conferences to decide a dispute, both of which shall be held by one or more Officers. Conferences shall be held virtually.

(d) *Request for additional discovery.* Any party may request additional discovery within the deadlines set forth in the scheduling order.

(1) *Allowable discovery.* Except for the standard discovery provided in this part, any additional discovery requested must be narrowly tailored to the issues at hand, not covered by the standard discovery set forth in this part, highly likely to lead to the production of information relevant to the core issues of the matter, and not result in an undue burden on the party responding to the request.

(2) *Standard for additional discovery.* The Board will grant a request for additional discovery upon a showing of good cause. In considering a request for additional discovery, the Board shall balance the needs and circumstances of the case against the burden of additional discovery on any party, along with the amount in dispute and overall goal of efficient resolution of the proceeding.

(3) *Consent from parties.* Prior to filing a request for additional discovery, the requesting party should make reasonable efforts to secure the consent of, or a compromise with, the other party regarding the proposed additional discovery request.

(4) *Form of request.* A request for additional discovery must be made by letter, no more than three pages, not including the additional requests themselves—

(i) Specifically indicating the means of additional discovery requested and the information sought;

(ii) Setting forth the basis and justifications for the request;

(iii) Indicating whether the other parties consent or object to the request; and

(iv) Attaching a copy of the additional discovery requests.

(5) *Response to request.* Within seven days of the date of service of a letter requesting additional discovery, any party that opposes the request may file a response letter of no more than three pages. No reply letters shall be permitted, unless the Board grants leave for a reply.

(e) *Request for expert witnesses.* An expert witness may be used in a proceeding only with leave of the Board. The use of expert witnesses in proceedings before the Board is highly disfavored and requests shall be rarely granted.

(1) *Standard for permitting expert witnesses.* The Board shall grant a request by a party to introduce an expert witness only in exceptional circumstances and upon a showing that the case cannot fairly proceed without the use of the expert. In considering a request for an expert witness, the Board shall balance the needs and circumstances of the case, and whether the request is made by one party or jointly among the parties, against the burden that permitting the expert testimony would impose on any other party, the costs to the opposing party of retaining a rebuttal witness, the amount in dispute, and the overall goal of efficient resolution of the proceeding. If the Board grants a request by a party to introduce an expert witness, an opposing party shall have the opportunity to introduce a rebuttal expert witness as a matter of course within an appropriate amount of time set by the Board. The Board will set a schedule for the service of the expert report and any rebuttal report and will adjust the dates in the existing scheduling order as needed.

(2) *Form of request.* A request for an expert witness must be made by letter, no more than five pages, at the time set forth for requests for additional discovery in the scheduling order. The letter must specifically indicate the topics of the expert's proposed testimony, the name of the proposed expert, and the anticipated cost of retaining the expert, and must set forth the basis and justifications for the request, and indicate whether the other parties consent or object to the request.

(3) *Form of response.* Within seven days of the date of service of a request for leave to offer an expert witness, any party that opposes the request may file a response letter of no more than five pages. No reply letters shall be permitted, unless the Board grants leave for a reply.

(4) *Form of expert testimony.* Any expert testimony permitted by the Board shall be submitted along with the offering party's written direct or response testimony in the form of an expert statement. An expert statement must—

(i) Be sworn under penalty of perjury by the expert witness;

(ii) Be organized into numbered paragraphs;

(iii) Be detailed as to the substance of the expert's opinion and the basis and reasons therefor;

(iv) Disclose the facts or data considered by the expert witness in forming the expert witness's opinions;

(v) Describe the expert witness's qualifications, including a list of all publications authored and speaking engagements in the previous 10 years;

(vi) Include a list of all other cases in which the expert witness testified as an expert at trial or by deposition during the previous four years; and

(vii) Include a statement of the compensation to be paid for the study and testimony in the case.

(5) *Unauthorized expert testimony.* Any expert testimony that is introduced in any way without the Board's express permission shall be stricken by the Board and shall not be considered in the Board's determination.

(f) *Definitions.* As used in this part, the term ''document'' shall refer to any tangible piece of information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form, whether in written or electronic form, an object, or otherwise. The Board shall read this definition broadly so that there is a comprehensive production of materials by each side needed to fairly decide matters before the Board, so long as that production is easily accomplished by a layperson.

§ 225.2 Standard interrogatories.

(a) *General.* Parties in an active proceeding shall use the set of standard interrogatories provided on the Board's website. Standard interrogatories shall consist of information pertaining to:

(1) The identity and nature of witnesses whom the parties plan to use in the proceeding, including contact information for the witnesses, if known;

(2) The identity of any other individuals who may have material information related to the claims or defenses, including contact information for the individuals, if known;

(3) Any agreement or other relationship between the parties relevant to the claim;

(4) Any damages sought; and

(5) A description of documents relevant to the claims and defenses.

(b) *For a party asserting infringement.* In addition to the witness, damages, and document description information in paragraph (a) of this section, the standard interrogatories for a party asserting an infringement claim or responding to a claim for non-infringement shall consist of information pertaining to:

(1) The allegedly infringed work's copyright registration, to the extent such information differs from or adds to information provided in the claim;

(2) The allegedly infringed work's compliance with any relevant copyright formalities;

(3) The party's ownership of the copyright in the allegedly infringed work;

(4) Publication history for the allegedly infringed work;

(5) The creation date and creation process for the allegedly infringed work, including whether the work is a joint or derivative work or was created through employment or subject to an agreement;

(6) Where the allegedly infringed work is a derivative work, the preexisting elements in the work, including ownership of those preexisting elements, and rights to use those preexisting elements;

(7) A description of the alleged infringer's access to the allegedly infringed work, if known;

(8) The basis for the party's belief that the opposing party's activities constitute infringement of the allegedly infringed work;

(9) The discovery of the opposing party's alleged infringement by the party;

(10) A description and calculation of the damages suffered by the party as a result of the alleged infringement; and

(11) Any attempts by the party to cause the infringement to be ceased or mitigated prior to bringing the claim.

(c) *For a party asserting non-infringement.* In addition to the information in paragraph (a) of this section, the standard interrogatories for a party responding to an infringement claim or asserting a claim for non-infringement shall consist of information pertaining to:

(1) The party's ownership of the copyright in the allegedly infringing material;

(2) The publication history of the allegedly infringing material;

(3) The creation date and creation process for the allegedly infringing material, including whether any allegedly infringing work is a joint or derivative work or was created through employment or subject to an agreement;

(4) Where the allegedly infringing material is a derivative work, the preexisting elements in the work, including ownership of those preexisting elements, and rights to use those preexisting elements;

(5) Any information indicating that the party alleging infringement does not own a copyright in the allegedly infringed work;

(6) All defenses to infringement asserted by the party and a detailed basis for those defenses;

(7) The basis for any other reasons the party believes that its actions do not constitute infringement;

(8) Any continued use of the allegedly infringing material; and

(9) For a party responding to infringement claims or counterclaims, the revenues and profits the party has received directly related to the sale or use of the allegedly infringing material, as well as the deductible expenses directly related to that sale or use, and the elements of profit for that sale or use attributable to factors other than the copyrighted work.

(d) *For a party asserting misrepresentation.* In addition to the information in paragraph (a) of this section, the standard interrogatories for a party asserting a claim of misrepresentation under 17 U.S.C. 512(f) shall consist of information pertaining to:

(1) The notification or counter notification that allegedly contained a misrepresentation;

(2) The identity of the internet service provider to which the notification or counter notification was sent;

(3) Any communications with the internet service provider, the parties, or

others related to the notification or counter notification at issue;

(4) The basis for the party's belief that the notification or counter notification included a misrepresentation; and

(5) The harm, including a description and calculation of damages, caused by the alleged misrepresentation.

(e) *For a party responding to misrepresentation claims.* In addition to the information in paragraph (a) of this section, the standard interrogatories for a party responding to a claim of misrepresentation under 17 U.S.C. 512(f) shall consist of information pertaining to:

(1) All defenses asserted to the misrepresentation claim and the basis for those assertions;

(2) The basis for any other reasons the party believes that its statement did not constitute a misrepresentation; and

(3) Any communications with the internet service provider, the parties, or others related to the notification or counter notification at issue.

(f) *Duty to update.* A party has an obligation to update its interrogatory responses and serve updated responses on the other parties as soon as practicable after the discovery of new or updated information.

§ 225.3 Requests for admission.

(a) *General.* Parties in an active proceeding may serve a maximum of 10 requests for admission on each other party relating to:

(1) Facts, the application of law to fact, or opinions about either; and

(2) The genuineness of any described documents, a copy of which must be attached to the request for admission.

(b) *Form.* Each matter must be separately stated in a request for admission in a numbered paragraph. Compound requests for admission shall not be permitted.

(c) *Responses to requests for admission.* A response to a request for admission must be served within 30 days from the date of service of a request for admission. A matter admitted is conclusively established unless the Board, on request and for good cause shown, permits the admission to be withdrawn or amended. If a matter is not admitted, the answer must specifically deny it or state in detail why the responding party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter, and when good faith requires that a party qualify an answer or deny only part of a matter, the answer must specify the part admitted and qualify or deny the rest. The responding party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(d) *Failure to respond.* A matter is not automatically admitted if a party fails to respond to a request for admission within the required timeframe. However, the Board may deem it admitted in the Board's discretion subject to the Board's power to apply adverse inferences to discovery violations under 17 U.S.C. 1506(n)(3).

§ 225.4 Standard production of document requests.

(a) *General.* Parties in an active proceeding shall use the relevant set of standard production of document requests provided on the Board's website. Standard production of document requests shall include copies of:

(1) All documents the party is likely to use in support of its claims or defenses;

(2) All other documents of which the party is reasonably aware that conflict with the party's claims or defenses;

(3) All documents related to damages; and

(4) All documents referred to in, or that were used in preparing, any of the party's responses to standard interrogatories.

(b) *For a party asserting infringement.* In addition to the information in paragraph (a) of this section, the standard production of document requests for a party asserting an infringement claim or responding to a claim for non-infringement shall include copies of:

(1) The work claimed to be infringed, its copyright registration, and all correspondence with the Copyright Office regarding that registration;

(2) The allegedly infringing material, if reasonably available;

(3) Where the allegedly infringed work is a derivative work, documents showing the preexisting works used and related to ownership of and rights to use those preexisting elements;

(4) Documents related to the allegedly infringing material, including communications about the allegedly infringing material;

(5) Agreements related to ownership of or rights in the works at issue;

(6) Documents related to the party's ownership of the copyright in the allegedly infringed work;

(7) Documents relating to the damages suffered by the party as a result of the alleged infringement; and

(8) Documents related to attempts by the party to cause the cessation or mitigation of infringement prior to bringing the claim.

(c) *For a party asserting non-infringement.* In addition to the information in paragraph (a) of this section, the standard production of document requests for a party responding to an infringement claim or asserting a claim for non-infringement shall include copies of:

(1) The allegedly infringing material;

(2) Documents related to the allegedly infringed work, including communications regarding the allegedly infringed work;

(3) Documents related to the creation of the allegedly infringing material or rights regarding the allegedly infringing material;

(4) Agreements related to ownership of or rights in the works at issue; and

(5) For a party responding to infringement claims or counterclaims, documents related to the revenues and profits the party has received directly related to the sale or use of the allegedly infringing material, as well as the deductible expenses directly related to that sale or use, and the elements of profit for that sale or use attributable to factors other than the copyrighted work.

(d) *For party asserting misrepresentation.* In addition to the information in paragraph (a) of this section, the standard production of document requests for a party asserting a claim of misrepresentation under 17 U.S.C. 512(f) shall include copies of:

(1) The notification or counter notification at issue;

(2) Communications with the internet service provider concerning the notification or counter notification at issue; and

(3) Documents pertaining to the truth or falsity of any representations made in the notification or counter notification.

(e) *For party responding to misrepresentation claims.* In addition to the information in paragraph (a) of this section, the standard production of document requests for a party responding to a claim of misrepresentation under 17 U.S.C. 512(f) shall include copies of:

(1) Communications with the internet service provider concerning the notification or counter notification at issue; and

(2) Documents pertaining to the truth or falsity of any representations made in the notification or counter notification.

(f) *Document searches and productions*—(1) *General.* Each party shall have an obligation to conduct a reasonable search for any responsive documents of any files in its possession or under its control, including the files of any of the party's agents, employees,

representatives, or others acting on the party's behalf.

(2) *Electronically stored information.* Documents responsive to the standard requests, or any additional requests permitted by the Board, may include electronically stored information (''ESI''), including emails and computer files. A reasonable search under the circumstances shall include the ESI of the party and the party's agents, employees, representatives, or others acting on the party's behalf, except that—

(i) ESI searches shall not exceed manual searches that are easily accomplished by a layperson; and

(ii) Parties need not conduct searches that would reasonably require the assistance of third parties, such as a document vendor that the party would have to hire to assist with or accomplish document collection or storage.

(3) *Voluminous productions.* Responses to document requests that include large amounts of irrelevant or duplicative material shall constitute bad-faith conduct.

(4) *Responsive documents no longer in possession of party.* A party shall disclose any materially responsive documents that the party is aware exist or once existed, but are no longer in the possession of that party, and shall explain why the documents are no longer in the possession of the party, including the circumstances surrounding any destruction of documents.

(5) *Duty to update.* A party has an obligation to preserve all material documents and to update its production of documents by providing to the other parties any documents it later finds responsive to the Board's standard requests or any other document requests allowed by the Board as soon as practicable after the discovery of such documents.

§ 225.5 Disputes and sanctions.

(a) *Obligation to attempt resolution.* Parties shall attempt in good faith to resolve any discovery disputes without the involvement of the Board. A party must confer with an opposing party, at least through a phone call, in an attempt to reach a resolution prior to raising any discovery dispute with the Board.

(b) *Request for conference to resolve dispute.* If an attempt to resolve a discovery dispute fails, the party seeking discovery may file a request by letter, no more than three pages not including the attachments referred to in this paragraph (b), for a conference with the Board. The letter request shall:

(1) Describe the dispute;

(2) State that party's position with respect to the dispute;

(3) Include a statement that the request is made following an attempted resolution call between the parties along with the date of such call, or explain why a call was not possible; and

(4) Attach the relevant discovery responses already provided by the opposing party, except for disputes pertaining to production of document requests, which shall attach a list of documents produced in response to the requests.

(c) *Response to request for conference.* Within seven days of the date of service of the letter request, an opposing party may submit a response to a request for a conference by letter, no more than three pages, not including any attachments, which states the opposing party's position with respect to the dispute. No reply letters shall be permitted, unless the Board grants leave for a reply.

(d) *Determination by Board.* Following receipt of the request and any response, the Board may schedule a conference to address the discovery dispute in its discretion. One or more Officers may participate in the conference. During or following the conference, the Board shall issue an order resolving the discovery dispute and, in the event of a decision in favor of the aggrieved party, setting a deadline for compliance.

(e) *Failure to comply with order.* If a party fails to timely comply with the Board's discovery order, the party seeking discovery may send a notice to the noncompliant party giving the noncompliant party 10 days to comply. If the noncompliant party fails to comply within 10 days of receipt of the notice, the aggrieved party may file a request for sanctions with the Board.

(f) *Sanctions*—(1) *Form of request for sanctions.* A request for sanctions shall be no more than 10 double-spaced pages, not including the attachments referred to in this paragraph (f)(1), in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page and shall attach the relevant discovery responses already provided by the opposing party, except for disputes pertaining to production of document requests, which shall attach a list of documents produced in response to the requests.

(2) *Form of response to request for sanctions.* Within 14 days of the date of service of the request for sanctions, the opposing party may file a response to the request. The response shall be no more than 10 double-spaced pages in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page. No reply papers will be accepted absent leave of the Board.

(3) *Standard for granting request.* Following receipt of a request for sanctions and any response from the opposing party, the Board may hold a conference to address the request for sanctions. In the Board's sole discretion and upon good cause shown, sanctions may be imposed if the opposing party is found to be noncompliant with the Board's discovery order.

(4) *Relief.* Sanctions imposed for noncompliance with a discovery order of the Board may include an adverse inference with respect to the disputed facts directly related to the discovery in question against the noncompliant party.

(5) *Implications for award of attorneys' fees and costs.* The Board may consider the assessment of discovery sanctions when considering the awarding of attorneys' fees and costs during a final determination.

■ 8. Part 226 is added to read as follows:

PART 226—SMALLER CLAIMS

Sec.

226.1 General.
226.2 Requesting a smaller claims proceeding.
226.3 Nature of a smaller claims proceeding.

Authority: 17 U.S.C. 702, 1510.

§ 226.1 General.

When total monetary relief sought in a claim does not exceed $5,000 (exclusive of attorneys' fees and costs), the claim may be adjudicated under the procedures set forth in this part.

§ 226.2 Requesting a smaller claims proceeding.

A claimant may request consideration of a claim under the smaller claim procedures in this part at the time of filing a claim. The claimant may also amend its filing at any time prior to service of the claim to modify its selection concerning smaller claim procedures. If the initial notice has already been issued, the claimant shall request reissuance of the initial notice with the smaller claim proceeding notice. Once the claimant chooses whether to proceed via a smaller claims proceeding or via the standard proceeding in 37 CFR parts 222 and 225, it may not amend its choice without consent of the other parties and leave of the Board.

§ 226.3 Nature of a smaller claims proceeding.

(a) *Proceeding before a Copyright Claims Officer.* A smaller claims proceeding shall be heard by one Officer. One of the three Officers shall hear smaller claims proceedings on a rotating basis at the Copyright Claims Board's discretion.

(b) *Limited discovery.* Discovery between the parties is limited to the standard discovery set forth in 37 CFR 225.2 through 225.4. Parties may not submit additional discovery requests, and the assigned Officer will not consider such requests.

(c) *No expert testimony.* Parties may not submit expert testimony for consideration. Any expert testimony submitted shall be disregarded by the assigned Officer.

(d) *Determination on written testimony.* The Officer will issue a determination based on the written testimony submitted pursuant to 37 CFR 222.14. No hearing will be held prior to a determination.

■ 9. Part 227 is added to read as follows:

PART 227—DEFAULT

Sec.

227.1 Failure by respondent to appear or participate in proceeding.
227.2 Submission of evidence by claimant in support of default determination.
227.3 Notice of proposed default determination.
227.4 Opportunity for respondent to submit evidence.
227.5 Issuance of determination.

Authority: 17 U.S.C. 702, 1510.

§ 227.1 Failure by respondent to appear or participate in proceeding.

(a) *General.* For purposes of this section, the term ''respondent'' shall include counterclaim respondents. If a respondent fails to file a response or fails, without justifiable cause, to meet any filing deadline or other requirement set forth in the scheduling order or other order, upon notice of a party or by its own initiative, the Copyright Claims Board (''Board'') may issue a notice to the respondent following the missed deadline or requirement.

(b) *Contents of notice*—(1) *First notice.* A notice issued under this section shall inform the respondent that failure to participate in the proceeding may result in the Board entering a default determination against the respondent, including dismissal of any counterclaims asserted by the respondent, and shall explain the legal effects of a default determination. The notice shall provide the respondent with 30 days from the date of the notice to cure the missed deadline or requirement. The notice shall be issued to the respondent by mail and all known email addresses.

(2) *Second notice.* If the respondent has failed to respond 15 days after the notice of the pendency of the default determination, the Board shall send a second notice to the respondent according to the procedures set forth in paragraph (b)(1) of this section. Such notice shall attach the first notice and shall remind the respondent that it must cure the missed deadline or requirement within 30 days from the date of the first notice.

(c) *Response to notice.* If the respondent cures the missed deadline or requirement within the time specified by the notice, the proceeding shall resume and the Board shall issue a revised scheduling order, if necessary. If the respondent fails to timely cure but submits a response that indicates an intent to re-engage with the proceeding, the Board shall consider the response and either provide the respondent with additional time to meet the deadline or proceed with the default determination process. If the respondent fails to cure the missed deadline or requirement within the time specified by the notice and does not otherwise respond to the notice, the Board shall require the claimant to submit evidence in support of a default determination, as set forth in § 227.2.

(d) *Multiple missed deadlines.* A respondent may cure a missed deadline according to the procedure set forth in this section twice without default being issued. If the respondent misses a third deadline in the scheduling order without good cause, the Board may, in its discretion, proceed directly to requiring submission of evidence to proceed with a default determination as set forth in § 227.2.

§ 227.2 Submission of evidence by claimant in support of default determination.

(a) *General.* If a respondent fails to appear or ceases to participate in the proceeding and the Board elects to proceed to a default determination, the Board shall require the claimant to submit written direct testimony, as set forth in § 227.1.

(b) *Additional evidence.* Following submission of the claimant's written testimony in support of a default determination, the Board shall consider the claimant's submissions and may request any additional evidence from the claimant within the claimant's possession.

§ 227.3 Notice of proposed default determination.

(a) *Consideration of evidence.* Following submission of evidence by the claimant, as set forth in § 227.2, the Board shall review such evidence and shall determine whether it is sufficient to support a finding in favor of the claimant under applicable law. As part of its review, the Board shall consider whether the respondent has a meritorious defense. If the Board finds the evidence sufficient to support a finding in favor of the claimant, it shall determine the appropriate relief and damages, if any, to be awarded.

(1) If the Board determines that the evidence is sufficient to support a finding in favor of the claimant, the Board shall prepare a proposed default determination.

(2) If the Board determines that the evidence is insufficient to support a finding in favor of the claimant, the Board shall dismiss the proceeding without prejudice.

(b) *Proposed default determination.* The proposed default determination shall include a finding in favor of the claimant and the damages awarded, if any. The proposed default determination shall also include dismissal of any counterclaims asserted by the respondent.

(c) *Notice to respondent.* The Board shall provide written notice to the respondent of the pendency of the default determination and the legal significance of the default determination, including any liability for damages, if applicable, as set forth in 17 U.S.C. 1506(u)(2). The notice shall be accompanied by the proposed default determination and shall provide the respondent 30 days, beginning on the date of the notice, to submit any evidence or other information in opposition to the proposed default determination.

§ 227.4 Opportunity for respondent to submit evidence.

(a) *Response to notice by respondent.* The respondent may submit in writing any evidence or information in opposition to the proposed default determination. The Board shall consider the submission and may request that the respondent submit additional information, including in the form of written response testimony, as set forth in 37 CFR 222.14, by a deadline set by the Board. If the respondent fails to timely submit evidence but submits a response that indicates an intent to re-engage with the proceeding, the Board shall consider the response and either provide the respondent with additional

time to submit evidence or proceed with issuing the default determination.

(b) *Response to respondent's submissions.* If the respondent provides any evidence or other information in response to the notice of the pending default determination, the other parties to the proceeding shall be provided an opportunity to address such submissions by a deadline set by the Board.

(c) *Hearings.* The Board may hold a hearing at its discretion.

§ 227.5 Issuance of determination.

(a) *Determination after respondent submits evidence.* If the respondent provides evidence or information as set forth in § 227.4, the Board shall consider all submissions. The Board then shall maintain or amend its proposed default determination. The resulting determination shall not be a default determination and instead shall be a final determination. The respondent may not challenge such determination under 17 U.S.C. 1508(c)(1)(C) and may only request reconsideration pursuant to 17 U.S.C. 1506(w) and the procedures set forth in part 230 of this subchapter.

(b) *Determination after respondent fails to respond to notice.* If the respondent fails to respond to the notice of pending default determination, the Board shall issue the proposed default determination as a final determination. The respondent may only challenge such determination to the extent permitted under 17 U.S.C. 1508(c) or the procedures set forth in paragraph (c) of this section.

(c) *Vacating a default determination.* If additional proceedings have not been initiated under 17 U.S.C. 1508(c), the respondent may request in writing that the default determination be vacated and provide the reasons why the decision should be vacated. The respondent and claimant shall follow the general procedures for a request for reconsideration as set forth in part 230 of this subchapter. The Board may vacate the default determination in the interests of justice.

■ 10. Part 228 is added to read as follows:

PART 228—CLAIMANT'S FAILURE TO PROCEED

Sec.
228.1 Claimant or counterclaimant's failure to complete service.
228.2 Claimant or counterclaimant's failure to prosecute.

Authority: 17 U.S.C. 702, 1510.

§ 228.1 Claimant or counterclaimant's failure to complete service.

(a) *Failure to serve a respondent who is not a necessary party.* If a claimant fails to timely complete service on a respondent who is not a necessary party, pursuant to 37 CFR 222.13, the Copyright Claims Board (''Board'') shall dismiss that respondent from the proceeding without prejudice. The proceeding shall continue against any remaining respondents.

(b) *Failure to serve a respondent who is a necessary party.* If a claimant fails to timely complete service on a respondent who is a necessary party, pursuant to 37 CFR 222.13, the Board shall dismiss the proceeding without prejudice.

(c) *Complete failure to serve respondents.* For a claim to proceed, a claimant must complete service on at least one respondent. If a claimant does not timely file any proof of service, the Board shall dismiss the proceeding without prejudice.

§ 228.2 Claimant or counterclaimant's failure to prosecute.

(a) *General.* If a claimant or counterclaimant fails to proceed in an active proceeding without justifiable cause, as demonstrated by a failure to meet any filing deadline or requirement set forth in the scheduling order or other order, upon request of a party or on its own initiative, the Board shall issue a notice following the missed deadline or requirement.

(b) *Contents of notice.* (1) A notice issued under paragraph (a) of this section shall inform the claimant that failure to proceed in the proceeding may result in the Board issuing a determination dismissing the claimant's claims, including an award of attorneys' fees and costs where appropriate, and shall explain the legal effects of such a determination. The notice shall provide the claimant with 30 days, beginning on the date of the notice, to respond to the notice and meet the missed deadline or requirement. The notice shall be issued to the claimant by mail and all known email addresses.

(2) If the claimant has failed to respond 15 days after the notice of the failure to proceed, the Board shall send a second notice to the claimant according to the procedures set forth in paragraph (b)(1) of this section. Such notice shall attach the first notice and shall remind the claimant that it must respond and meet the missed deadline or requirement within 30 days from the date of the first notice.

(c) *Response to notice.* (1) If the claimant cures the missed deadline or requirement within the time specified by the notice, the proceeding shall resume and the Board shall issue a revised scheduling order, if necessary.

(2) If the claimant fails to cure the missed deadline or requirement within the time specified by the notice but submits a response that indicates an intent to re-engage with the proceeding, the Board shall consider the response and either provide the claimant with additional time to cure the missed deadline or requirement or issue a determination dismissing the claimant's claims.

(3) If the claimant fails to cure the missed deadline or requirement within the time specified by the notice and does not otherwise respond to the notice, the Board shall issue a determination dismissing the claimant's claims.

(d) *Determination dismissing claims.* A determination dismissing the claimant's claims for failure to proceed in the active proceeding shall be with prejudice and shall include an award of attorneys' fees and costs pursuant to 37 CFR 232.3, if appropriate. The claimant may only challenge such determination to the extent permitted under 17 U.S.C. 1508(c) or the procedures set forth in paragraph (e) of this section.

(e) *Vacating a determination dismissing claims.* If additional proceedings have not been initiated under 17 U.S.C. 1508(c), the claimant may request in writing that the determination be vacated and provide the reasons supporting the request. The claimant and respondent shall follow the general procedures for a request for reconsideration as set forth in part 230 of this subchapter. The Board may vacate the determination of dismissal in the interests of justice.

■ 11. Part 229 is added to read as follows:

PART 229—RECORDS AND PUBLICATION

Sec.
229.1 Access to records and proceedings.
229.2 Record certification.

Authority: 17 U.S.C. 702, 1510.

§ 229.1 Access to records and proceedings.

(a) *Official written record.* Submissions by parties to a proceeding and documents issued by the Copyright Claims Board (''Board'') shall constitute the official written record.

(b) *Access to record.* Any member of the public may inspect the official written record through the electronic filing system, except any materials that have been marked confidential pursuant to 37 CFR 222.18.

(c) *Attendance at hearing.* Attendance at a Board hearing, including virtual hearings, is limited to the parties to the proceeding and their representatives, except with leave of the Board. A request for attendance may be made in writing.

(d) *Hearing transcript.* The Board may cause a transcript of a hearing to be made by using an official reporter or any technology that is available to the Board. At the request of any party, the Board may designate an official reporter to attend and transcribe a hearing or to prepare a transcript from a recording of a hearing. The requesting party or parties shall pay the reporter directly for the cost of creating an official transcript.

§ 229.2 Record certification.

Upon a written request to the Records Research and Certification Section of the U.S. Copyright Office pursuant to 37 CFR 201.2, and payment of the appropriate fee pursuant to 37 CFR 201.3, the Board will certify the official record of a proceeding.

■ 12. Part 230 is added to read as follows:

PART 230—REQUESTS FOR RECONSIDERATION

Sec.

230.1 General.
230.2 Request for reconsideration.
230.3 Response to request.
230.4 No new evidence.
230.5 Determination.

Authority: 17 U.S.C. 702, 1510.

§ 230.1 General.

This part prescribes rules pertaining to procedures for reconsideration of a final determination issued by the Copyright Claims Board (''Board''). A party may request reconsideration according to the procedures in this part if the party identifies a clear error of law or fact material to the outcome or a technical mistake. A party may also request reconsideration to vacate a default determination.

§ 230.2 Request for reconsideration.

Upon receiving a final determination from the Board, any party may request that the Board reconsider its determination. Such a request must be filed within 30 days of the determination and shall be no more than 12 doubled-spaced pages in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page. The request must identify a clear error of law or fact that was material to the outcome or a technical mistake. The request shall not merely repeat any oral or written argument made to the Board as part of the proceeding but shall be specific as to the purported error or technical mistake that is the subject of the request.

§ 230.3 Response to request.

A party opposing a request for a reconsideration may file a response to the request within 21 days of the date of service of the request. Such response shall be no more than 12 double-spaced pages in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page. No reply shall be filed by the party seeking reconsideration absent leave of the Board.

§ 230.4 No new evidence.

Evidence that was not previously submitted to the Board as part of written testimony or at a hearing or in response to a specific request for evidence from the Board shall not be submitted as part of a request for reconsideration or a response to a request, except where the party demonstrates, through clear and convincing evidence, that the evidence was not available to that party in the exercise of reasonable diligence prior to the submission of written testimony or prior to the hearing.

§ 230.5 Determination.

After the filing of response papers or after the time for a party opposing the request for reconsideration to file a response has elapsed, the Board shall consider the request and any response and shall either deny the request for reconsideration or issue an amended final determination. The Board will base its decision on the party's written submissions.

■ 13. Part 231 is added to read as follows:

PART 231—REGISTER'S REVIEW

Sec.

231.1 General.
231.2 Request for Register's review.
231.3 Response to request.
231.4 No new evidence.
231.5 Standard of review.
231.6 Determination.

Authority: 17 U.S.C. 702, 1510.

§ 231.1 General.

This part prescribes rules pertaining to procedures for review by the Register of Copyrights of a final determination by the Copyright Claims Board (''Board''). A party whose request for reconsideration has been denied under 37 CFR 230.5 may seek review of the final determination by the Register of Copyrights not later than 30 days after a request for reconsideration has been denied in whole or in part.

§ 231.2 Request for Register's review.

A party may not file for review of the Board's final determination by the Register of Copyrights unless it has first filed, and had denied, a request for reconsideration. Where the Board has denied a request for reconsideration, the party who requested reconsideration may request review of the final determination by the Register of Copyrights. Such a request must be filed within 30 days of the denial of a request for reconsideration and shall be no more than 15 doubled-spaced pages in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page. The request must include the reasons the party believes there was an abuse of discretion in denying the request for reconsideration. The request must be accompanied by the filing fee set forth in 37 CFR 201.3(g).

§ 231.3 Response to request.

A party opposing the request for review may file a response to the request for review within 21 days of the date of service of the request. Such response shall be no more than 15 double-spaced pages in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page. The request must include the reasons the party believes there was no abuse of discretion in denying the request for reconsideration. No reply filings shall be permitted.

§ 231.4 No new evidence.

Evidence that was not previously submitted to the Board as part of written testimony or at a hearing or in response to a specific request for evidence from the Board shall not be submitted as part of a request for review or a response to a request for review.

§ 231.5 Standard of review.

The Register's review shall be limited to consideration of whether the Board abused its discretion in denying reconsideration of the determination.

§ 231.6 Determination.

After the filing of response papers or after the time for a party opposing the request for review to file a response has elapsed, the Register shall consider the request and any response and shall either deny the request for review or remand the proceeding to the Board for reconsideration of issues specified in the remand and for issuance of an amended final determination. The Register will base such a decision on the party's written submissions.

■ 14. Part 232 is added to read as follows:

PART 232—CONDUCT OF PARTIES

Sec.
232.1 General.
232.2 Representations to the Board.
232.3 Bad-faith conduct.
232.4 Bar on initiating claims.
232.5 Attorney and representative conduct.

Authority: 17 U.S.C. 702, 1510.

§ 232.1 General.

All parties and any attorneys or other representatives shall act with the utmost respect for others and shall behave ethically and truthfully in connection with all submissions and appearances before the Copyright Claims Board (''Board'').

§ 232.2 Representations to the Board.

By submitting materials or advocating positions before the Board, a party, including any attorneys representing a party, certifies that to the best of the party's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances:

(a) It is not being presented for any improper purpose;

(b) Any legal contentions are made in good faith based on the party's reasonable understanding of existing law;

(c) Any factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(d) Any denials of factual contentions have evidentiary support or, if specifically so identified, are reasonably based on belief or a lack of information.

§ 232.3 Bad-faith conduct.

(a) *General.* The Board shall award costs and attorneys' fees as part of a determination where it is established that a party or its representative engaged in bad-faith conduct, unless such an award would be inconsistent with the interests of justice.

(b) *Allegations of bad-faith conduct*—(1) *On the Board's initiative.* On its own, and prior to a final determination, the Board may order a party or its representative to show cause why certain conduct does not constitute bad-faith conduct. Within seven days, the party or representative accused of bad-faith conduct shall file a letter response to this order, which shall be not more than three pages.

(2) *On a party's initiative.* A party that in good faith believes that another party or its representative has engaged in bad-faith conduct, may file a letter describing the alleged bad-faith conduct, attaching any relevant exhibits, and requesting a conference with the Board. Within seven days of the date of service of the letter, the accused party or representative may file a response to this letter. Any letters described within this paragraph (b)(2) shall be no longer than three pages. No reply letters shall be permitted, unless the Board grants leave for a reply.

(c) *Establishing bad-faith conduct.* After an accused party's or representative's response letter has been filed under paragraph (b) of this section, or the time to file such a letter has passed, the Board shall either make a determination that no bad-faith conduct occurred or schedule a conference concerning the allegations.

(d) *Determining the award.* In determining whether to award attorneys' fees and costs due to bad-faith conduct, and the amount of any such award, the Board shall consider the letters submitted by the parties, any arguments on the issue, and the accused party's or representative's behavior in other proceedings. Any award of attorneys' fees or costs shall be included in the final determination. Such an award shall be limited to an amount of not more than $5,000, unless—

(1) The adversely affected party appeared *pro se* in the proceeding, in which case the award shall be limited to costs in an amount of not more than $2,500; or

(2) Extraordinary circumstances are present, such as a demonstrated pattern or practice of bad-faith conduct, in which case the Board may award costs and attorneys' fees in excess of the limitations in this section.

§ 232.4 Bar on initiating claims.

(a) *General.* A party or a party representative that has been found to have engaged in bad-faith conduct on more than one occasion within a 12-month period shall be subject to the penalties set forth in paragraph (d) of this section.

(b) *Allegations of multiple instances of bad-faith conduct*—(1) *On the Board's initiative.* On its own, and at any point during a proceeding, the Board may order a party or its representative to show cause why certain conduct engaged in on more than one occasion within a 12-month period does not constitute bad-faith conduct. Within seven days, such accused party or representative shall file a letter response to this order, which shall be not more than three pages in length.

(2) *On a party's initiative.* A party that in good faith believes that another party or its representative to the proceeding has engaged in bad-faith conduct before the Board on more than one occasion within a 12-month period, may file a letter with the Board at any point after a proceeding has been initiated. Such letter shall describe the alleged instances of bad-faith conduct, include the case numbers for any other instances of bad-faith conduct if known, attach any relevant exhibits, and request a conference with the Board. Such a letter filed by a respondent before the time to opt out of the proceeding has expired shall not operate as a waiver of that respondent's right to opt out of the proceeding. Within seven days of the date of service of the letter, the accused party or representative may file a response to this letter. Any letters described within this section shall be not more than three pages in length. No reply letters shall be permitted unless the Board grants leave.

(c) *Establishing bad-faith conduct.* After an accused party's or representative's response letter has been filed under paragraph (b) of this section, the Board shall either make a determination that the party or representative has not engaged in bad-faith conduct before the Board on more than one occasion within a 12-month period, or shall schedule a conference concerning the allegations. An award of attorneys' fees or costs against the accused party or its representative, pursuant to § 232.3, within the prior 12 months shall establish an instance of bad-faith conduct within the requisite time period. The Board may consider other evidence of bad-faith conduct by the accused party or representative that did not result in an award of attorneys' fees or costs pursuant to § 232.3, including but not limited to claims that were reviewed by a Copyright Claims Attorney and found to be noncompliant or where proceedings were initiated but the respondent opted out.

(d) *Penalties.* In determining whether to bar a party from initiating claims or a representative from initiating claims on a party's behalf, the Board shall consider the letters submitted by the parties, any arguments on the issue, and the accused party's or representative's behavior in other proceedings. The Board shall issue its determination in writing. If the Board determines that the accused party or representative has engaged in bad-faith conduct on more than one occasion within a 12-month period, such determination shall include:

(1) A provision that the accused party be barred from initiating a claim, or in the case of a representative, barred from initiating claims for parties, before the

Board for a period of 12 months beginning on the date on which the Board makes such a finding;

(2) In the case of bad-faith conduct by a party, dismissal without prejudice of any proceeding commenced by that party or by the representative on behalf of a party that is still pending before the Board at the time the finding is made, except that active proceedings shall be dismissed only if the respondent provides written consent to the dismissal; and

(3) In the case of a representative, a provision that the representative be barred from representing any party before the Board for a period of 12 months beginning on the date on which the Board makes such a finding. In deciding whether the representative shall be barred from representing other parties in already pending proceedings, the Board may take into account the hardship to the parties represented by the sanctioned representative. If a representative is barred from further representing a party in a pending claim, the Board will consider requests from that party asking the Board to amend the scheduling order or issue a stay of the pending action to allow that party to find other representation. Whether to issue amend the scheduling order or issue a stay shall be at the Board's discretion.

§ 232.5 Attorney and representative conduct.

(a) *Notices of appearance.* If a party elects to be represented by an attorney or other representative in a proceeding, such attorney or representative must file a notice of appearance that provides the name of the case, the representative's bar number in a State in which the representative has been admitted to practice (if applicable), the case number (if assigned), the person on whose behalf the appearance is made, and the representative's mailing address, email address, and telephone number. Similar notice must also be given for any withdrawal of appearance.

(b) *Bar admissions.* An attorney must be a member in good standing of the bar of the highest court of a State, the District of Columbia, or any territory or commonwealth of the United States. A law student representative must qualify under regulations governing law student representation of a party ([to be proposed at 37 CFR part 234]). An attorney or representative must file with the Board a written statement under penalty of perjury that the attorney or representative is currently qualified and is authorized to represent the party on whose behalf the attorney or representative appears.

(c) *Disbarred attorneys.* Any attorney or representative who has been disbarred by any Federal court, a court of any State, the District of Columbia, or any territory or commonwealth of the United States shall not be allowed to represent a party before the Board. If an attorney in any proceeding active or pending before the Board is disbarred after a notice of appearance has been made, the attorney must report the disbarment to the Board and withdraw representation from any proceeding.

(d) *Duties toward the Board and the parties.* An attorney or representative has a duty of candor and impartiality toward the Board, and a duty of fairness toward opposing parties and counsel. In assessing whether an attorney or representative has breached its duties, the Board shall consider the rules of professional conduct of the District of Columbia and the State in which the attorney practices.

(e) *Penalties for violation.* Any attorney or representative found to be in violation of any of the rules of conduct as set forth in this section, or who is otherwise found to be behaving unethically or inappropriately before the Board, may be barred from representing parties in proceedings before the Board for a period of twelve months.

■ 15. Part 233 is added to read as follows:

PART 233—LIMITATION ON CASES

Sec.

233.1 General.
233.2 Limitation on proceedings.
233.3 Temporary limitations.

Authority: 17 U.S.C. 702, 1510.

§ 233.1 General.

This part prescribes rules pertaining to the management of the Copyright Claims Board's (''Board's'') docket and prevention of abuse of the Board's proceedings.

§ 233.2 Limitation on proceedings.

(a) *Maximum number of proceedings filed by a party.* A party, including a corporate party's parents, subsidiaries, and affiliates, shall file no more than 10 Copyright Claims Board proceedings in any 12-month period. A private attorney or law firm shall represent a claimant in no more than 40 Copyright Claims Board proceedings in any 12-month period. A proceeding shall count toward this limitation as soon as it is filed, regardless of how the proceeding is resolved, whether it is found to be noncompliant or unsuitable, voluntarily dismissed, or fails to become active due to a respondent's opt-out. Amendments to a claim and counterclaims filed in response to a claim shall not count toward this limit.

(b) *Circumvention of limit.* It shall be considered bad-faith conduct under 37 CFR 232.3 for a party to take any action for the sole purpose of avoiding the limitation on the number of proceedings that may be filed as set forth in this section.

(c) *Maximum total number of proceedings before the Board.* There shall not be a maximum total number of proceedings that may be filed before the Board.

§ 233.3 Temporary limitations.

(a) *Moratorium on new claims.* When the Board has determined that the number of pending cases before it has overwhelmed the capacity of the Board, the Board may impose a temporary stay on the filing of claims or on the number of claims that may be filed by a party or representative. The Board shall publish an announcement of that determination on its website, stating the effective date of the stay, and the duration of the stay, not to exceed six months.

(b) *Exception to moratorium.* If a claimant's statute of limitations under 17 U.S.C. 1504(b) is about to expire during the stay under paragraph (a) of this section, the claimant may file a claim on or before the statutory deadline accompanied by a declaration under penalty of perjury stating that the statute of limitations will expire during the stay and setting forth facts in support of that conclusion. If the Board determines that the statute of limitations likely will expire during the stay based on the facts set forth in the declaration, the Board shall hold the claim in abeyance and conduct a compliance review following the end of the stay.

Dated: November 24, 2021.

Kevin R. Amer,

Acting General Counsel and Associate Register of Copyrights.

[FR Doc. 2021–26058 Filed 12–7–21; 8:45 am]

BILLING CODE 1410–30–P

FEDERAL REGISTER

Vol. 86 Wednesday,

No. 233 December 8, 2021

Part VI

Department of the Treasury

Financial Crimes Enforcement Network

31 CFR Part 1010

Beneficial Ownership Information Reporting Requirements; Proposed Rule

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010

RIN 1506–AB49

Beneficial Ownership Information Reporting Requirements

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FinCEN is promulgating proposed regulations to require certain entities to file reports with FinCEN that identify two categories of individuals: The beneficial owners of the entity; and individuals who have filed an application with specified governmental authorities to form the entity or register it to do business. The proposed regulations would implement Section 6403 of the Corporate Transparency Act (CTA), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA), and describe who must file a report, what information must be provided, and when a report is due. Requiring entities to submit beneficial ownership and company applicant information to FinCEN is intended to help prevent and combat money laundering, terrorist financing, tax fraud, and other illicit activity. Once finalized, these proposed regulations will affect a large number of entities doing business in the United States. This document also invites comments from the public regarding all aspects of the proposed regulations as well as comments in response to specific questions.

DATES: Written comments on this proposed rule may be submitted on or before February 7, 2022.

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–2021–0005 and RIN 1506–AB49.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2021–0005 and RIN 1506–AB49.

FOR FURTHER INFORMATION CONTACT: The FinCEN Regulatory Support Section at 1–800–767–2825 or electronically at *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

These proposed regulations would implement the requirement in the CTA [1] that a reporting company submit to FinCEN a report containing beneficial owner and company applicant information (together, ''beneficial ownership information'' or BOI). This proposal fulfills the statutory direction to Treasury to promulgate regulations to implement the CTA and reflects FinCEN's careful consideration of public comments received in response to an advanced notice of proposed rulemaking (the ''ANPRM'').[2] To the extent practicable, and as required by the CTA, the proposed regulations aim to minimize the burden on reporting companies and to ensure that the information collected is accurate, complete, and highly useful. More broadly, the proposed regulations are intended to protect U.S. national security, provide critical information to law enforcement, and promote financial transparency and compliance. The CTA and these proposed regulations represent the culmination of years of efforts by Congress, the Department of the Treasury (Treasury), other national security agencies, law enforcement, and other stakeholders to bolster the United States' corporate transparency framework and to address deficiencies in BOI reporting noted by the Financial Action Task Force (FATF), Congress, law enforcement, and others. The proposed regulations address: (1) Who must file; (2) when they must file; and (3) what information they must provide. Collecting this information and providing access to law enforcement, the intelligence community, and other key stakeholders will diminish the ability of malign actors to obfuscate their activities through the use of anonymous shell and front companies. The proposed regulations would also specify circumstances in which a person violates the reporting requirements.

The proposed regulations describe two distinct types of reporting companies that must file reports with FinCEN—domestic reporting companies and foreign reporting companies. Generally, under the proposed regulations, a domestic reporting company is any entity that is created by the filing of a document with a secretary of state or similar office of a jurisdiction within the United States. A foreign reporting company is any entity formed under the law of a foreign jurisdiction that is registered to do business within the United States.

The proposed regulations also describe the twenty-three specific exemptions from the definition of reporting company under the CTA. The CTA also includes an option for the Secretary of the Treasury (Secretary), with the written concurrence of the Attorney General and the Secretary of Homeland Security, to exclude by regulation additional types of entities. FinCEN does not currently propose to exempt additional types of entities beyond those specified by the CTA.

The proposed regulations describe who is a beneficial owner and who is a company applicant. A beneficial owner is any individual who meets at least one of two criteria: (1) Exercising substantial control over the reporting company; or (2) owning or controlling at least 25 percent of the ownership interest of the reporting company. The proposed regulations define the terms ''substantial control'' and ''ownership interest'' and describe rules for determining whether an individual owns or controls 25 percent of the ownership interests of a reporting company. The proposed regulations would also describe five types of individuals who the CTA exempts from the definition of beneficial owner.

The proposed regulations also describe who is a company applicant. In the case of a domestic reporting company, a company applicant is the individual who files the document that forms the entity. In the case of a foreign reporting company, a company applicant is the individual who files the document that first registers the entity to do business in the United States. The proposed regulations specify that a company applicant includes anyone who directs or controls the filing of the document by another.

Under the proposed regulations, the time at which a required report is due would depend on: (1) When the reporting company was created or registered; and (2) whether the report is an initial report, an updated report providing new information, or a report correcting erroneous information in a previous report. Domestic reporting companies created, or foreign reporting companies registered to do business in the United States, before the effective date of the final regulations would have one year from the effective date of the final regulations to file their initial

[1] The CTA is Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (January 1, 2021) (the ''NDAA''). Division F of the NDAA is the Anti-Money Laundering Act of 2020, which includes the CTA. Section 6403 of the CTA, among other things, amends the Bank Secrecy Act (BSA) by adding a new Section 5336, Beneficial Ownership Information Reporting Requirements, to Subchapter II of Chapter 53 of Title 31, United States Code.

[2] 86 FR 17557 (Apr. 5, 2021).

report with FinCEN. Domestic reporting companies created, or foreign reporting companies registered to do business in the U.S. for the first time, on or after the effective date of the final regulations would be required to file their initial report with FinCEN within 14 calendar days of the date on which they are created or registered, respectively. If there is a change in the information previously reported to FinCEN under these regulations, reporting companies would have 30 calendar days to file an updated report. Finally, if a reporting company filed information that was inaccurate at the time of filing, the reporting company would have to file a corrected report within 14 calendar days of the date it knew, or should have known, that the information was inaccurate.

The proposed regulations also describe the type of information that a reporting company is required to file. First, the reporting company would have to identify itself. The proposed regulations describe the information that a reporting company must submit to FinCEN about: (1) The reporting company, and (2) each beneficial owner and company applicant. This includes, for example, the name and address of each beneficial owner and company applicant, among other things. In lieu of providing specific information about an individual, the reporting company may provide a unique identifier issued by FinCEN called a FinCEN identifier. The proposed regulations describe how to obtain a FinCEN identifier and when it may be used. The proposed regulations also describe highly useful information that reporting companies are encouraged, but not required, to provide. This additional information would support efforts by government authorities and financial institutions to prevent money laundering, terrorist financing, and other illicit activities such as tax evasion.

The CTA provides that it is unlawful for any person to willfully provide, or attempt to provide, false or fraudulent BOI to FinCEN, or to willfully fail to report complete or updated BOI to FinCEN. The proposed regulations describe persons that are subject to this provision and what acts (or failures to act) trigger a violation.

II. Scope of the NPRM

In addition to the reporting requirements addressed by this proposed rule, Section 6403 contains other requirements. Section 6403 requires FinCEN to maintain the information that it collects under the CTA in a confidential, secure, and non-public database. It further authorizes FinCEN to disclose the information to certain government agencies, domestic and foreign, for certain purposes specified in the CTA; and to financial institutions to assist them in meeting their customer due diligence requirements. All disclosures of information submitted pursuant to Section 6403 are subject to appropriate protocols to protect the security and confidentiality of the BOI. FinCEN is required to establish such protocols by rulemaking.

Section 6403 also requires that FinCEN revise its current regulation concerning customer due diligence (CDD) requirements for financial institutions at 31 CFR 1010.230 (the ''CDD Rule''). The current CDD Rule requires certain financial institutions to identify and verify the beneficial owners of legal entity customers when those customers open new accounts as part of those financial institutions' customer due diligence programs.[3]

FinCEN intends to issue three sets of rulemakings to implement the requirements of Section 6403: A rulemaking to implement the beneficial ownership information reporting requirements, a second to implement the statute's protocols for access to and disclosure of beneficial ownership information, and a third to revise the existing CDD Rule, consistent with the requirements of section 6403(d) of the CTA. In this proposed rule, however, FinCEN seeks comments only on the first—the proposed regulations that would implement the reporting requirements of Section 6403. FinCEN intends to issue proposed regulations that would implement the other aspects of section 6403 of the CTA in the future and will solicit public comments on those proposed rules through publication in the **Federal Register**.

While developing the final BOI reporting regulations, the BOI access regulations, and the revisions to the current CDD Rule, FinCEN continues to evaluate options for verification of information submitted in BOI reports.[4]

[3] *See* 31 CFR 1010.230. *See also* Final Rule: Customer Due Diligence Requirements for Financial Institutions, 81 FR 29398 (May 11, 2016) (promulgating same).

[4] In addition, pursuant to section 6502(b)(1)(C) and (D) of the NDAA, the Secretary, in consultation with the Attorney General, will conduct a study no later than two years after the effective date of the BOI reporting final rule, to evaluate the costs associated with imposing any new verification requirements on FinCEN and the resources necessary to implement any such changes.

III. Background

A. Beneficial Ownership of Entities

i. Overview and Current Status of BOI Reporting in the United States

Legal entities such as corporations, limited liability companies, partnerships, and trusts play an essential and legitimate role in the U.S. and global economies. They are used to engage in lawful business activity, raise capital, limit personal liability, generate investments, and can be engines for innovation and economic growth, among other activities. They can also be used to engage in illicit activity and launder its proceeds, and enable those who threaten U.S. national security to access and transact in the U.S. economy. Because of the ease of setting up legal entities and the minimal amount of information required to do so in most U.S. states,[5] combined with the investment opportunities the United States presents, the United States continues to be a popular jurisdiction for legal entity formation. The number of legal entities currently operating in the United States is difficult to estimate with certainty, but Congress found that more than two million corporations and limited liability companies are being formed under the laws of the states each year.[6] According to Global Financial Integrity, more public and anonymous corporations are formed in the United States than in any other jurisdiction.[7] The number of legal entities already in existence in the United States that may need to report information on themselves, their beneficial owners, and their formation or registration agents pursuant to the CTA is very likely in the tens of millions.[8]

[5] For simplicity, in the remainder of this NPRM preamble the term ''state'' means the 50 states and the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands.

[6] CTA, Section 6402(1). FinCEN's analysis estimating such entities is included in the regulatory analysis in Section VI of this NPRM.

[7] Global Financial Integrity, *The Library Card Project: The Ease of Forming Anonymous Companies in the United States,* (March 2019) (''GFI Report''), p. 1, available at *https://secureservercdn.net/50.62.198.97/34n.8bd.myftpupload.com/wp-content/uploads/2019/03/GFI-Library-Card-Project.pdf?time=1635277837.* In 2011, the World Bank assessed that 10 times more legal entities were formed in the United States than in all 41 tax haven jurisdictions combined. *See* The World Bank, UNODC, Stolen Asset Recovery Initiative, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (2011), p. 93, available at *https://star.worldbank.org/sites/star/files/puppetmastersv1.pdf.*

[8] In the regulatory analysis in Section VI of this NPRM, FinCEN estimates that there will be at least

Continued

The United States does not have a centralized or other complete aggregation of information about who owns and operates legal entities within the United States. The information about U.S. legal entities that is readily available to law enforcement is limited to the information required to be reported when the entity is formed at the state or Tribal level, unless an entity opens an account at a covered financial institution that is required to collect certain BOI pursuant to the CDD Rule. Though state- and Tribal-level entity formation laws vary, most jurisdictions do not require the identification of an entity's individual beneficial owners at the time of formation.[9] In addition, the vast majority of states require disclosure of little to no contact information or information about an entity's officers.[10]

ii. The Value of BOI and the Department of the Treasury's Efforts To Address the Lack of Transparency in Legal Entity Ownership Structures

Access to BOI reported under the CTA would significantly enhance the U.S. Government and law enforcement's ability to protect the U.S. financial system from illicit use. It would also impede malign actors from abusing legal entities to conceal proceeds from criminal acts that undermine U.S. national security, such as corruption, human smuggling, drug and arms trafficking, and terrorist financing. For example, BOI can add valuable context to financial analysis in support of law enforcement and tax investigations. It can also provide essential information to the intelligence and security professionals who work to prevent terrorists, proliferators, and those who seek to undermine our democratic institutions or threaten other core U.S. interests from raising, hiding, or moving money in the United States through anonymous shell or front companies.[11] Broadly, and critically, BOI can assist in the identification of linkages between potential illicit actors and business entities, including shell companies. Shell companies are typically non-publicly traded corporations, limited liability companies, or entities that have no physical presence beyond a mailing address and generate little to no independent economic value,[12] and often are formed without disclosing their beneficial owners. Furthermore, shell companies can be used to conduct financial transactions without disclosing their true beneficial owners' involvement.

Some of the principal authors of the CTA in the Senate and U.S. House of Representatives recently wrote to Department of the Treasury Secretary Janet L. Yellen that ''[e]ffective and timely implementation of the new BOI reporting requirement will be a dramatic step forward, strengthening U.S. national security by making it more difficult for malign actors to exploit opaque legal structures to facilitate and profit from their bad acts. . . . This means writing the rule *broadly* to include in the reporting as many corporate entities as possible while *narrowly* limiting the exemptions to the smallest possible set permitted by the law.'' [13] They went on to note that such an approach ''will address the current and evolving strategies that terrorists, criminals, and kleptocrats employ to hide and launder assets. It will also foreclose loophole options for creative criminals and their financial enablers, maximize the quality of the information collected, and prevent the evasion of BOI reporting.'' [14] The integration of BOI reported pursuant to the CTA with the current data collected under the Bank Secrecy Act (BSA),[15] and other

25 million ''reporting companies'' (entities that are required to report BOI and are not exempt) in existence when the proposed rule becomes effective.

[9] *See, e.g.,* GFI Report, pp. 4, 6. *See also* U.S. Government Accountability Office, *Company Formations: Minimal Ownership Information Is Collected and Available* (April 2006), available at *https://www.gao.gov/assets/gao-06-376.pdf.* A few jurisdictions require information about entities' beneficial owners. For example, effective January 1, 2020, the District of Columbia requires that entity registration filings ''state the names, residence and business addresses of each person whose aggregate share of direct or indirect, legal or beneficial ownership of a governance or total distributional interest of the entity:

(A) Exceeds 10%; or

(B) Does not exceed 10%; provided, that the person:

(i) Controls the financial or operational decisions of the entity; or

(ii) Has the ability to direct the day-to-day operations of the entity.''

D.C. Code sec. 29–102.01(a)(6) (2021), available at *https://code.dccouncil.us/us/dc/council/code/sections/29-102.01.*

[10] *See* U.S. Government Accountability Office, *Company Formations: Minimal Ownership Information Is Collected and Available* (April 2006), available at *https://www.gao.gov/assets/gao-06-376.pdf. See also, e.g.,* The National Association of Secretaries of State (NASS), *NASS Summary of Information Collected by States (June 2019),* available at *https://www.nass.org/sites/default/files/company%20formation/nass-business-entity-info-collected-june2019.pdf,* noting that in its review of key business entity information collected by states during the entity formation process and in annual or periodic reports, it observed that while 49 states and the District of Columbia request information on registered agent and incorporators during formation, collection of other information is less widespread. For corporation formation, only 24 states collected a principal office address; 21 states collected contact or filer information; 17 states and the District of Columbia collected information about the directors, officers, managers, or members, though NASS notes that several states specify this as optional; and one state collected ownership or control information. For limited liability company formation, 32 states and the District of Columbia collected a principal office address; 20 states collected contact or filer information; 20 states collected information about the directors, officers, managers, or members (though NASS noted this collection requirement may be optional; and 2 states collected ownership or control information. It appears more states collected information during periodic reports than formation, but ownership information remained the least reported, with 3 states and 2 states collecting such information from corporations and limited liability companies, respectively. In its 2019 state-by state analysis of incorporation requirements, the GFI found that (1) 23 states (Alaska, Arkansas, Connecticut, Indiana, Illinois, Maine, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, New Hampshire, New Mexico, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wisconsin) and the District of Columbia do not require that a company's address be provided; (2) every state requires the name of the person who incorporated the company; (3) four states (Alaska, California, Ohio and Virginia) do not require the incorporator's address; (4) 13 states require information about a company's directors; and (5) five states require information about a company's officers either upon incorporation or within the first 90 days after incorporation. GFI Report, *supra* note 4, p. 4.

[11] A front company generates legitimate business proceeds to commingle with illicit earnings. *See* U.S. Department of the Treasury, *National Money Laundering Risk Assessment* (2018), p. 29, available at *https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf.*

[12] FinCEN Advisory, FIN–2017–A003, ''Advisory to Financial Institutions and Real Estate Firms and Professionals,'' p. 3 (August 22, 2017), available at *https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory_FINAL%20508%20Tuesday%20%28002%29.pdf.* ''Most shell companies are formed by individuals and businesses for legitimate purposes, such as to hold stock or assets of another business entity or to facilitate domestic and international currency trades, asset transfers, and corporate mergers. Shell companies can often be formed without disclosing the individuals that ultimately own or control them (*i.e.,* their beneficial owners) and can be used to conduct financial transactions without disclosing their true beneficial owners' involvement.'' *Id.* While shell companies are used for legitimate corporate structuring purposes including in mergers or acquisitions, they are also used in common financial crime schemes. *See* FinCEN, *The Role of Domestic Shell Companies in Financial Crime and Money Laundering: Limited Liability Companies* (November 2006), p. 4, available at *https://www.fincen.gov/sites/default/files/shared/LLCAssessment_FINAL.pdf.*

[13] United States Congress, Letter from Senator Sherrod Brown, Chairman of the Senate Committee on Banking, Housing and Urban Affairs, Representative Maxine Waters, Chairwoman of the House Committee on Financial Services, and Representative Carolyn B. Maloney, Chairwoman of the House Committee on Oversight and Reform, letter to Department of the Treasury Secretary Janet L. Yellen (November 3, 2021), available at *https://financialservices.house.gov/uploadedfiles/11.04_waters_brown_maloney_letter_on_cta.pdf.*

[14] *Id.*

[15] Section 6003(1) of the Anti-Money Laundering Act of 2020 defines the BSA as comprising Section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b), Chapter 2 of Title I of Public Law 91–508 (12 U.S.C. 1951 *et seq.*), and Subchapter II of Chapter 53 of Title 31, United States Code. Congress has authorized the Secretary to administer the BSA. The Secretary has delegated to the Director of

relevant government data, is expected to improve efforts to target illicit actors and their financial activities. The collection of BOI in a centralized database accessible to U.S. Government departments and agencies, law enforcement, tax authorities, and financial institutions may also help to level the playing field for honest businesses, particularly small businesses with fewer resources, that are at a disadvantage when competing against criminals who use shell companies to evade taxes, hide their illicit wealth, and defraud employees and customers.[16]

Since 2000, the Department of the Treasury, including FinCEN, has been raising awareness about the role of shell companies, their obfuscation of beneficial owners, and their role in facilitating criminal activity.[17] In a 2006 report on the role of domestic shell companies in financial crime and money laundering, FinCEN found that shell companies enabled the movement of billions of dollars across borders by unknown beneficial owners, thereby facilitating money laundering or terrorist financing.[18] Concurrently with the issuance of the report in 2006, FinCEN published an advisory alerting financial institutions to the money laundering risks involved in providing financial services to shell companies.[19] In 2010, FinCEN, along with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Securities and Exchange Commission, and in consultation with the Commodity Futures Trading Commission, issued guidance clarifying and consolidating regulatory expectations at the time for obtaining BOI for certain accounts and customer relationships.[20] The guidance noted that BOI in account relationships provides another tool for financial institutions to better understand and address money laundering and terrorist financing risks, protect themselves from criminal activity, and assist law enforcement with investigations and prosecutions.[21]

In 2006, the FATF [22] issued its Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism, with respect to the United States (''2006 FATF Report''). The 2006 FATF Report highlighted the United States' lack of timely BOI available to relevant stakeholders.[23] Following this report, both the U.S. Senate and the U.S. House of Representatives introduced bipartisan legislation to establish a nationwide beneficial ownership registry. These initial beneficial ownership registry bills included the Incorporation Transparency and Law Enforcement Assistance Act, first introduced in the U.S. Senate in 2008 and in the U.S. House of Representatives in 2010.[24]

FinCEN took its first major regulatory step to collecting BOI when it initiated the CDD rulemaking process in March 2012 by issuing an advance notice of proposed rulemaking (ANPRM),[25] followed by a NPRM in August 2014.[26] FinCEN published the final CDD Rule in May 2016.[27] The CDD Rule was the culmination of years of study and consultation with industry, law enforcement, civil society organizations, and other stakeholders, on the need for financial institutions to collect BOI and the value of that information. Citing a number of examples, the preamble to the CDD Rule noted that, among other things, BOI collected by financial institutions pursuant to the CDD Rule would: (1) Assist financial investigations by law enforcement and examinations by regulators; (2) increase the ability of financial institutions, law enforcement, and the intelligence community to address threats to national security; (3) facilitate reporting and investigations in support of tax compliance; and (4) advance Treasury's broad strategy to enhance financial transparency of legal entities.[28]

In December 2016, the FATF issued another Anti-Money Laundering and Counter-Terrorist Financing Measures, United States Mutual Evaluation Report (''2016 FATF Report''), and continued to note U.S. deficiencies in the area of beneficial ownership transparency. The 2016 FATF Report identified the lack of BOI reporting requirements as one of the fundamental gaps in the U.S. anti-money laundering/countering the financing of terrorism (AML/CFT)

FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations (Treasury Order 180–01 (Jan. 14, 2020)).

[16] FinCEN, Prepared Remarks of FinCEN Director Kenneth A. Blanco, delivered at the Federal Identity (FedID) Forum and Exposition, *Identity: Attack Surface and a Key to Countering Illicit Finance,* noting also that ''[f]or many of the companies here today—those that are developing or dealing with sensitive technologies—understanding who may want to invest in your ventures, or who is competing with you in the marketplace, would allow for better, safer decisions to protect intellectual property.'' (September 24, 2019). *https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-federal-identity-fedid.*

[17] *See, e.g.,* Suspicious Activity (SAR) Report Review Issue #1 (October 2000) (noting that SARS filed in 2000 reflected suspicious wire transfer patterns involving shell companies that lacked legitimate business purposes and that were being used to transfer large amounts of funds), p. 11. *https://www.fincen.gov/sites/default/files/shared/sar_tti_01.pdf.*

[18] FinCEN, *The Role of Domestic Shell Companies in Financial Crime and Money Laundering: Limited Liability Companies* (November 2006), available at *https://www.fincen.gov/sites/default/files/shared/LLCAssessment_FINAL.pdf.*

[19] FinCEN, *Potential Money Laundering Risks Associated with Shell Companies* (November 2006), available at *https://www.fincen.gov/resources/statutes-regulations/guidance/potential-money-laundering-risks-related-shell-companies.*

[20] FinCEN, FIN–2010–G001, *Guidance on Retaining and Obtaining Beneficial Ownership Information* (March 5, 2010), available at *https://www.fincen.gov/resources/statutes-regulations/guidance/guidance-obtaining-and-retaining-beneficial-ownership.* The CDD Rule and subsequent guidance and examination guidelines have superseded the 2010 beneficial ownership guidance.

[21] *Id.,* noting that ''[h]eightened risks can arise with respect to beneficial owners of accounts because nominal account holders can enable individuals and business entities to conceal the identity of the true owner of assets or property derived from or associated with criminal activity. Moreover, criminals, money launderers, tax evaders, and terrorists may exploit the privacy and confidentiality surrounding some business entities, including shell companies and other vehicles designed to conceal the nature and purpose of illicit transactions and the identities of the persons associated with them.''

[22] The FATF, of which the United States is a founding member, is an international, inter-governmental task force whose purpose is the development and promotion of international standards and the effective implementation of legal, regulatory, and operational measures to combat money laundering, terrorist financing, the financing of proliferation, and other related threats to the integrity of the international financial system. The FATF assesses over 200 jurisdictions against its minimum standards for beneficial ownership transparency. Among other things, it has established standards on transparency and beneficial ownership of legal persons, so as to deter and prevent the misuse of corporate vehicles. *See* FATF Recommendation 24, Transparency and Beneficial Ownership of Legal Persons, The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (updated October 2020), available at *https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html;* FATF Guidance, Transparency and Beneficial Ownership, Part III (October 2014), available at *https://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf.*

[23] Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism, United States (2006), p. 237–239, 299, 302, 305, 308 available at *https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf.*

[24] Incorporation Transparency and Law Enforcement Assistance Act, S. 2956 110th Cong. (2008), available at *https://www.congress.gov/110/bills/s2956/BILLS-110s2956is.pdf;* Incorporation Transparency and Law Enforcement Assistance Act, H.R. 6098 111th Cong. (2010).

[25] 77 FR 13046 (March 5, 2012).

[26] 79 FR 45151 (August 4, 2014).

[27] 81 FR 29397 (May 11, 2016).

[28] 81 FR 29399–29402.

regime.[29] The 2016 FATF Report also observed that ''the relative ease with which U.S. corporations can be established, their opaqueness and their perceived global credibility makes them attractive to abuse for [money laundering and terrorism financing], domestically as well as internationally.'' [30] The Assistant Attorney General of the Criminal Division and Acting Assistant Attorney General of the National Security Division at the Department of Justice issued a statement following the publication of the 2016 FATF Report stating that ''[f]ull transparency of corporate ownership would strengthen our ability to trace illicit financial flows in a timely fashion and firmly declare that the United States will not be a safe haven for criminals and terrorists looking to disguise their identities for nefarious purposes.'' [31]

While the CDD Rule increased transparency by requiring the collection of BOI by covered financial institutions at the time of an account opening, the Rule did not address the collection of BOI at the time of a legal entity's formation. Following the issuance of the 2016 FATF Report, Treasury and Department of Justice officials remained committed to working with Congress on beneficial ownership legislation that would require companies to report adequate, accurate, and current beneficial ownership information at the time of a company's formation. In addition, between the initial 2008 Incorporation Transparency and Law Enforcement Assistance Act [32] and the 2016 FATF Report, bipartisan beneficial ownership registry legislation continued to be introduced in each Congress. The introduction of the Corporate Transparency Act of 2017 in June 2017 (in the U.S. House of Representatives) and August 2017 (in the U.S. Senate) [33] followed the 2016 FATF Report. In November 2017, testimony at a Senate Judiciary Committee hearing, Deputy Assistant Secretary of the Treasury Jennifer Fowler, head of the U.S. FATF delegation during the 2016 FATF Report, highlighted the significant vulnerability identified by FATF, noting that ''this has permitted criminals to shield their true identities when forming companies and accessing our financial system.'' She also remarked that, while Treasury's CDD Rule was an important step forward, more remained to be done working with Congress to find a solution to collecting BOI.[34]

Over the years, Treasury and Department of Justice officials repeatedly and publicly articulated the need for the United States to enhance and improve authorities to collect BOI. In February 2018, Acting Deputy Assistant Attorney General M. Kendall Day testified at a Senate Judiciary Committee hearing on beneficial ownership reporting that ''[t]he pervasive use of front companies, shell companies, nominees, or other means to conceal the true beneficial owners of assets is one of the greatest loopholes in this country's AML regime.'' [35] In December 2019, FinCEN Director Kenneth Blanco noted that ''[t]he lack of a requirement to collect information about who really owns and controls a business and its assets at company formation is a dangerous and widening gap in our national security apparatus.'' [36] He also highlighted how this gap has been addressed in part through the CDD Rule and how much more work needed to be done, stating that ''[t]he next critical step to closing this national security gap is collecting beneficial ownership information at the corporate formation stage. If beneficial ownership information were required at company formation, it would be harder and more costly for criminals, kleptocrats, and terrorists to hide their bad acts, and for foreign states to avoid detection and scrutiny. This would help deter bad actors accessing our financial system in the first place, denying them the ability to profit and benefit from its power while threatening our national security and putting people at risk.'' [37]

Continuing its analysis of the use of shell and front companies to hide ill-gotten gains, in its 2018 National Money Laundering Risk Assessment, and in its 2018 and 2020 National Strategies for Combating Terrorist and Other Illicit Financing (''2018 Illicit Financing Strategy'' and ''2020 Illicit Financing Strategy,'' respectively), the Department of the Treasury discussed the money laundering risks inherent in the United States' lack of a comprehensive beneficial ownership reporting regime.[38] In the 2018 National Money Laundering Risk Assessment, Treasury highlighted a number of cases where shell and front companies were used in the United States to disguise funds generated in Medicare and Medicaid fraud, trade-based money laundering, or drug trafficking, among other crimes.[39] In the 2018 Illicit Financing Strategy, Treasury flagged the use of shell companies by Russian organized crime groups in the United States, as well as the Iranian Government's use of shell companies to obfuscate the source of funds and its role as it tried to generate revenue.[40] The 2020 Illicit Financing Strategy cited the lack of a requirement to collect BOI at the time of company formation and after changes in ownership as one of the most significant vulnerabilities of the U.S. financial system.[41]

Most recently, Congress enacted the Anti-Money Laundering Act of 2020 (the ''AML Act''), of which the CTA is a part.[42] Congress explained that among

[29] *See* FATF, Anti-Money Laundering and Counter-Terrorist Financing Measures United States Mutual Evaluation Report (2016), p. 4 (key findings) and Ch. 7., available at *https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf.*

[30] *Id.,* p. 153.

[31] U.S. Department of Justice, Assistant Attorney General Leslie Caldwell of the Criminal Division and Acting Assistant Attorney General Mary McCord of the National Security Division, *Financial Action Task Force Report Recognizes U.S. Anti-Money Laundering and Counter-Terrorist Financing Leadership, but Action is Needed on Beneficial Ownership,* (December 1, 2016), available at *https://www.justice.gov/archives/opa/blog/financial-action-task-force-report-recognizes-us-anti-money-laundering-and-counter.*

[32] *See supra* note 23.

[33] Corporate Transparency Act of 2017, H.R. 3089 115th Cong. (2017); Corporate Transparency Act of 2017, S. 1717 115th Cong. (2017).

[34] U.S. Department of the Treasury, *Testimony of Jennifer Fowler, Deputy Assistant Secretary Office of Terrorist Financing and Financial Crimes, Senate Judiciary Committee* (November 28, 2017), available at *https://www.judiciary.senate.gov/imo/media/doc/Fowler%20Testimony.pdf.*

[35] U.S. Department of Justice, *Statement of M. Kendall Day, Acting Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, Before the Committee on the Judiciary, United States Senate, for a Hearing Entitled ''Beneficial Ownership: Fighting Illicit International Financial Networks Through Transparency,''* presented February 6, 2018, p. 3, available at *https://www.judiciary.senate.gov/imo/media/doc/02-06-18%20Day%20Testimony.pdf.*

[36] FinCEN, *Prepared Remarks of FinCEN Director Kenneth A. Blanco, delivered at the American Bankers Association/American Bar Association Financial Crimes Enforcement Conference,* (December 10, 2019), available at *https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-american-bankers.*

[37] *Id.*

[38] *See e.g., id.,* p. 28, and U.S. Department of the Treasury, *National Strategy for Combating Terrorist and Other Illicit Financing* (2020) (''2020 Illicit Financing Strategy''), pp. 13–14, 27, 34, available at *https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf.*

[39] U.S. Department of the Treasury, *National Money Laundering Risk Assessment* (2018), pp. 28–30, available at *https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf.*

[40] U.S. Department of the Treasury, *National Strategy for Combating Terrorist and Other Illicit Financing* (2018), pp. 20, 47, available at *https://home.treasury.gov/system/files/136/nationalstrategyforcombatingterroristandotherillicitfinancing.pdf.*

[41] 2020 Illicit Financing Strategy, *supra* note 35, p. 12, available at *https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf.*

[42] The Anti-Money Laundering Act of 2020 was enacted as Division F, §§ 6001–6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (2021).

other purposes, the AML Act was meant to ''improve transparency for national security, intelligence, and law enforcement agencies and financial institutions concerning corporate structures and insight into the flow of illicit funds through those structures'' and ''discourage the use of shell corporations as a tool to disguise and move illicit funds.'' [43] As part of its ongoing efforts to implement the AML Act, FinCEN published in June 2021 the first national AML/CFT priorities, further highlighting the use of shell companies by human traffickers, smugglers, and weapons proliferators, among others, to generate revenues and transfer funds in support of illicit conduct.[44]

iii. National Security and Law Enforcement Implications of Legal Entities With Anonymous Beneficial Owners

While many legal entities are used for legitimate purposes, they can also be misused, as highlighted above and as Congress recognized in the CTA.[45] Corrupt actors and their financial facilitators, as a general matter, take advantage of the administrative ease of entity formation, the low cost, and the lack of information needed to establish such structures in the United States. Those actors then use the resulting anonymity and perceived legitimacy afforded to legal entities, such as shell companies, to disguise and convert the proceeds of crime before introducing them into the financial system. For example, such legal entities are used to: (1) Obscure the proceeds of bribery and large-scale corruption, money laundering, narcotics offenses, terrorist or proliferation financing, and human trafficking; (2) disguise efforts to undermine the integrity of U.S. elections and institutions; and (3) conduct other threatening and illegal activities. The ability of malign actors to hide behind opaque corporate structures, including anonymous shell and front companies, and to generate funding to finance their illicit activities continues to be a significant threat to the national security of the United States. The lack of a centralized BOI repository accessible to law enforcement and the intelligence community not only erodes the safety and security of our nation, but also undermines the U.S. Government's ability to address these threats to the United States.

In the United States, the deliberate misuse of legal entities, including corporations and limited liability companies, continues to significantly enable money laundering and other illicit financial activity and national security threats. Treasury noted in its 2020 Illicit Financing Strategy that ''[m]isuse of legal entities to hide a criminal beneficial owner or illegal source of funds continues to be a common, if not the dominant, feature of illicit finance schemes, especially those involving money laundering, predicate offences, tax evasion, and proliferation financing . . . A Treasury study based on a statistically significant sample of adjudicated IRS cases from 2016–2019 found legal entities were used in a substantial proportion of the reviewed cases to perpetrate tax evasion and fraud. According to federal prosecutors and law enforcement, large-scale schemes that generate substantial proceeds for perpetrators and smaller white-collar cases alike routinely involve shell companies, either in the underlying criminal activity or subsequent laundering.'' [46] The Drug Enforcement Administration also recently highlighted that drug trafficking organizations (DTOs) use shell and front companies to commingle illicit drug proceeds with legitimate revenue of front companies, thereby enabling the DTOs to launder their drug proceeds.[47]

Recently, in a joint Federal Bureau of Investigation (FBI) and Internal Revenue Service—Criminal Investigations (IRS–CI) investigation, the Department of Justice filed civil forfeiture complaints aggregating to $1.7 billion under the Kleptocracy Asset Recovery Initiative related to the 1Malaysia Development Berhad (1MDB) investigation. From 2009 through 2015, more than $4.5 billion in funds belonging to 1MDB was allegedly misappropriated by high-level officials of 1MDB and their associates. 1MDB was created by the Government of Malaysia to promote economic development in Malaysia through global partnerships and foreign direct investment, and the associated funds were intended to be used for improving the well-being of the Malaysian people. However, using fraudulent documents and representations, the co-conspirators allegedly laundered the funds through a series of complex transactions and shell companies with bank accounts located in the United States and abroad. These transactions allegedly served to conceal the origin, source and ownership of the funds, and ultimately passed through U.S. financial institutions to then be used to acquire and invest in assets located in the United States and overseas. Included in the forfeiture were multiple luxury properties in New York City, Los Angeles, Beverly Hills, and London, mostly titled in the name of shell companies, as well as paintings by Van Gogh, Monet, Picasso, a yacht, several items of extravagant jewelry, and numerous other items of personal property. The investigation into the location and holders of the assets associated with the alleged 1MDB scheme was made much more difficult by the shell companies with connections in foreign destinations.[48]

Shell companies also are used to evade sanctions imposed by the U.S. Government, thereby endangering U.S. national security. In a 2020 bipartisan report, the Senate Permanent Subcommittee on Investigations detailed, for example, how after Treasury's Office of Foreign Assets Control (OFAC) had sanctioned certain Russian oligarchs in connection with Russia's annexation of Crimea and for supporting Russian President Vladimir Putin,[49] those sanctioned oligarchs used shell companies to engage in a total of $91 million in transactions, and to purchase $18 million dollars in high-value art in the United States.[50] In a

[43] *Id.,* Section 6002(5)(A)–(B).

[44] FinCEN, *Anti-Money Laundering and Countering the Financing of Terrorism Priorities* (June 30, 2021), pp. 11–12, available at *https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf.*

[45] ''[Ma]lign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption[.]'' CTA, Section 6402(3).

[46] 2020 Illicit Financing Strategy, *supra* note 35, pp. 13–14, available at *https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf.*

[47] Drug Enforcement Administration, *2020 Drug Enforcement Administration National Drug Threat Assessment* (''DEA 2020 NDTA''), pp. 87–88 (2020), available at *https://www.dea.gov/sites/default/files/2021-02/DIR-008-212020NationalDrugThreatAssessment_WEB.pdf.*

[48] FBI, *Testimony of Steven M. D'Antuono, Section Chief, Criminal Investigative Division,* ''*Combatting Illicit Financing by Anonymous Shell Companies*'' (May 21, 2019), available at *https://www.fbi.gov/news/testimony/combating-illicit-financing-by-anonymous-shell-companies.*

[49] U.S. Department of Treasury, *Treasury Sanctions Russian Officials, Members of the Russian Leadership's Inner Circle, and an Entity for Involvement in the Situation in Ukraine* (March 20, 2014), available at *https://www.treasury.gov/press-center/press-releases/Pages/jl23331.aspx.*

[50] United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, *Staff Report: The Art Industry And U.S. Policies That Undermine Sanctions* (July 2020), pp. 7 and 144, available at *https://www.hsgac.senate.gov/imo/media/doc/2020-07-29%20PSI%20Staff%20Report%20-%20The%20Art%20Industry%20and%20U.S.%20Policies%20that%20Undermine%20Sanctions.pdf.*

more recent example, in a federal criminal complaint unsealed in March 2021, the Department of Justice charged 10 Iranian nationals with running a nearly 20-year-long scheme to evade U.S. sanctions on the Government of Iran by disguising more than $300 million worth of transactions—including the purchase of two $25 million oil tankers—on Iran's behalf through front companies in the San Fernando Valley, Canada, Hong Kong and the United Arab Emirates.[51] The U.S. State Department has designated Iran as a state sponsor of terrorism. During the scheme, the defendants allegedly created and used more than 70 front companies, money service businesses, and exchange houses in the United States, Iran, Canada, the United Arab Emirates and Hong Kong. The defendants also allegedly made false representations to financial institutions to disguise more than $300 million worth of transactions on Iran's behalf, using money wired in U.S. dollars and sent through U.S.-based banks.[52]

iv. The Law Enforcement Need for Improved BOI Collection

Although the U.S. Government has tools capable of obtaining some beneficial ownership information, their limitations and the time and cost required to successfully deploy them demonstrate the significant benefits that a centralized repository of information would provide law enforcement. The CTA explains that ''malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity,'' yet ''most or all States do not require information about the beneficial owners of the corporations, limited liability companies, or other similar entities formed under the laws of the State.'' The CTA continues, ''money launderers and others involved in commercial activity intentionally conduct transactions through corporate structures in order to evade detection, and may layer such structures . . . across various secretive jurisdictions such that each time an investigator obtains ownership records for a domestic or foreign entity, the newly identified entity is yet another corporate entity, necessitating a repeat of the same process.'' [53]

As Kenneth A. Blanco, then-Director of FinCEN observed in testimony to the U.S. Senate Committee on Banking, Housing and Urban Affairs, and based on his experience as a former state and Federal prosecutor, identifying the ultimate beneficial owner of a shell or front company in the United States ''often requires human source information, grand jury subpoenas, surveillance operations, witness interviews, search warrants, and foreign legal assistance requests to get behind the outward facing structure of these shell companies. This takes an enormous amount of time—time that could be used to further other important and necessary aspects of an investigation—and wastes resources, or prevents investigators from getting to other equally important investigations. The collection of beneficial ownership information at the time of company formation would significantly reduce the amount of time currently required to research who is behind anonymous shell companies, and at the same time, prevent the flight of assets and the destruction of evidence.'' [54] He also noted during the testimony that ''[i]dentifying and disrupting illicit financial networks not only assists in the prosecution of criminal activity of all kinds, but also allows law enforcement to halt and dismantle criminal organizations and other bad actors before they harm our citizens or our financial system.'' [55]

The FBI's Steven M. D'Antuono elaborated on these difficulties, testifying before the Senate Banking Housing and Urban Affairs Committee in 2019 that ''[t]he process for the production of records can be lengthy, anywhere from a few weeks to many years, and . . . . can be extended drastically when it is necessary to obtain information from other countries . . . . [I]f an investigator obtains the ownership records, either from a domestic or foreign entity, the investigator may discover that the owner of the identified corporate entity is an additional corporate entity, necessitating the same process for the newly discovered corporate entity. Many professional launderers and others involved in illicit finance intentionally layer ownership and financial transactions in order to reduce transparency of transactions. As it stands, it is a facially effective way to delay an investigation.'' [56] D'Antuono acknowledged that these challenges may be even more stark for state, local, and Tribal law enforcement agencies that may not have the same resources as their federal counterparts to undertake long and costly investigations to identify the beneficial owners of these entities.[57] During the testimony, he noted that requiring the disclosure of BOI by legal entities and the creation of a central BOI repository available to law enforcement and regulators could address these challenges.[58]

The process of obtaining BOI through grand jury subpoenas and other means can be time consuming and of limited utility in some cases. Grand jury subpoenas, for example, require an underlying grand jury investigation into a possible violation of law. In addition, the law enforcement officer or investigator must work with a prosecutor's office, such as a U.S. Attorney's Office, to open a grand jury investigation, obtain the grand jury subpoena, and issue it on behalf of the grand jury. The investigator also needs to determine the proper recipient of the subpoena and coordinate service, which raises additional complications in cases where there is excessive layering of corporate structures to hide the identity of the ultimate beneficial owners. In some cases, however, BOI still may not be attainable via grand jury subpoena because it does not exist. For example, because most states do not require the disclosure of BOI when forming or registering an entity, BOI cannot be obtained from the secretary of state or similar office. Furthermore, many states permit corporations to acquire property without disclosing BOI, and therefore BOI cannot be obtained from property records.

FinCEN's existing regulatory tools also have significant limitations. The current CDD Rule, for example, requires that certain types of U.S. financial institutions identify and verify the beneficial owners of legal entity customers at the time those financial institutions open a new account for a legal entity customer,[59] but the rule

[51] U.S. Department of Justice (U.S. Attorney's Office, Central District of California), *Iranian Nationals Charged with Conspiring to Evade U.S. Sanctions on Iran by Disguising $300 Million in Transactions Over Two Decades* (March 19, 2021), available at *https://www.justice.gov/usao-cdca/pr/iranian-nationals-charged-conspiring-evade-us-sanctions-iran-disguising-300-million.*

[52] *Id.*

[53] CTA, Section 6402.

[54] FinCEN, *Testimony for the Record, Kenneth A. Blanco, Director, U.S. Senate Committee on Banking, Housing and Urban Affairs* (May 21, 2019), available at *https://www.banking.senate.gov/imo/media/doc/Blanco%20Testimony%205-21-19.pdf.*

[55] *Id.*

[56] FBI, *Testimony of Steven M. D'Antuono, Section Chief, Criminal Investigative Division,* ''*Combatting Illicit Financing by Anonymous Shell Companies*'' (May 21, 2019), available at *https://www.fbi.gov/news/testimony/combating-illicit-financing-by-anonymous-shell-companies.*

[57] *Id.*

[58] *Id.*

[59] The CDD Rule NPRM contained a requirement that covered financial institutions conduct ongoing monitoring to maintain and update customer

provides only a partial solution.[60] The information about beneficial owners of certain U.S. entities is generally not comprehensive and not reported to the Government, and therefore not immediately available to law enforcement, intelligence, and national security agencies. Other FinCEN authorities—geographic targeting orders [61] and the so-called ''311 measures'' (*i.e.,* special measures imposed on jurisdictions, financial institutions, or international transactions of primary money laundering concern) [62]—offer temporary and targeted tools. Neither provides law enforcement the ability to quickly and efficiently follow the money.

Shell companies, in particular, demonstrate how critical a centralized database of beneficial ownership information is for investigators. Treasury's 2020 Illicit Financing Strategy addressed in part how current sources of information are inadequate to prosecute the use of shell entities to hide ill-gotten gains. In particular, while law enforcement agencies may be able to use subpoenas and access public databases to collect information to identify the owners of corporate structures, the 2020 Illicit Financing Strategy explained that ''[t]here are numerous challenges for federal law enforcement when the true beneficiaries of illicit proceeds are concealed through shell or front companies.'' [63] In May 2019 testimony before the Senate Banking, Housing, and Urban Affairs Committee, then-FinCEN Director Blanco provided examples of criminals who used anonymous shell corporations, including: ''A Russian arms dealer nicknamed 'The Merchant of Death,' who sold weapons to a terrorist organization intent on killing Americans. Executives from a supposed investment group that perpetrated a Ponzi scheme that defrauded more than 8,000 investors, most of them elderly, of over $1 billion. A complex nationwide criminal network that distributed oxycodone by flying young girls and other couriers carrying pills all over the United States. A New York company that was used to conceal Iranian assets, including those designated for providing financial services to entities involved in Iran's nuclear and ballistic missile program. A former college athlete who became the head of a gambling enterprise and a violent drug kingpin who sold recreational drugs and steroids to college and professional football players. A corrupt Venezuelan treasurer who received over $1 billion in bribes.'' He continued, ''These crimes are very different, as are the dangers they pose and the damage caused to innocent and unsuspecting people. The defendants and bad actors come from every walk of life and every corner of the globe. The victims—both direct and indirect—include Americans exposed to terrorist acts; elderly people losing life savings; a young mother becoming addicted to opioids; a college athlete coerced to pay extraordinary debts by violent threats; and an entire country driven to devastation by corruption. But all these crimes have one thing in common: shell corporations were used to hide, support, prolong, or foster the crimes and bad acts committed against them. These criminal conspiracies thrived at least in part because the perpetrators could hide their identities and illicit assets behind shell companies. Had beneficial ownership information been available, and more quickly accessible to law enforcement and others, it would have been harder and more costly for the criminals to hide what they were doing. Law enforcement could have been more effective and efficient in preventing these crimes from occurring in the first place, or could have intercepted them sooner and prevented the scope of harm these criminals caused from spreading.'' [64]

During the same hearing in front of the Senate's Committee on Banking, Housing, and Urban Affairs in May 2019, the FBI's D'Antuono explained that ''[t]he strategic use of [shell and front companies] makes investigations exponentially more difficult and laborious. The burden of uncovering true beneficial owners can often handicap or delay investigations, frequently requiring duplicative, slow-moving legal process in several jurisdictions to gain the necessary information. This practice is both time consuming and costly. The ability to easily identify the beneficial owners of these shell companies would allow the FBI and other law enforcement agencies to quickly and efficiently mitigate the threats posed by the illicit movement of the succeeding funds. In addition to diminishing regulators', law enforcement agencies', and financial institutions' ability to identify and mitigate illicit finance, the lack of a law requiring production of beneficial ownership information attracts unlawful actors, domestic and abroad, to abuse our state-based registration system and the U.S. financial industry.'' [65]

In February 2020, then-Secretary of the Treasury Steven T. Mnuchin testified at a Senate hearing on the President's Fiscal Year 2021 Budget that the lack of information on who controls shell companies is ''a glaring hole in our system.'' [66] In his December 9, 2020, floor statement accompanying the AML Act, Senator Sherrod Brown, the then-Ranking Member of the Senate Committee on Banking, Housing, and Urban Affairs and one of the primary authors of the enacted CTA, stated that the reporting of BOI ''will help address longstanding problems for U.S. law enforcement. It will help them investigate and prosecute cases involving terrorism, weapons proliferation, drug trafficking, money laundering, Medicare and Medicaid fraud, human trafficking, and other crimes. And it will provide ready access to this information under long-established and effective privacy rules. Without these reforms, criminals, terrorists, and even rogue nations could continue to use layer upon layer of shell companies to disguise and launder illicit funds. That makes it harder to hold bad actors accountable, and puts

---

information on a risk basis, specifying that customer information includes the beneficial owners of legal entity customers. As noted in the supplementary material to the final rule, FinCEN did not construe this obligation as imposing a categorical, retroactive requirement to identify and verify BOI for existing legal entity customers. Rather, these provisions reflect the conclusion that a financial institution should obtain BOI from existing legal entity customers when, in the course of its normal monitoring, the financial institution detects information relevant to assessing or reevaluating the risk of such customer. Final Rule, *Customer Due Diligence Requirements for Financial Institutions,* 81 FR 29398, 29404 (May 11, 2016).

[60] *See* U.S. Money Laundering Threat Assessment Working Group, *U.S. Money Laundering Threat Assessment* (2005), pp. 48–49, available at *https://www.treasury.gov/resource-center/terrorist-illicit-finance/documents/mlta.pdf. See also* Congressional Research Service, Miller, Rena S. and Rosen, Liana W., *Beneficial Ownership Transparency in Corporate Formation, Shell Companies, Real Estate, and Financial Transactions* (July 8, 2019), available at *https://crsreports.congress.gov/product/pdf/R/R45798.*

[61] 31 U.S.C. 5326(a); 31 CFR 1010.370.

[62] 31 U.S.C. 5318A, as added by section 311 of the USA PATRIOT Act (Pub. L. 107–56).

[63] 2020 Illicit Financing Strategy, *supra* note 35, p. 14, available at *https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf.*

[64] FinCEN, *Testimony for the Record, Kenneth A. Blanco, Director, U.S. Senate Committee on Banking, Housing and Urban Affairs* (May 21, 2019), available at *https://www.banking.senate.gov/imo/media/doc/Blanco%20Testimony%205-21-19.pdf.*

[65] FBI, *Testimony of Steven M. D'Antuono, Section Chief, Criminal Investigative Division,* ''*Combatting Illicit Financing by Anonymous Shell Companies*'' (May 21, 2019), available at *https://www.fbi.gov/news/testimony/combating-illicit-financing-by-anonymous-shell-companies.*

[66] Steven T. Mnuchin (Secretary, Department of the Treasury), *Transcript: Hearing on the President's Fiscal Year 2021 Budget before the Senate Committee on Finance* (February 12, 2020),'' p. 25, available at *https://www.finance.senate.gov/imo/media/doc/45146.pdf.*

us all at risk.'' [67] Senators Sheldon Whitehouse, Charles Grassley, Ron Wyden, and Marco Rubio, who were co-sponsors of the CTA and its predecessor legislation in the Senate, commented on the ANPRM that ''the CTA marked the culmination of a years-long effort in Congress to combat money laundering, international corruption, and kleptocracy by requiring certain companies to disclose their beneficial owners to law enforcement, national security officials, and financial institutions with customer due diligence obligations.'' [68]

v. The United States' Corporate Transparency Measures Within the Broader International Framework

The laundering of illicit proceeds frequently entails cross-border transactions involving jurisdictions with weak AML/CFT compliance frameworks, as these jurisdictions may present more ready options for criminals to place, launder, or store the proceeds of crime. For over a decade, through the former Group of Eight (G8), Group of Twenty (G20),[69] FATF, and the Egmont Group,[70] the global community has worked to establish a set of mutual standards to enhance beneficial ownership transparency across all jurisdictions. U.S. efforts to collect BOI are part of this growing international consensus by jurisdictions to enhance beneficial ownership transparency, and will be reinforced by similar efforts by foreign jurisdictions.

The current lack of a centralized U.S. BOI reporting requirement and database makes the United States a jurisdiction of choice to establish shell companies that hide the ultimate beneficiaries. This makes it easier for bad actors to exploit these companies for the placement, laundering, and investment of the proceeds of crime. Global financial centers such as the United States are particularly exposed to transnational illicit finance threats, as they tend to have characteristics—such as extensive links to the international financial system, sophisticated financial sectors, and robust institutions—that make them appealing destinations for the proceeds of illicit transnational activity. Corrupt foreign officials, sanctions evaders, and narco-traffickers, among others, exploit the current gap in the U.S. BOI reporting regime to park their ill-gotten gains in a stable jurisdiction, thereby exposing the United States to serious national security threats. For example, the Department of Justice indicted the alleged heads of the Los Zetas Mexican drug cartel for their roles in using the race horse industry and shell companies to launder millions of dollars in drug proceeds.[71] The FBI's D'Antuono noted that the wide use of shell companies, in both the United States and Mexico, made it challenging for banks and investigators to associate the drug cartel with horses and bank accounts. If not for solid witness testimony and extremely diligent forensic accounting, it would have been difficult to prove the case, he noted.[72]

As noted previously, the United States' lack of a centralized BOI reporting requirement constitutes a weak link in the integrity of the global financial system. In the CTA, Congress explained that the statute is necessary to ''bring the United States into compliance with international [AML/CFT] standards.'' [73] Many countries, including the United Kingdom and all member states of the European Union, have incorporated elements derived from these standards into their domestic legal or regulatory frameworks. At the same time, FATF mutual evaluations show that jurisdictions, including the United States, still have work to do to meet the standards for beneficial ownership transparency. Establishing the requirements to report BOI to a centralized database at FinCEN is another step in Treasury's decades-long efforts to strengthen the U.S. and global financial systems and to combat money laundering and corruption.

B. The CTA

The CTA added a new section, 31 U.S.C. 5336, to the BSA to address the broader objectives of enhancing beneficial ownership transparency while minimizing the burden on the regulated community.

In brief, 31 U.S.C. 5336 requires certain types of domestic and foreign entities, called ''reporting companies,'' to submit specified BOI to FinCEN. FinCEN is authorized to share this BOI with certain Government agencies, financial institutions, and regulators, subject to appropriate protocols.[74] The requirement for reporting companies to submit BOI takes effect ''on the effective date of the regulations prescribed by the Secretary of the Treasury under [31 U.S.C. 5336].'' [75] Reporting companies formed or registered after the effective date will need to submit the requisite BOI to FinCEN at the time of formation, while preexisting reporting companies will have a specified period to comply and report.[76]

The CTA reporting requirements target generally smaller, more lightly regulated entities that may not be subject to any other BOI reporting requirements. In contrast, the CTA exempts certain more heavily regulated entities from its reporting requirements, including to avoid imposing duplicative requirements.

The provision at 31 U.S.C. 5336 requires reporting companies to submit to FinCEN, for each beneficial owner and company applicant, the individual's full legal name, date of birth, current residential or business street address, and either a unique identifying number from an acceptable identification document (*e.g.,* a passport) or a FinCEN identifier—four readily accessible pieces of information that should not be unduly burdensome for individuals to produce, or for reporting companies to collect and submit to FinCEN.[77] A FinCEN identifier is a unique identifying number that FinCEN will

[67] Senator Sherrod Brown, ''National Defense Authorization Act,'' Congressional Record 166:208 (December 9, 2020), p. S7311, available at *https://www.govinfo.gov/content/pkg/CREC-2020-12-09/pdf/CREC-2020-12-09.pdf.*

[68] Senators Sheldon Whitehouse, Chuck Grassley, Ron Wyden, and Marco Rubio, Letter to the Financial Crimes Enforcement Network, (May 5, 2021), available at *https://www.rubio.senate.gov/public/_cache/files/ceb65708-7973-4b66-8bd4-c8254509a6f3/13D55FBEE293CAAF52B7317C5CA7E44C.senators-cta-comment-letter-05.04.2021.pdf.*

[69] *See, e.g., United States G–8 Action Plan for Transparency of Company Ownership and Control* (June 2013), *https://obamawhitehouse.archives.gov/the-press-office/2013/06/18/united-states-g-8-action-plan-transparency-company-ownership-and-control; G8 Lough Erne Declaration* (July 2013), *https://www.gov.uk/government/publications/g8-lough-erne-declaration; G20 High Level Principles on Beneficial Ownership* (2014), *https://www.g20.utoronto.ca/2014/g20_high-level_principles_beneficial_ownership_transparency.pdf* ; *United States Action Plan to Implement the G–20 High Level Principles on Beneficial Ownership* (Oct. 2015), *https://obamawhitehouse.archives.gov/blog/2015/10/16/us-action-plan-implement-g-20-high-level-principles-beneficial-ownership.*

[70] FATF has also collaborated with the Egmont Group of Financial Intelligence Units on a study that identifies key techniques used to conceal beneficial ownership and identifies issues for consideration that include coordinated national action to limit the misuse of legal entities. FATF-Egmont Group, *Concealment of Beneficial Ownership* (2018), *https://egmontgroup.org/sites/default/files/filedepot/Concealment_of_BO/FATF-Egmont-Concealment-beneficial-ownership.pdf.* The Egmont Group is a body of 166 Financial Intelligence Units (FIUs); FinCEN is the FIU of the United States and a founding member of the Egmont Group. The Egmont Group provides a platform for the secure exchange of expertise and financial intelligence amongst FIUs to combat money laundering and terrorist financing.

[71] FBI, *Testimony of Steven M. D'Antuono, Section Chief, Criminal Investigative Division,* ''*Combatting Illicit Financing by Anonymous Shell Companies*'' (May 21, 2019), available at *https://www.fbi.gov/news/testimony/combating-illicit-financing-by-anonymous-shell-companies.*

[72] *Id.*

[73] CTA, Section 6402(5)(E).

[74] *See generally* 31 U.S.C. 5336(b), (c).

[75] 31 U.S.C. 5336(b)(5).

[76] *See* 31 U.S.C. 5336(b)(1)(B), (C).

[77] *See* 31 U.S.C. 5336(b)(2).

issue to individuals or entities upon request.[78] In certain instances, the FinCEN identifier provides a substitute to individuals who do not wish to provide their names, birth dates, or addresses to a reporting company.[79]

Given the sensitivity of the reportable information, the CTA imposes strict confidentiality, security, and access restrictions on the data. FinCEN is authorized to disclose reportable BOI to a statutorily defined group of governmental authorities and financial institutions, in limited circumstances. Federal agencies, for example, may only obtain access to BOI when acting in furtherance of national security, intelligence, or law enforcement activity.[80] State, local, and Tribal law enforcement agencies require ''a court of competent jurisdiction'' to authorize them to seek BOI as part of a criminal or civil investigation.[81] Foreign government access is limited to foreign law enforcement agencies, prosecutors, and judges in specified circumstances.[82] FinCEN may also disclose reported BOI to financial institutions that need such BOI to facilitate compliance with customer due diligence requirements under applicable law, with the consent of the reporting company.[83] Moreover, a financial institution's regulator can obtain BOI that has been provided to a regulated financial institution for the purpose of performing regulatory oversight that is specific to that financial institution.[84] Taken together, these measures, along with other restrictions, requirements, and security protocols delineated in the CTA, will help to ensure that BOI collected under 31 U.S.C. 5336 is only used for statutorily described purposes. As noted above, FinCEN intends to address the regulatory requirements related to access to information reported pursuant to the CTA through a future rulemaking process.

The CTA also requires that FinCEN rescind and revise portions of the current CDD Rule within one year after the effective date of the BOI reporting rule.[85] The CTA does not direct FinCEN to rescind the requirement for financial institutions to identify and verify the beneficial owners of legal entity customers under 31 CFR 1010.230(a), but does direct FinCEN to rescind the beneficial ownership identification and verification requirements of 31 CFR 1010.230(b)–(j).[86] The CTA identifies three purposes for this revision: (1) To bring the rule into conformity with the AML Act as a whole, including the CTA; (2) to account for financial institutions' access to BOI reported to FinCEN ''in order to confirm the beneficial ownership information provided directly to the financial institutions'' for AML/CFT and customer due diligence purposes; and (3) to reduce unnecessary or duplicative burdens on financial institutions and legal entity customers.[87]

FinCEN intends to satisfy the requirements related to the revision of the CDD Rule through a future rulemaking process that will provide the public with an opportunity to comment on the effect of the final provisions of the beneficial ownership reporting rule on financial institutions' customer due diligence obligations. The rulemaking process will also allow FinCEN to reach informed conclusions about the proper scope of the CDD Rule.[88] FinCEN anticipates that this rulemaking process will touch on the issue of the interplay between the FinCEN-hosted BOI information technology (IT) system and financial institutions' diligence efforts.

C. The Advance Notice of Proposed Rulemaking

On April 5, 2021, FinCEN published an ANPRM on the BOI reporting requirements.[89] The ANPRM sought public input in five open-ended categories of questions, including on clarifying key definitions, developing reporting procedures, and establishing compliance standards for reporting companies. The ANPRM also sought comment on FinCEN's implementation of the related provisions of the CTA that govern FinCEN's maintenance and disclosure of BOI subject to appropriate protocols.

In response to the ANPRM, FinCEN received 220 public comments from a wide variety of commenters, including businesses, civil society organizations, trade associations, law firms, secretaries of state and other state officials, Indian Tribes, Members of Congress, and numerous individuals. Commenters expressed a range of opinions, frequently conflicting, about which entities should report, what information they should report, about whom they should report, how to ensure that the implementation of the CTA generates highly useful data for authorized users, how to minimize burden on reporting companies, and more.

FinCEN has considered all of the comments that it received in response to the ANPRM in drafting this proposed rule. The section-by-section analysis that follows incorporates discussion of certain issues raised by commenters.

D. Outreach

FinCEN has also engaged in outreach with a variety of potential stakeholders, including state and Tribal entities (*e.g.,* secretaries of state), law enforcement, representatives of civil society organizations, financial institution trade associations, and broader business trade associations, to make them aware of the CTA and encourage them to provide written comments during the rulemaking process to ensure FinCEN's consideration of their perspectives.

IV. Section-by-Section Analysis

This proposed rule would revise the regulations implementing the BSA by adding a new reporting requirement at § 1010.380 (''Reports of beneficial ownership information''), in subpart C (''Reports Required to be Made'') of part 1010 (''General Provisions'') of chapter X (''Financial Crimes Enforcement Network'') of title 31, Code of Federal Regulations.

The analysis that follows addresses the key elements of the proposed rule: (A) Information to be reported; (B) beneficial owners; (C) company applicant; (D) reporting company; (E) timing, format, and mechanics of reports; (F) reporting violations; and (G) definitions. The analysis has a final subsection (H) that discusses the issue of the effective date of the regulation.

A. Information To Be Reported

The CTA requires each reporting company to submit to FinCEN a report identifying each beneficial owner of the reporting company and each company applicant by: (1) Full legal name, (2) date of birth, (3) current residential or business street address, and (4) unique identifying number from an acceptable identification document; or, if this

[78] *See* 31 U.S.C. 5336(b)(3)(A)(i).

[79] *See* 31 U.S.C. 5336(b)(3)(B).

[80] *See* 31 U.S.C. 5336(c)(2)(B)(i)(I).

[81] *See* 31 U.S.C. 5336(c)(2)(B)(i)(II).

[82] *See* 31 U.S.C. 5336(c)(2)(B)(ii).

[83] *See* 31 U.S.C. 5336(c)(2)(B)(iii).

[84] *See* 31 U.S.C. 5336(c)(2)(C).

[85] CTA, Section 6403(d)(1).

[86] CTA, Section 6403(d)(2). The CTA orders the rescission of paragraphs (b) through (j) directly (''the Secretary of the Treasury shall rescind paragraphs (b) through (j)'') and orders the retention of paragraph (a) by a negative rule of construction (''nothing in this section may be construed to authorize the Secretary of the Treasury to repeal . . . [31 CFR] 1010.230(a)[.]'').

[87] CTA, Section 6403(d)(1)(A)–(C).

[88] Final Rule, *Customer Due Diligence Requirements for Financial Institutions,* 81 FR 29398–29402 (May 11, 2016).

[89] ANPRM, *Beneficial Ownership Information Reporting Requirements,* 86 FR 17557–17565 (April 5, 2021).

information has already been provided to FinCEN, by a FinCEN identifier.[90]

To implement this requirement, proposed 31 CFR 1010.380(b) specifies that each report or application under that section must be filed with FinCEN in the form and manner FinCEN prescribes, and each person filing such report shall certify that the report is accurate and complete.[91] It then sets forth the requirement for reporting companies to report to FinCEN identifying information about their beneficial owners, the company applicant, and the reporting company itself. Finally, it outlines certain special reporting rules and sets forth the requirements for obtaining a FinCEN identifier.

i. Information To Be Reported on Beneficial Owners and Company Applicants

Proposed 31 CFR 1010.380(b)(1)(ii) sets forth the specific items of information that a reporting company must report about each individual beneficial owner and each individual company applicant.[92] The language is drawn nearly verbatim from 31 U.S.C. 5336(b)(2)(A). In addition, for clarity, it incorporates the statutory definition of ''acceptable identification document,'' 31 U.S.C. 5336(a)(1), rather than leaving the reader to identify the cross-reference based on the CTA's reference to a ''unique identifier number from an acceptable identification document.'' [93] Also for clarity, the proposed rule consolidates discussion of the FinCEN identifier in proposed 31 CFR 1010.380(b)(5).

The proposed rule also clarifies what address information should be reported. The statute requires reporting companies to identify beneficial owners and applicants by their ''residential or business street address.'' 31 U.S.C. 5336(b)(2)(A)(iii). The statutory requirement does not specify when or whether one type of address should be used in preference to another or resolve more specific questions regarding secondary addresses or whether addresses should be domestic, if possible, or can be foreign. FinCEN considered leaving to the reporting company the choice of which address to report, but assessed that this would unduly diminish the usefulness of the reported information to national security, intelligence, and law enforcement activity. Beneficial owners are of interest because of their economic status as persons who own or control a reporting company. Business addresses or secondary residence addresses are of some investigative value as points of contact in the event that an investigation requires follow-up, but such addresses do not definitively establish a beneficial owner's primary residence jurisdiction. A beneficial owner's residential address for tax residency purposes, by contrast, is of value both as a point of contact and for tax administration purposes.[94] Moreover, multiple persons may be associated with a business address. FinCEN believes that the residential street address will therefore be more useful for establishing the unambiguous identity of an identified beneficial owner. The reporting of a residential street address will also likely allow for easier follow-up by law enforcement in the event of investigative need. Accordingly, FinCEN believes that requiring the disclosure of beneficial owners' residential street address for tax residency purposes is appropriate. FinCEN therefore proposes that the reporting company report the residential address for tax residency purposes of each beneficial owner.

With respect to a company applicant's address, FinCEN proposes a bifurcated approach. For company applicants that provide a business service as a corporate or formation agent, the reporting company would need to report the business address of any company applicant that files a document in the course of such individual's business. Company applicants that provide a business service as a corporate or formation agent are of particular interest because of their role in creating or registering reporting companies. While any address for such a company applicant is of some value as a point of contact in an inquiry or investigation, company applicants who file formation documents in the course of their business may be more easily identified by their business address. To the extent company applicants make a business of filing documents on behalf of many companies, reporting the associated business address may provide more useful information to national security, intelligence, and law enforcement agencies. The business address will also allow law enforcement to identify patterns of entities that are created or registered by company applicants working at the same business address; such patterns would not be easily identifiable if the name and address reported is specific to an individual operating on a formation agent's behalf. This information could provide insight into business practices and relationships between individuals and entities, including patterns of entity formation that suggest persons are engaged in the business of creating legal entities for the purpose of obscuring the beneficiaries of transactions or the owners of valuable assets. This information may therefore provide valuable information for national security, intelligence, and law enforcement activity.

For all other company applicants, the reporting company would need to report the residential street address that the individual uses for tax residency purposes. This establishes a uniform rule for the selection of addresses to be reported and provides specificity to the reporting company for ease of administration. It would also help to maximize the benefit to be gained from the reporting of this data element because stakeholders will not have to figure out which address was reported.

In addition, the CTA authorizes FinCEN to prescribe procedures and standards governing the reports identifying beneficial owners and applicants ''by,'' among other things, a ''unique identifying number from an acceptable identification document.'' [95] The CTA does not specify how an individual is to be identified ''by'' such number ''from'' such document. However, the CTA also makes it unlawful to ''willfully provide, or attempt to provide . . . a false or fraudulent identifying photograph or document . . . to FinCEN,'' indicating an assumption that identifying photographs or documents would be reported.[96] This provision therefore

[90] 31 U.S.C. 5336(b)(1)(A) (reporting requirement); 31 U.S.C. 5336(b)(2) (required information).

[91] Commenters to the ANPRM discussed the potential for FinCEN to require an attestation of accuracy or other certification on either a one-time or periodic basis, including financial institution trade associations and civil society organizations, which argued that such a requirement would encourage reporting companies to keep their information up to date. However, others argued that FinCEN lacks the statutory authority to include such a requirement in the regulations. FinCEN invites further comments on its proposal that a person filing a report or application with FinCEN pursuant to 31 CFR 1010.380(a) shall certify that the report is accurate and complete.

[92] ''Company applicant'' is the proposed rule's term for what the statute refers to as the ''applicant.'' *See* 31 U.S.C. 5336(a)(2).

[93] *See* 31 U.S.C. 5336(b)(2)(A)(iv)(I) (for information submission requirement); 31 U.S.C. 5336(a)(1) (for definition of ''acceptable identification document''). The definition of ''acceptable identification document'' is not inserted entirely verbatim because FinCEN has made certain minor changes to the statutory language to clarify the text.

[94] *See* 31 U.S.C. 5336(c)(5)(B) (''Officers and employees of the Department of the Treasury may obtain access to beneficial ownership information for tax administration purposes . . . .'').

[95] 31 U.S.C. 5336(b)(4), (b)(2)(A)(iv).

[96] 31 U.S.C. 5336(h)(1)(A).

indicates that FinCEN has authority to collect a scanned copy of an identification document, along with the document's number, in prescribing reporting procedures and standards. Therefore, the proposed rule specifies that the reporting company provide a scanned copy of the identification document from which the unique identifying number of the beneficial owner or company applicant is obtained, in connection with reporting that unique number.

FinCEN believes that the collection of an image would significantly contribute to the creation of a highly useful database for law enforcement and other authorized users. The image submitted by a reporting company in connection with a specific beneficial owner or company applicant could help to confirm the accuracy of the reported unique identification number because the image would contain the number. FinCEN also believes this requirement would make it more difficult to provide false identification information because it is likely to be significantly more difficult to falsify an image of an identification document than to report an inaccurate number. The image may also assist law enforcement in identifying an individual because it would contain a picture of the individual associated with the identifying number, providing further confirmation of the individual's identity. While such pictures may already be available to law enforcement from existing records associated with the reported identification numbers, it would be highly useful for law enforcement to obtain such information from a centralized BOI database than to obtain the identification number from the BOI database and the picture from a different source. FinCEN considered that, as noted by several commenters, requiring an image may impose some additional burdens on reporting companies (*e.g.,* gathering and submitting images of the identification documents for each beneficial owner and company applicant). FinCEN anticipates, however, that the burdens should be minimal because requesting a copy of an individual's identification document appears routine (*e.g.,* to verify an employee's immigration status), and technological advances have made it relatively easy for individuals to provide scanned images. FinCEN welcomes comments on the proposed collection of a scanned copy of an identification document. FinCEN recognizes that several commenters encouraged FinCEN to require reporting companies to report significantly more information on each beneficial owner than is required by statute. For example, various commenters suggested FinCEN should require reporting of whether a beneficial owner fell under the ''ownership interests'' or ''substantial control'' components of the definition of ''beneficial owner,'' precise reporting of ownership interest percentages, whether ownership interests are held directly or indirectly, and other types of information. Such additional information might enhance the utility of the database to authorized users. FinCEN welcomes further comments on the statutory authority for and practical effect of requiring additional information to be reported.

Proposed 31 CFR 1010.380(b)(2) would permit a reporting company to report the Taxpayer Identification Number [97] (TIN) of its beneficial owners and company applicants on a voluntary basis, solely with the prior consent of each individual whose TIN would be reported and with such consent to be recorded on a form that FinCEN will provide. While the statute requires reporting companies to provide certain specified information, it does not prohibit reporting companies from providing additional information on a voluntary basis. FinCEN has proposed this voluntary reporting option because such information would help ensure that the database of beneficial ownership information is highly useful for authorized users, in furtherance of the CTA's purpose and mandate. For example, having access to a TIN will allow authorized users such as FinCEN, law enforcement, investigators, and financial institutions to cross-reference other databases and more easily verify the information of an individual. FinCEN believes that the inclusion of TIN reporting, even if voluntary, may help to raise standards for due diligence and transparency expectations for financial institutions and other governments. FinCEN is particularly interested in comments on this proposal to provide a voluntary mechanism to report beneficial owner and company applicant TINs.

ii. Information To Be Reported on Reporting Companies

Proposed 31 CFR 1010.380(b)(1)(i) would require reporting companies to report certain information to identify the reporting company. While the CTA specifies the information required to be reported to ''identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company,'' the CTA does not specify what, if any, information a reporting company must report about itself.[98] However, the CTA's express requirement to identify beneficial owners and applicants for each reporting company clearly implies a requirement to identify the associated company. That implicit requirement is confirmed by the structure and overriding objective of the CTA, which is to identify the individuals who own, control, and register each particular entity, as well as by the CTA's direction to ''ensure that information is collected in a form and manner that is highly useful.'' [99] Without identifying information about the reporting company itself, FinCEN would have no ability to determine the entity that is associated with each reported beneficial owner or company applicant. For example, an investigator could not determine what entities a known drug trafficker uses to launder money. Conversely, an investigator also could not determine who owns or controls an entity it knows is being used to launder money. This would frustrate Congress's express purposes in enacting the CTA and would amount to an absurd result.[100]

Therefore, to ensure that each reporting company can be identified, the proposed regulations would require each reporting company to report its name, any alternative names through which the company is engaging in business (''d/b/a names''), its business street address, its jurisdiction of formation or registration, as well as a unique identification number.

FinCEN believes that a company name alone may not be sufficient

[97] A TIN is an identification number used by the Internal Revenue Service (IRS) in the administration of tax laws and assists in identifying entities and individuals and distinguishing them from one another. *See* IRS, *Taxpayer Identification Numbers (TINs),* available at *https://www.irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tin.* A TIN is unique to an entity or individual.

[98] 31 U.S.C. 5336(b)(2)(A).

[99] CTA, Section 6402. *See also* 31 U.S.C. 5336(b)(1)(F)(iv)(I), (b)(4)(B)(ii), (d)(2)–(3).

[100] *See, e.g., Griffin* v. *Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982) (noting that ''interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available''); *Arkansas Dairy Co-op Ass'n, Inc.* v. *Dep't of Agr.,* 573 F.3d 815, 829 (D.C. Cir. 2009) (rejecting a reading of a statute that would produce a ''glaring loophole'' in Congress's instruction to an agency); *Ass'n of Admin. L. Judges* v. *FLRA,* 397 F.3d 957, 962 (D.C. Cir. 2005) (''Unless it has been extraordinarily rigid in expressing itself to the contrary . . . the Congress is always presumed to intend that pointless expenditures of effort be avoided.'' (cleaned up)); *Pub. Citizen* v. *Young,* 831 F.2d 1108, 1112 (D.C. Cir. 1987) (explaining that ''a court must look beyond the words to the purpose of the act where its literal terms lead to absurd or futile results'' (cleaned up)).

information to uniquely identify each reporting company and distinguish it from other companies with similar names. Companies formed in different states may have the same names because the entity formation practices of many states require a new entity to choose a legal name that is unique within that state but do not require a new entity's legal name to be unique within the United States. In addition, companies with similar names may be mistaken for each other due to misspellings or other errors. Moreover, FinCEN must have enough specific information about a reporting company to enable accurate searching of the database of beneficial ownership information. Given that companies may have similar names, addresses, and states of formation or registration, FinCEN believes that having a unique identification number for each reporting company is critical to enabling the unique identification of a reporting company and effectively searching the database to identify the beneficial ownership information reported for a particular company. The proposed rules would thus require the submission of additional information beyond each company's name.

Specifically, the reporting company would be required to submit a TIN (including an Employer Identification Number (EIN)), or where a reporting company has not yet been issued a TIN, a Dun & Bradstreet Data Universal Numbering System (DUNS) number or a Legal Entity Identifier (LEI). A reporting company must furnish a TIN on all tax returns, statements, and other tax related documents filed with the IRS. As a result, FinCEN believes that there will be limited burdens for a reporting company with a tax filing obligation in the United States to provide its TIN. However, FinCEN recognizes that an entity may not be able to provide a TIN, such as in the case of a newly formed entity that does not yet have a TIN when it submits a report to FinCEN at the time of formation or registration. Accordingly, in FinCEN's proposal, a reporting company may provide a DUNS [101] or LEI [102] if it does not yet have a TIN. The DUNS and LEI numbers are commonly used in the United States and globally to distinguish entities from one another and to create unique identifying codes to facilitate financial and other transactions. Over 1.8 million LEIs have been created globally and the LEI is being adopted as a global standard in business transactions. More than 240,000 entities in the United States use LEIs to identify and distinguish themselves.[103] Pursuant to 31 CFR 1010.380(b)(5)(ii)(B), if a reporting company has applied for and received a FinCEN identifier, it may submit the FinCEN identifier in lieu of a TIN, DUNS, or LEI number.

FinCEN expects that there should be minimal burden on a reporting company to obtain and report basic identifying information about itself in light of the need to have a TIN to pay taxes in the United States and the need for other identifying numbers and information to conform to other business requirements. Additionally, the information that FinCEN is proposing to collect does not extend beyond basic identifying information that should be readily available to the reporting company. However, FinCEN welcomes comments on the anticipated burden of this reporting requirement, particularly for newly formed entities that may not have a unique identifying number shortly after formation, and potential alternatives that would allow for the unique identification of the reporting company and effective searching of the beneficial ownership database.

FinCEN recognizes the perspective of the many commenters who encouraged FinCEN to require a reporting company to report a significant amount of additional information about itself and about intermediate legal entity owners through which ultimate natural person beneficial owners of the reporting company own their interests. FinCEN believes that requiring detailed reporting of intermediate legal entity owners and other information about reporting companies could substantially enhance the transparency of companies' ownership structures and make the collected data more useful for law enforcement, financial institutions, and other authorized users. However, the commenters who urged collection of this information did not identify the statutory authority for the collection of such information from reporting companies. FinCEN welcomes further comments on the authority for and practical effect of collecting such additional information under the CTA.

FinCEN further recognizes certain commenters have raised concerns that a reporting company may list the address of a formation agent or other third party as its ''business street address,'' rather than its principal place of business or the business entity's actual physical location. FinCEN believes that requirement to submit a reporting company's business street address precludes the reporting of the address of the reporting company's formation agent or other third party representatives, but welcomes comments on whether the term ''business street address'' is sufficiently clear or whether further clarification is needed to avoid the reporting of addresses of formation agents and other third parties as a reporting company's ''business street address.''

iii. Special Rules

Proposed 31 CFR 1010.380(b)(3) sets forth special reporting rules for ownership interests held by exempt entities, minor children, foreign pooled investment vehicles, and deceased company applicants. Specifically, proposed 31 CFR 1010.380(b)(3)(i) sets forth a special rule for reporting companies with ownership interests held by exempt entities, consistent with the requirements of 31 U.S.C. 5336(b)(2)(B). As set forth in the special rule, if an exempt entity under 31 CFR 1010.380(c)(2) has, or will have, a direct or indirect ownership interest in a reporting company, and an individual is a beneficial owner of the reporting company by virtue of such ownership interest, the report shall include the name of the exempt entity rather than the information required under paragraph (b)(1) with respect to such beneficial owner. This rule is intended to avoid a situation in which an entity that is exempt from the beneficial ownership reporting requirement is nonetheless required to disclose its beneficial owners as a result of its ownership of a reporting company.

Proposed 31 CFR 1010.380(b)(3)(ii) provides a special rule for reporting the information of a parent or guardian in lieu of information about a minor child. Specifically, proposed 31 CFR 1010.380(b)(3)(ii) provides that if a reporting company reports the information required under paragraph (b)(1) with respect to a parent or legal guardian of a minor child consistent with the exception outlined at 31 CFR 1010.380(d)(4)(i), then the report shall indicate that such information relates to the parent or legal guardian. Without this information, stakeholders would not know that the parent or legal guardian is not the actual beneficial owner.

Proposed 31 CFR 1010.380(b)(3)(iii) explains the special rule for foreign pooled investment vehicles that the CTA established in 31 U.S.C.

[101] *See* Dun & Bradstreet, *What is a D–U–N–S Number?,* available at *https://www.dnb.com/duns-number.html.*

[102] *See* LEI Worldwide, *What is a Legal Entity Identifier?,* available at *https://www.lei-worldwide.com/what-is-a-legal-entity-identifier.html.*

[103] *See* Global LEI Foundation, *LEI Statistics—Global LEI Index—LEI Data—GLEIF,* available at *https://www.gleif.org/en/lei-data/global-lei-index/lei-statistics.*

5336(b)(2)(C). Under proposed 31 CFR 1010.380(b)(3)(iii), a foreign legal entity that is formed under the laws of a foreign country, and that would be a reporting company but for the pooled investment vehicle exemption in 31 CFR 1010.380(c)(2)(xviii), must report to FinCEN the BOI of the individual who exercises substantial control over the legal entity.

Proposed 31 CFR 1010.380(b)(3)(iv) sets forth a special reporting rule for situations where a reporting company is created before the effective date of the regulations and the company applicant has died before the reporting obligation is effective. The proposed rule elaborates at 31 CFR 1010.380(e) that a company applicant is the individual who files, including by directing or controlling the filing, the document that created the reporting company. This may present substantial challenges for a longstanding company (*e.g.,* one that was formed a century ago). In specifying the information to be reported about beneficial owners and applicants, the CTA appears to presume that such individuals are not deceased, as it requires a current address and a number from a nonexpired identification document.[104] Thus, for deceased individuals, Congress does not appear to have spoken directly to the information required to be reported to identify such individuals, and FinCEN must ''prescribe procedures and standards governing any report'' for such individuals.[105]

To minimize burdens in this unique situation, proposed 31 CFR 1010.380(b)(3)(iv) would allow a reporting company formed or registered before the effective date of the regulations, and whose company applicant died before the reporting company had an obligation to obtain identifying information from a company applicant, to report that fact along with whatever identifying information the reporting company actually knows about the company applicant. FinCEN believes that this tailored approach balances stakeholders' need for information on company applicants with the challenges older reporting companies may face. FinCEN welcomes comments on this special rule or any other special rules that may be required to alleviate the burden of company applicant reporting, and would encourage commenters to include an explanation of why they believe such further proposed special rules are consistent with the CTA.

FinCEN does not propose to apply the same rule to deceased beneficial owners because, as the statute makes clear and as the proposed rule elaborates at proposed 31 CFR 1010.380(d), the requirement to report beneficial owners pertains to those who are the *current* beneficial owners of the reporting company. While a company applicant will remain the same for all time after the entity is created, an individual will cease to be a beneficial owner upon death. As a result, no beneficial owners will be deceased at the time a company must report them. A reporting company thus will not face the same burdens in reporting information about current beneficial owners as it may face in reporting information about deceased company applicants.

iv. FinCEN Identifier; Other Matters

Proposed 31 CFR 1010.380(b)(4) would specify the contents of corrected and updated reports, making clear that such reports filed in the time and manner specified in 31 CFR 1010.380(a) must contain the corrected or updated information, and in the case of newly exempt entities, shall contain a notification that the exempt entity is no longer a reporting company. These updated and corrected reports are explained in 31 CFR 1010.380(a)(2) and (3).

Proposed 31 CFR 1010.380(b)(5) sets forth rules that relate to obtaining and using a FinCEN identifier, reflecting requirements that are found in several different parts of 31 U.S.C. 5336. Consistent with 31 U.S.C. 5336(b)(3)(A), an individual may obtain a FinCEN identifier by providing FinCEN with the information that the individual would otherwise have to provide to a reporting company if the individual were a beneficial owner or applicant of the reporting company; an entity can obtain a FinCEN identifier from FinCEN when it submits a filing as a reporting company or any time thereafter.[106] This means that an individual or legal entity must still disclose information to FinCEN, but once an individual or legal entity has a FinCEN identifier, the individual or legal entity can provide the identifier to a reporting company in lieu of the personal details required under paragraph (b)(1). For instance, an individual can provide his or her FinCEN identifier to the reporting company, and the reporting company can provide the FinCEN identifier to FinCEN in lieu of any information the reporting company would otherwise have to report about the individual under paragraph (b)(1). Similarly, an entity can provide the FinCEN identifier to the reporting company, and the reporting company can provide the FinCEN identifier to FinCEN in lieu of any information the reporting company would otherwise have to report about that entity's beneficial owners if they qualified as beneficial owners of the reporting company through their interests in the entity. In such circumstances, the underlying information associated with a FinCEN identifier would still be available to FinCEN.

B. Beneficial Owners

The CTA defines a beneficial owner, with respect to a reporting company, as ''any individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25% of the ownership interests of the entity.''[107] The statute, however, does not define ''substantial control'' or ''ownership interests.'' FinCEN proposes to clarify these terms in the rule so that a reporting company has sufficient guidance to identify and report its beneficial owners.

Consistent with the CTA, the proposed rule would require a reporting company to identify any individual who satisfies either of these two components. Based on the breadth of the substantial control component, FinCEN expects that a reporting company would identify at least one beneficial owner under that component regardless of whether (1) any individual satisfies the ownership component, or (2) exclusions to the definition of beneficial owner apply. FinCEN is interested in comments addressing whether that expectation is reasonable, under what circumstances a reporting company may not have at least one reportable beneficial owner, and how to address such circumstances, if they exist.

i. Substantial Control

Proposed 31 CFR 1010.380(d)(1) sets forth three specific indicators of substantial control: (1) Service as a senior officer of a reporting company; (2) authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar body) of a reporting company; and (3) direction, determination, or decision of, or substantial influence over, important

[104] 31 U.S.C. 5336(b)(2)(A).

[105] 31 U.S.C. 5336(b)(4)(A).

[106] The statute provides that only entities that report their beneficial ownership information to FinCEN are eligible to receive FinCEN identifiers. 31 U.S.C. 5336(b)(3)(A)(i).

[107] 31 U.S.C. 5336(a)(3)(A).

matters of a reporting company. The regulation also includes a catch-all provision to make clear that substantial control can take additional forms not specifically listed. Each of these indicators supports the basic goal of requiring a reporting company to identify the individuals who stand behind the reporting company and direct its actions. The first indicator identifies the individuals with nominal or *de jure* authority, the second and third indicators identify the individuals with functional or *de facto* authority, and the catch-all provision recognizes that control exercised in novel and unorthodox ways can still be substantial. This last approach is consistent with the common law tradition and the standards that FinCEN examined, as well as the broader objective of preventing individuals from evading identification as beneficial owners by hiding behind formalisms such as job descriptions, job titles, and nominal lack of authority.

In developing the proposed definition of substantial control, FinCEN looked to the common law of agency and corporate law and the usage of that term in other federal statutes, which generally incorporate similar agency-law concepts. FinCEN considered these statutes in framing functional tests for assessing whether an individual exercises substantial control over an entity. FinCEN also considered the FATF Recommendations, established beneficial-owner reporting standards such as that used with the United Kingdom's (UK's) People with Significant Control (or PSC) Register, U.S. Federal tax law, and the statutory law and administrative practice informing the activity of the Committee on Foreign Investment in the United States (CFIUS). Drawing in part on these standards, and supported by many commenters' suggestions that FinCEN do so, proposed 31 CFR 1010.380(d)(1)(iii) provides specific examples of indicators of substantial control. This non-exhaustive list of examples is intended to clarify the types of matters FinCEN considers relevant to an analysis of whether an individual is ''direct[ing], determin[ing], or deci[ding] . . . important matters affecting [a] reporting company'' and thus exercising substantial control. Reporting companies should be guided by the specific examples in the proposed rule, but they should also consider how individuals could exercise substantial control in other ways.

FinCEN acknowledges the concerns raised by commenters that too broad a definition of substantial control could engender confusion. One commenter pointed out that property managers make decisions that influence the operations of the property but are hired by and report to the owners of the property; the commenter did not think such individuals should necessarily be considered beneficial owners on these facts alone, and FinCEN agrees. The ordinary execution of day-to-day managerial decisions with respect to one part of a reporting company's assets or employees typically should not, in isolation, cause the decision-maker to be considered in substantial control of a reporting company, unless that person satisfies another element of the ''substantial control'' criteria.

Proposed 31 CFR 1010.380(d)(2) provides a general reminder that an individual can exercise substantial control directly or indirectly. This incorporates statutory language from the CTA that applies to all beneficial ownership determinations and includes additional language applying the concept found in the CTA to the specific instances of substantial control found in proposed 31 CFR 1010.380(d)(1).

FinCEN carefully considered the burden that this approach to defining substantial control might impose on reporting companies, small businesses in particular. Based on the comments to the ANPRM, FinCEN recognizes that the CTA may require certain entities to disclose BOI on more and different individuals than they are accustomed to under the control prong of the current CDD Rule. FinCEN also recognizes that reporting companies will likely incur some additional costs in complying with this obligation. That said, FinCEN expects the amount of additional time and effort required to comply with the proposed rule to be minimal. Specifically, under the proposed rule, a reporting company would not need to spend significant time assessing which of its beneficial owners would be the most appropriate to report as being in substantial control. Rather, entities would simply report all persons in substantial control as beneficial owners, with no need to distinguish among them. Additionally, FinCEN believes that entities are already aware of their own ownership structures, regardless of complexity, and should be able to readily identify their beneficial owners. Therefore, FinCEN expects that compliance should not be particularly burdensome for most businesses. While FinCEN's approach could be viewed to raise concerns about the disclosure of personal information about a broader range of individuals, the privacy impact of reporting BOI to FinCEN is relatively light, because, unlike beneficial ownership registries in many other countries, FinCEN's database will not be public and will be subject to stringent access protocols.

FinCEN recognizes that its proposed definition of substantial control diverges from the approach that a number of commenters to the ANPRM stated they would prefer, *i.e.,* the approach laid out in the current CDD Rule. Under the ''control prong'' of the current CDD Rule, new legal entity customers of a financial institution must provide BOI for the one individual who exercises a ''significant degree of control'' over the entity. FinCEN considered whether the proposed rule should adopt a comparable approach. As some ANPRM commenters argued, limiting the number of persons identified under the substantial control component to one could minimize burden to reporting companies and help clarify when reporting companies had complied with the CTA's reporting requirements.

However, the CTA does not require the identification of only one person in substantial control.[108] The CTA also mandates that FinCEN rescind and revise portions of the CDD Rule, including the paragraph on beneficial owners, to bring the pre-CTA CDD Rule into conformity with the CTA.[109] FinCEN therefore need not adopt the framework established by the current CDD Rule, and incorporating the CDD Rule's numerical limitation would appear inconsistent with the CTA's objective of establishing a comprehensive BOI database for all beneficial owners of reporting companies. FinCEN believes that limiting reporting of individuals in substantial control to one person as in the CDD Rule—or indeed to impose any other numerical limit—would artificially limit the reporting of beneficial owners who may exercise substantial control over an entity, and could become a means of evasion. Requiring reporting companies to identify all individuals who exercise

[108] The proposed approach would also be consistent with the text of the CTA, which—unlike the CDD Rule that preceded it—does not expressly limit the definition of beneficial owner to ''a single individual.'' *Compare* 31 U.S.C. 5336(a)(3)(A) (''The term beneficial owner means, with respect to an entity, an individual who . . . exercises substantial control over the entity.'') *with* 31 CFR 1010.230(d)(2) (defining ''beneficial owner'' as ''a *single* individual with significant responsibility to control, manage or direct a legal entity'' (emphasis added)). Under well-established principles of agency law, moreover, more than one individual can exercise substantial control over a single agent. *See, e.g.,* Restatement (Third) of Agency Sec. 3.14, *Agents with Multiple Principals; id.* Sec. 3.16, *Agents for Coprincipals* (''Two or more persons may as coprincipals appoint an agent to act for them in the same transaction or matter.'').

[109] 31 U.S.C. 5336(d).

substantial control would provide law enforcement and others a much more complete picture of who makes important decisions at a reporting company.

FinCEN also considered but rejected a *per se* rule that would have deemed all officers of a reporting company to be in ''substantial control'' of the entity, and therefore, beneficial owners. While a *per se* rule is clear and easy to administer, FinCEN ultimately concluded that the CTA's consistent focus on individuals that are in actual substantial control of a reporting company argued against creating a definition of ''substantial control'' that relies on titles alone. Thus, while FinCEN has retained a *per se* element in its proposed definition of substantial control—requiring the reporting of any ''senior officer'' as a person in substantial control—this is only a part of the definition in proposed 31 CFR 1010.380(d)(1). Despite comments from some that FinCEN should adopt a definition of substantial control drawn from another BOI disclosure regime, such as the UK's PSC Register, FinCEN believes that its proposed definition of ''substantial control,'' which, as discussed above, is based on established legal principles and usages of this term in other contexts, provides specificity to the regulated community while being flexible enough to account for unique ways in which individuals can exercise substantial control over an entity.

FinCEN seeks comments on the overall proposed approach to substantial control as well as on the specific indicators and examples, including whether they are clear and useful. FinCEN welcomes additional suggestions for possible indicators and specific language in this regard.

ii. Ownership or Control of Ownership Interests

The other component of the definition of beneficial owner concerns individuals who own or control 25 percent of a reporting company's ownership interests. The CTA defines a beneficial owner to include ''an individual who . . . owns or control not less than 25 percent of the ownership interests of the entity.'' [110] Proposed 31 CFR 1010.380(d)(3)(i) provides that ''ownership interests,'' for the purposes of this rule, would include both equity in the reporting company and other types of interests, such as capital or profit interests (including partnership interests) or convertible instruments, warrants or rights, or other options or privileges to acquire equity, capital, or other interests in a reporting company. Debt instruments are included if they enable the holder to exercise the same rights as one of the specified equity or other interests, including the ability to convert the instrument into one of the specified equity or other interests. This is similar to the U.S. Securities and Exchange Commission's definition of ''equity security'' in 17 CFR 230.405.[111] FinCEN proposes to adopt this understanding as a way of ensuring that the underlying reality of ownership, not the form it takes, drives the identification of beneficial owners. The approach also thwarts the use of complex ownership structures and ownership vehicles other than direct equity ownership to obscure a reporting company's real owners.

Proposed 31 CFR 1010.380(d)(3)(ii) identifies ways in which an individual may ''own or control'' interests. It restates statutory language that an individual may own or control an ownership interest directly or indirectly. It also gives a non-exhaustive list of examples to further emphasize that an individual can own or control ownership interests through a variety of means. FinCEN's proposed approach requires reporting companies to consider all facts and circumstances when making determinations about who owns or controls ownership interests. FinCEN believes that the specific examples will illustrate what FinCEN believes to be relevant to an ownership-interests analysis. For example, with proposed 31 CFR 1010.380(d)(3)(ii)(A) (joint ownership), FinCEN's objective is to highlight that an individual may reach the 25 percent threshold by jointly owning or controlling with one or more other persons an undivided ownership interest in a reporting company.

Proposed 31 CFR 1010.380(d)(3)(ii)(C) specifies that an individual may directly or indirectly own or control an ownership interest in a reporting company through a trust or similar arrangement. The proposed language aims to make clear that an individual may own or control ownership interests by way of the individual's position as a grantor or settlor, a beneficiary, a trustee, or another individual with authority to dispose of trust assets. In relation to trust beneficiaries in particular, FinCEN believes that it is appropriate to consider an individual as owning or controlling ownership interests held in trust if the individual is the sole permissible recipient of both income and principal from the trust, or has the right to demand a distribution of, or withdraw substantially all of the assets from, the trust. Other individuals with authority to dispose of trust assets, such as trustees, will also be considered as controlling the ownership interests held in trust, as will grantors or settlors that have retained the right to revoke the trust, or to otherwise withdraw the assets of the trust. FinCEN believes that these circumstances comport with the general understanding of ownership and control in the context of trusts and furthers the CTA's objective of identifying true beneficial owners regardless of formalities that may vary across different jurisdictions. However, FinCEN acknowledges that these concepts do not map easily onto every trust or similar arrangement. Accordingly, FinCEN is seeking comment on its general approach to the attribution of ownership interests held in trust to certain individuals, as well as the particular circumstances in which individuals may be considered to own or control ownerships interests held in trust. More broadly, FinCEN seeks comments on whether these and the other proposed examples of how one might own or control ownership interests are clear and useful, and which, if any, require elaboration.

Proposed 31 CFR 1010.380(d)(3)(iii) concludes the ownership interest section with general guidance on determining whether an individual owns or controls 25 percent of the ownership interests of a reporting company. An individual's ownership interests of the reporting company shall include all ownership interests of any class or type, and the percentage of such ownership interests that an individual owns or controls shall be determined by aggregating all of the individual's ownership interests in comparison to the undiluted ownership interests of the company. FinCEN believes this approach would further the CTA's objective of identifying true beneficial owners by accounting for complex ownership or investment structures. FinCEN seeks comments on this approach to the 25 percent calculation, including any issues that FinCEN should consider in relation to reporting companies with more complex ownership structures.

FinCEN considered alternative approaches to identifying beneficial owners according to their ownership interests, in particular the approach laid out in the ownership prong of the CDD Rule. In that approach, only ''equity interests'' are relevant, joint ownership is not explicitly addressed, and assets in trust are deemed to be owned by their

[110] 31 U.S.C. 5336(a)(3)(A)(ii).

[111] Securities Act Rule 405.

trustees.[112] The ownership prong of the CDD Rule is well known, easily understood, and easy to comply with. Many commenters urged FinCEN to adopt the CDD Rule approach to trusts. However, FinCEN has declined to follow the CDD Rule approach for a combination of reasons.

First, as discussed above, the CTA does not require following the CDD Rule by default. The same statutory interpretation arguments that led FinCEN to believe that the CDD Rule is not an appropriate standard in connection with substantial control apply equally to the subject of ownership interests.

Second, the CDD Rule does not provide transparency with respect to complex ownership structures, extensive use of trusts, voting arrangements among owners, golden shares entitling their owners to voting rights disproportionate to their equity stake, and other mechanisms that can obscure the connection between an individual owner and a reporting company. Therefore, it is not at all clear that the CDD Rule results in the identification of all individuals who should be identified as 25 percent owners. Instead, the CDD Rule standard could permit obfuscatory behavior. In connection with trusts, for example, FinCEN believes that requiring the reporting only of the trustee under the ownership interests component would promote the misuse of trusts to hide beneficial ownership interests and complicate the ability of reporting companies to comply with the CTA and the proposed rule. As with the definition of substantial control, FinCEN believes its proposed approach would provide law enforcement with a more accurate and complete picture of an entity's true ownership, regardless of formalities.

Finally, FinCEN considered the burden this proposed approach would have on reporting companies. FinCEN is mindful of the effect of new regulations on small businesses, given their critical role in the U.S. economy and the special consideration that Congress and successive administrations have mandated that federal agencies should give to small business concerns. FinCEN expects that most reporting companies that are small businesses will have simple ownership structures with easily identifiable beneficial owners, thereby minimizing the potential burden on such entities. FinCEN's expectation is supported by a recent empirical analysis on the compliance burden that resulted from the creation of a beneficial ownership registry in the UK. In its post-implementation review of the PSC Register, the UK Government found that only 13% of companies had three or more beneficial owners.[113] It also found that the mean overall cost of compliance for small and micro businesses (defined as businesses with less than 50 employees) to file an initial report and provide required updates was £265 (approximately $358 at current exchange rates).[114] Notably, the UK's beneficial owner database is public and the UK requires businesses to provide considerably more information about each beneficial owner. This suggests that the reporting burden of FinCEN's approach may be materially less than the burden of compliance borne by small businesses and other reporting companies in the UK since the establishment of the PSC Register. FinCEN seeks comments on these considerations, particularly regarding its assessment of the effect on small businesses based on the assessment of the UK's implementation of its register. FinCEN further welcomes specific data on this topic.

Entities for which relative burden may be higher are likely very small entities with complex structures. As noted above, FinCEN believes that most reporting companies will not have complex ownership structures, and that the few that do previously chose their structures recognizing that costs associated with legal and tax advice and other filing and compliance obligations might be higher as a result. Moreover, in FinCEN's experience administering the BSA and other AML efforts, small-but-complex entities often are the highest risk for money laundering, terrorist financing, and other illicit financial activity. Indeed, both the CTA's statutory text and legislative history indicate that Congress was concerned with ensuring effective BOI reporting for these entities. Thus, in FinCEN's experience, such a reporting burden is justified because these are the entities most at risk for abuse of the corporate form and, therefore, an additional compliance burden is necessary to make the BOI database ''highly useful to law enforcement'' under the statute.

iii. Exceptions to Definition of Beneficial Owner

Proposed 31 CFR 1010.380(d)(4) describes five exceptions to the definition of beneficial owners that are included in the CTA. These exceptions relate to minor children, nominees or other intermediaries, employees, inheritors, and creditors. Proposed 31 CFR 1010.380(d)(4) mirrors the statutory text with additional clarification to ensure that reporting companies identify real parties in interest, not only the nominal beneficial owners.

a. Minor Children

In the case of minor children, consistent with the statute, proposed 31 CFR 1010.380(d)(4)(i) states that the term beneficial owner does not include a minor child, provided that the reporting company reports the required information for a parent or legal guardian of the minor child.[115] Proposed 31 CFR 1010.380(b)(3)(ii) provides additional clarification regarding the manner in which a reporting company would need to provide information of a parent or legal guardian.

b. Nominees

With respect to the exception for an individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual, FinCEN notes that the statute affirms that reporting companies must report real parties in interest who exercise control indirectly.[116] In implementing this statutory exception, FinCEN emphasizes the obligation of a reporting company to report identifying information of the individual on whose behalf an apparent beneficial owner is acting, not the apparent beneficial owner.

c. Employees

The CTA further exempts from the definition of a beneficial owner an employee of a reporting company, ''acting solely as an employee,'' whose ''control over or economic benefits from'' a reporting company are derived solely from the employment status of the person. Proposed 31 CFR 1010.380(d)(4)(iii) adopts the statutory language, with two clarifications. First, the word ''substantial'' is added to modify ''control'' to clarify that the control referenced in the exception is the same type of ''substantial control'' over the reporting company referenced

[112] *See* 31 CFR 1010.230(d)(3) (CDD Rule provision stating that ''[i]f a trust owns directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, 25 percent or more of the equity interests of a legal entity customer, the beneficial owner for purposes of [the definition of beneficial owner] shall mean the trustee.'').

[113] *See* United Kingdom Department for Business, Energy & Industrial Strategy, *Review of the Implementation of the PSC Register,* (March 2019), p. 4, available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822823/review-implementation-psc-register.pdf.*

[114] *Id.,* Table 3.9.

[115] 31 U.S.C. 5336(a)(3)(B)(i).

[116] 31 U.S.C. 5336(a)(3)(B)(ii).

in the definition of beneficial owner and defined in the regulations. Second, the proposed rule clarifies that a person acting as a senior officer of a reporting company could not avail himself or herself of the exception. Under the CTA, only employees who are ''acting solely as an employee'' may be exempt. The statute does not, however, specify what it means to act ''solely as an employee,'' and this phrase may be viewed as ambiguous. FinCEN proposes to address this ambiguity by distinguishing between employees and senior officers and by clarifying that a person acting as a senior officer of an entity is not a person acting ''solely as an employee.'' In the common law of agency and corporate law, senior officers have long been distinguished from employees, with officers often regarded as principals and employees regarded as agents.[117] Senior officers may be considered employees in some contexts, such as for certain tax purposes where the distinction between officers and employees may be less relevant. But in contexts focused more on an individual's ownership or control of an entity, such as disclosure requirements or imputation of conduct for various purposes, senior officers are often treated differently.[118] In the context of the CTA's exceptions from the definition of beneficial owner, FinCEN believes that distinguishing employees from senior officers would appropriately ensure that individuals whose functions enable them to exercise substantial control over an entity in many important ways are reported as beneficial owners.[119] Exempting senior officers from the definition of beneficial owner would seem to frustrate the CTA's objective of identifying individuals who exercise substantial control over an entity, and who may thereby be in a position to use the entity for illicit purposes. FinCEN welcomes comments on the exclusion of senior officers from this exemption.

d. Inheritance

The inheritor exception restates statutory text with one added clarification. The CTA's definition of beneficial owner excludes ''an individual whose only interest . . . is through a right of inheritance.''[120] Proposed 31 CFR 1010.380(d)(4)(iv) clarifies that this exception refers to a ''future'' interest associated with a right of inheritance, not a present interest that a person may acquire as a result of exercising such a right. In proposing this addition, FinCEN seeks to emphasize that once an individual has inherited an ownership interest in an entity, that individual owns it. Individuals who may in the future come to own ownership interests in an entity through a right of inheritance do not have ownership until the inheritance occurs. But once an ownership interest is inherited and comes to be owned by an individual, that individual has the same relationship to an entity as any other individual who acquires an ownership interest through another means. FinCEN thus believes this clarification is necessary to avoid exempting individuals on the basis of how ownership interests are acquired.

e. Creditors

Finally, the CTA's definition of beneficial owner excludes a creditor of a reporting company unless the creditor exercises substantial control over the entity or owns or controls 25 percent of the entity's ownership interests.[121] Based on FinCEN's understanding that the overarching intent of the CTA is to identify real parties in interest, FinCEN interprets this exception to mean that the mere fact that an individual is a creditor cannot make that individual a beneficial owner of the reporting company: What is relevant is whether the individual exercises substantial control of the reporting company or owns or controls 25 percent of the reporting company's ownership interests. However, the CTA does not define the term ''creditor.'' Drawing from U.S. tax law, proposed 31 CFR 1010.380(d)(4)(v) clarifies that an exempt creditor is an individual who meets the definition of beneficial owner in proposed 31 CFR 1010.380(d) *solely* through rights or interests in the reporting company for the payment of a predetermined sum of money, such as a debt and the payment of interest on such debt. The proposed rules clarify that any capital interest in the reporting company, or any right or interest in the value of the reporting company or its profits, would not be considered rights or interests for payment of a predetermined sum, regardless of whether they take the form of a debt instrument. Accordingly, if an individual has a right or ability to convert the right to payment of a predetermined sum to any form of ownership interest in the company, that would prevent that individual from claiming the creditor exception. FinCEN believes this approach is necessary to prevent individuals from obscuring their ownership of a company by structuring their ownership interests in the form of debt, when in substance they hold an interest with characteristics of equity.

One commenter noted that it is not uncommon for creditors to have so-called ''equity kickers'' allowing some form of sharing in cash flow or capital gains in addition to fixed interest. FinCEN believes such arrangements would not be within the proposed creditor exemption because the payments would not be for a predetermined sum. Therefore, it would be considered an ownership interest that could aggregate to a reportable ownership interest. FinCEN welcomes further comments on whether there are specific creditor or security interests that involve equity-like attributes that should be considered as within the creditor exemption and how such exemptions could be integrated into the proposed rule, including an explanation of how such interests would not affect the proposed rule's ability to generate a highly useful database. FinCEN also welcomes comments on whether the proposed rules implementing these statutory exceptions are sufficiently clear, and which, if any, require further clarification.

C. Company Applicant

A reporting company would be required to report identifying information about a company applicant under proposed 31 CFR 1010.380(a)(1). Proposed 31 CFR 1010.380(e) defines a company applicant as any individual who files a document that creates a domestic reporting company or who first registers a foreign reporting

[117] *See, e.g., Goldman* v. *Shahmoon,* 208 A.2d 492, 494 (D. Ch. 1965) (''It is clear that the terms officers and agents are by no means interchangeable. Officers as such are the corporation. An agent is an employee . . . .''); *Rosenblum* v. *New York Cent. R. Co.,* 57 A.2d 690, 691 (Pa. Sup. Ct. 1948) (distinguishing ''regular employees'' and ''mere agents'' from ''executive officers'').

[118] *See, e.g.,* 12 U.S.C. 308.602 (debarment of accounting firms); 15 U.S.C. 78p (requiring disclosures from directors, officers, and principal stakeholders); 15 U.S.C. 77aa (disclosure of directors and officers in securities issuer's registration statement); 22 CFR 126.7 (revocation of export licenses on the basis of senior officer conduct).

[119] In corporate and agency-law contexts, a formal or functional position as a senior officer can be a key indicator of an individual's substantial control over an entity. *See United States ex rel. Vavra* v. *Kellong Brown & Root, Inc.,* 848 F.3d 366, 374 (5th Cir. 2017); *see also, e.g.,* U.S. Sentencing Commission Guidelines, U.S.S.G. sec. 8A1.2 cmt. 3(B) ('' 'High-level personnel of the organization, means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: A director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest.'').

[120] 31 U.S.C. 5336(a)(3)(B)(iv).

[121] 31 U.S.C. 5336(a)(3)(B)(v).

company with a secretary of state or similar office in the United States.

The proposed definition of a company applicant would also include any individual who directs or controls the filing of such a document by another person. This additional requirement is designed to ensure that the reporting company provides information on individuals that are responsible for the decision to form a reporting company given that, in many cases, the company applicant may be an employee of a business formation service or law firm, or an associate, agent, or family member who is filing the document on behalf of another individual. In such a case, the individual directing or controlling the formation of a legal entity should not be able to remain anonymous simply by directing another individual to file the requisite paperwork, and must therefore disclose his or her identity to FinCEN along with the individual that made the filing. FinCEN believes that this additional information about the person directing or controlling the formation or registration of the reporting company will be highly useful to law enforcement, which may be able to draw connections between and among seemingly unrelated reporting companies, beneficial owners, and company applicants based on this additional information. In addition, FinCEN believes that it will be better positioned to investigate the submission of inaccurate BOI if it is able to identify both the individual who submitted the report and the person who directed or controlled that activity. It may also give a company applicant executing the filing an incentive to reasonably satisfy himself or herself that the BOI being submitted to FinCEN at the direction of another is accurate because they could also be held accountable, thereby improving data quality. FinCEN believes that the burden of this reporting requirement is minimal because the identity of any individual that meets the definition of ''company applicant''—both the person submitting the report and the person directing it—should be readily available to reporting companies. FinCEN welcomes comments on this proposal.

D. Reporting Company

The CTA defines a reporting company as ''a corporation, limited liability company, or other similar entity'' that is either (1) ''created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe;'' or (2) ''formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe.'' [122]

To facilitate application of the statutory definition of reporting company, proposed 31 CFR 1010.380(c)(1) defines two new terms: ''Domestic reporting company'' and ''foreign reporting company.''

i. Domestic Reporting Company

Consistent with the CTA's statutory language, FinCEN proposes to define a domestic reporting company to include: (1) A corporation; (2) a limited liability company; or (3) other entity that is created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian Tribe.[123] Because corporate formation is governed by state or Tribal law, and because the CTA does not provide independent definitions of the terms ''corporation'' and ''limited liability company,'' FinCEN intends to interpret these terms by reference to the governing law of the domestic jurisdiction in which a reporting company that is a corporation or limited liability company is formed. For clarity and ease of administration, the proposed rule defines ''reporting company'' to include all domestic corporations and limited liability companies based on FinCEN's understanding that all corporations and limited liability companies are created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian Tribe. FinCEN, however, invites comment on whether this understanding is accurate.[124]

The proposed rule does not separately define the statutory clause ''other similar entity,'' but rather reflects FinCEN's interpretation of ''other similar entity'' as referring to any entity that is created by the filing of a document with a secretary of state or similar office, the only common characteristic the statute identifies. FinCEN considered alternative approaches when determining how to interpret ''similar entity,'' but those alternatives do not appear to accord with Congress's objective of enabling law enforcement and others to counter illicit activity conducted through such entities, or are otherwise unworkable.[125] For example, FinCEN considered defining ''similar entity'' narrowly to include entities that limit their owners' personal liability under state or Indian Tribe law, but it is not clear how this limitation would align with the purpose of the statute because legal entities can be used by malign actors to further or hide illicit activity regardless of whether they enjoy limited liability. Alternatively, ''similar entity'' might be defined somewhat more broadly to include entities that are legally distinct from their natural person owners, but this definition would depend on varying state law and could be difficult to apply. Moreover, any approach that unduly narrows the scope of the reporting company definition could exclude entities that malign actors can use to obscure their true ownership or control structures, thereby limiting the usefulness of the reported information for law enforcement, tax authorities, and other stakeholders. In passing the CTA, Congress was concerned with entities that can be created without needing to report who their beneficial owners are.[126] And Congress was aware that malign actors take advantage of these entities to conceal their involvement in illicit activity.[127] As explained above, this creates a significant hurdle for investigators who are forced to use time-consuming and resource-intensive tools to try to obtain this information, if it can be obtained at all. An unduly narrow interpretation of ''similar entity'' could therefore impede a key objective of the CTA. Thus, FinCEN proposes to focus on the act of filing to create the entity as the determinative factor in defining entities besides corporations and limited liability companies that are also reporting companies. FinCEN welcomes comments on this approach.

In general, FinCEN believes the proposed definition of domestic reporting company would likely include limited liability partnerships, limited liability limited partnerships, business trusts (a/k/a statutory trusts or

[122] 31 U.S.C. 5336(a)(11)(A)(i)–(ii).

[123] 31 U.S.C. 5336(a)(11)(A)(i)–(ii).

[124] A 2016 World Bank guide to beneficial ownership information in the United States notes that the actual mechanics of creating a corporation or limited liability company may vary slightly from state to state, but are generally very similar. Specifically, the guide notes that ''[f]or corporations, every state requires the filing of a corporate governance document (called the 'articles of incorporation,' 'certificate of incorporation,' or 'charter') with the state filing office, together with the payment of a filing fee.'' It further states that ''[f]or limited liability companies. . . [e]very state requires the filing of an organization document (generally called a 'certificate of organization,' 'certificate of formation,' or 'articles of organization') which constitutes proof of its organization, form, and existence.'' World Bank G–20 Anti-Corruption Working Group, *Guide to Beneficial Ownership Information: Legal Entities and Legal Arrangements (United States)* (2016), p. 3, available at *https://star.worldbank.org/resources/beneficial-ownership-guide-united-states-america-2016.* (accessed on November 1, 2021).

[125] CTA, Section 6402(5)(D).

[126] CTA, Section 6402(2).

[127] CTA, Section 6402(3)–(4).

Massachusetts trusts), and most limited partnerships, in addition to corporations and limited liability companies (LLCs), because such entities appear typically to be created by a filing with a secretary of state or similar office. FinCEN estimates that there are now approximately 30 million such entities in the United States, and that approximately three million such entities are created in the United States each year.[128] FinCEN understands that state and Tribal laws may differ on whether certain other types of legal or business forms—such as general partnerships, other types of trusts, and sole proprietorships—are created by a filing, and therefore does not propose to categorically include any particular legal forms other than corporations and limited liability companies within the scope of the definition. FinCEN invites commenters to provide information on state and Indian Tribe legal entity formation practices and requirements for consideration.

ii. Foreign Reporting Company

Proposed 31 CFR 1010.380(c)(1)(ii) defines a foreign reporting company as any entity that is a corporation, limited liability company, or other entity that is formed under the law of a foreign country and that is registered to do business in the United States by the filing of a document with a secretary of state or equivalent office under the law of a state or Indian Tribe. Similar to the treatment of the phrase ''corporation, limited liability company, or other similar entity'' for domestic reporting companies, FinCEN intends to interpret these terms by reference to the requirement to register to do business in the United States by the filing of a document in a state or Tribal jurisdiction. The proposed regulation otherwise tracks the statutory text except to clarify that registration to do business in any state or Tribal jurisdiction suffices as registration to do business in the United States.

As with domestic reporting companies that are ''created by a filing,'' there may be questions about how the ''registered to do business'' standard applies to different entity types across state and Tribal jurisdictions. The phrase ''registered to do business'' may capture more entities than ''created by the filing of a document'' because typically a jurisdiction within the United States will require any legal entity formed under the law of any other jurisdiction—including another jurisdiction within the United States—to register to do business as a ''foreign'' entity if it engages in certain types of activities.[129] FinCEN welcomes comments on what activities will trigger foreign entity registration requirements in particular state or Tribal jurisdictions, whether compliance with those requirements constitutes ''registering to do business,'' and whether FinCEN should further clarify the ''registered to do business'' requirement.

iii. Exemptions

The CTA specifically excludes from the definition of ''reporting company'' twenty-three types of entities.[130] The statute also authorizes the Secretary to exempt, by regulation, additional entities for which collecting BOI would neither serve the public interest nor be highly useful in national security, intelligence, law enforcement, or other similar efforts.[131] Except for the proposed clarifications discussed below, as well as minor alterations to paragraph structure and the addition of short titles, FinCEN proposes to adopt verbatim the statutory language granting the twenty-three specified exemptions. Each proposed short title summarizes the applicable exemptions, which cover securities issuers, domestic governmental authorities, banks, domestic credit unions, depository institution holding companies, money transmitting businesses, brokers or dealers in securities, securities exchange or clearing agencies, other Securities Exchange Act of 1934 entities,[132] registered investment companies and advisers, venture capital fund advisers, insurance companies, state licensed insurance producers, Commodity Exchange Act registered entities,[133] accounting firms, public utilities, financial market utilities, pooled investment vehicles, tax exempt entities, entities assisting tax exempt entities, large operating companies, subsidiaries of certain exempt entities, and inactive businesses. These categories of exempt entities either are already generally subject to substantial Federal or state regulation under which their beneficial ownership may be known.

While most of the reporting company exemptions are straightforward, several contain ambiguous language that FinCEN proposes to clarify in its regulations. FinCEN first proposes to define ''public utility'' [134] via reference to the Internal Revenue Code definition of ''regulated public utility'' at 26 U.S.C. 7701(a)(33)(A). Under this definition, a ''public utility'' would generally be a corporation that furnishes or sells electric energy, gas, water, or sewage disposal services, or transportation, at rates established or approved by a government body. Using this preexisting definition should promote predictability and continuity across Treasury and other federal regulations, which may reduce compliance burdens that would otherwise arise from definitional differences among regulatory regimes.

Proposed 31 CFR 1010.380(c)(2)(xxi) clarifies an exemption relating to what the proposed regulations refer to as ''large operating companies.'' An entity falls into this category, and therefore is not a reporting company, if it: (1) ''Employs more than 20 employees on a full-time basis in the United States''; (2) ''filed in the previous year Federal income tax returns in the United States demonstrating more than $5,000,000 in gross receipts or sales in the aggregate,'' including the receipts or sales of other entities owned by the entity and through which the entity operates; and (3) ''has an operating presence at a physical office within the United States.'' [135] Under the proposed regulations, an entity with an ''operating presence at a physical office within the United States'' would be one for which the physical office is owned or leased by the entity, is not a residence, and is not shared space (beyond being shared with affiliated entities)—in short, a genuine working office of the entity. In the exemption, FinCEN also proposes to clarify what it means to employ someone on a full-time basis through reference to the Internal Revenue Service definition of ''full-time employee'' and related determination methods at 26 CFR 54.4980H–1(a)(21) and 54.4980H–3. These regulations generally count as a full-time employee anyone employed an average of at least 30 service hours per week or 130 service hours per month, with adaptations for non-hourly employees. As with the ''public utility'' definition, FinCEN is borrowing the IRS concept to promote regulatory consistency and because most large operating companies should already be familiar with it from compliance with the Affordable Care Act.[136] Therefore, FinCEN believes its

[128] See Section VI of this NPRM for more information on these estimates.

[129] *See, e.g.,* Cal. Corp. Code sec. 2107, Del. Code tit. 8, sec. 371, New York Consolidated Laws (N.Y.C.L.), Business and Corporations Code secs. 1301–1305, Mass. Gen. L. Ann. Ch. 156D, secs. 15.01–15.03, Va. Code tit. 13.1, secs. 757–759.

[130] *See* 31 U.S.C. 5336(a)(11)(B)(i)–(xxiii).

[131] *See* 31 U.S.C. 5336(a)(11)(B)(xxiv).

[132] *See* 15 U.S.C. 78l.

[133] *See* 15 U.S.C. 78o(d).

[134] 31 U.S.C. 5336(a)(11)(B)(xvi).

[135] 31 U.S.C. 5336(a)(11)(B)(xxi).

[136] *See* 26 U.S.C. 4980H.

proposed approach will help minimize compliance burdens.

Regarding the $5,000,000 filing threshold, FinCEN proposes to make clear that the relevant filing may be a federal income tax or information return, and that the $5,000,000 must be reported as gross receipts or sales (net of returns and allowances) on the entity's IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120–S, IRS Form 1065, or other applicable IRS form, excluding gross receipts or sales from sources outside the United States, as determined under federal income tax principles. For entities that are part of an affiliated group of corporations within the meaning of 26 U.S.C. 1504 that filed a consolidated return, FinCEN proposes that the applicable amount should be the amount reported on the group's consolidated return. FinCEN's proposal to exclude gross receipts or sales from sources outside the United States reflects the CTA's domestic focus in requiring that a qualifying entity have filed ''Federal tax returns *in the United States.*'' [137] This focus on the United States is reinforced in other prongs requiring that an entity's 20 or more employees be employed in the United States, and that the entity have an operating presence at an office within the United States.[138] FinCEN believes that focusing on gross receipts or sales from U.S. sources would maintain consistency with the exemption's overall United States-centric approach, but welcomes comments on the feasibility of applying this test to only U.S.-sourced gross receipts.

Proposed 31 CFR 1010.380(c)(2)(xxii) would clarify the exemption for entities in which ''the ownership interests are owned or controlled, directly or indirectly, by 1 or more [specified entity types that do not qualify as reporting companies].'' [139] FinCEN is calling this the ''subsidiary exemption,'' and interprets the definite article ''the'' in the quoted statutory text as requiring an entity to be owned entirely by one or more specified exempt entities in order to qualify for it. In addition to expressing greater fidelity to the statutory language, this interpretation also prevents entities that are only partially owned by exempt entities from shielding all of their ultimate beneficial owners—including those that beneficially own the entity through a non-exempt parent—from disclosure.

[137] 31 U.S.C. 5336(a)(11)(B)(xxi)(II) (emphasis added).

[138] 31 U.S.C. 5336(a)(11)(B)(xxi)(I).

[139] 31 U.S.C. 5336(a)(11)(B)(xxii) (emphasis added).

The last category of exempt entities for which FinCEN proposes to clarify ambiguous statutory language is the exemption for ''dormant entities'' that meet the criteria provided at 31 U.S.C. 5336(a)(11)(B)(xxiii). Under the CTA, the exemption applies to any entity: (1) ''In existence for over 1 year;'' (2) that is not engaged in active business; (3) that is not owned, directly or indirectly, by a foreign person; (4) that has not, in the preceding 12-month period, experienced a change in ownership or sent or received more than $1,000; and (5) that does not otherwise hold assets of any type.

The phrase ''in existence for over 1 year'' is ambiguous because the CTA did not specify whether it refers to entities in existence for over one year *at the time of the CTA's enactment* or to entities in existence for over one year at *any time the statute is applied.* While other prongs of the exemption use the present tense (''is'' not engaged in active business; ''does'' not hold assets) and such present-tense language generally does not include the past, the first prong notably lacks any verb, much less one in the present tense.[140] Moreover, both the CTA's text and its legislative history suggest that the exemption was understood to be a ''grandfathering'' provision for entities in existence before the CTA's enactment. Another CTA provision expressly refers to entities subject to this exemption as ''exempt grandfathered entities.'' [141] And in a floor statement made just before the passage of the CTA, Senator Brown explained that ''[t]he exemption for dormant companies is intended to function solely as a grandfathering provision that exempts from disclosure only those dormant companies in existence prior to the bill's enactment.'' [142] He added, ''No entity created after the date of enactment of the bill is intended to qualify for exemption as a dormant company.'' [143] It therefore appears reasonable to interpret the dormant entity exemption as a grandfathering provision applicable only to entities in existence for over one year at the time the CTA was enacted. This interpretation also limits opportunities for bad actors to exploit the exemption by forming exempt shelf companies for later use.

[140] *See Carr* v. *United States,* 130 S. Ct. 2229, 2236 (2010).

[141] 31 U.S.C. 5336(b)(2)(E).

[142] Senator Sherrod Brown, *National Defense Authorization Act,* Congressional Record 166:208 (December 9, 2020), p. S7311, available at *https://www.govinfo.gov/content/pkg/CREC-2020-12-09/pdf/CREC-2020-12-09.pdf.*

[143] *Id.*

FinCEN notes that this exemption's first prong may appear to bear some similarity to its fourth, with the latter requiring an entity to have not experienced a change in ownership or sent or received more than $1,000 ''in the preceding 12-month period.'' However, FinCEN does not propose to interpret this language as applying to the 12-month period before the enactment of the CTA. This fourth prong not only uses different language from the first, but also focuses on repeatable actions by the entity rather than its creation date. Requiring an entity to be in existence one year before the CTA's enactment is consistent with an understanding of the exemption as a grandfathering provision for entities created before that date because creation is a one-time event. Changes in ownership and funds transfers, by contrast, are not necessarily events that occur once and then never again. They may occur at any time after an entity comes into existence. For these actions, we do not believe that the 12-month period prior to the enactment of the CTA is more significant than any other subsequent 12-month period. If a company experiences an ownership change or transfers more than $1,000 at some later date after the CTA's enactment, we do not see a reason why the company should be subject to the exemption simply because it did not take those actions for the 12 months prior to the CTA's enactment. FinCEN therefore proposes to interpret the first prong of the dormant entity exemption as applying to the one-year period before enactment, but FinCEN understands the fourth prong as applying to any 12-month period.

In addition to the exemptions Congress specified in the CTA, Congress also provided an exemption for ''any entity or class of entities that the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security, has, by regulation, determined should be exempt.'' [144] To make such a determination, there must be a finding that requiring beneficial ownership information ''would not serve the public interest'' and ''would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes.'' [145] Commenters to the ANPRM suggested creating exemptions for state-licensed accounting companies; federally regulated health care

[144] 31 U.S.C. 5336(a)(11)(B)(xxiv).

[145] *Id.*

institutions; limited liability companies owned by spouses solely to hold real property; certain Tribal entities; certain commodity pools, additional pooled investment vehicles, additional investment advisors, and family offices; companies with less than a defined capitalization or revenue threshold; well-established businesses; and entities owned by U.S. persons with significant asset holdings held in custody at regulated financial institutions. Many of these commenters, however, did not explain why they believe their proposed additions would meet the statutory standard. Other commenters from civil society organizations recommended construing existing exemptions narrowly and not introducing new exemptions at this time. While the proposed rule would not create additional exemptions, FinCEN will continue to consider whether any additional exemptions would be appropriate. FinCEN welcomes comments on this approach and whether to adopt exemptions beyond those specifically required by statute. FinCEN also welcomes comments on how, when considering a new exemption, the agency should make the statutorily required determinations that collecting beneficial ownership information for a potentially exempt entity or class of entities ''would not serve the public interest'' and also ''would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes.''

Many commenters also encouraged FinCEN to require exempt entities to file a report in order to claim an exemption. Such a requirement may make FinCEN's BOI database significantly more useful by making it clear which entities did not file BOI because they intentionally claimed exemptions and which simply failed to satisfy the reporting obligation. Many other commenters opposed such a requirement, arguing it was inconsistent with both the statutory language of the CTA and the CTA's legislative history, and likely to be highly burdensome. One commenter suggested that a reasonable alternative to any affirmative exemption filing requirement would be a requirement to provide an exemption certification to FinCEN only upon request from the bureau or another applicable governmental authority. However, the commenter did not identify the statutory authority that would permit FinCEN to impose such a requirement. FinCEN invites comment on any applicable statutory authority. At least one commenter noted that FinCEN should permit exempt entities to voluntarily file exemption certifications. FinCEN invites comment on the appropriateness of inviting such voluntary filings.

E. Timing of Reports; Update or Correction of Reports

i. Timing of Initial Reports

The CTA describes the filing deadlines for both reporting companies in existence prior to the effective date of the regulations and for reporting companies formed or registered after the effective date. The provision at 31 U.S.C. 5336(b)(1)(B) provides that any reporting company that has been formed or registered before the effective date of the reporting regulations shall, in a timely manner, and not later than two years after the effective date of the reporting regulations, submit to FinCEN a report that contains the information described in 31 U.S.C. 5336(b)(2). Separately, 31 U.S.C. 5336(b)(1)(C) provides that in accordance with regulations prescribed by the Secretary, any reporting company that has been formed or registered after the effective date of the regulations shall, at the time of formation or registration, submit to FinCEN a report that contains the information described in 31 U.S.C. 5336(b)(2).

Thus, the CTA requires FinCEN to prescribe regulations for exactly when reporting companies must file. The proposed regulations elaborate and clarify these filing deadlines in a manner that seeks to both minimize burdens on filers and to advance the objective of providing a timely and accurate database of highly useful information for authorized users. For newly formed or registered companies, proposed 31 CFR 1010.380(a)(1)(i) specifies that a domestic reporting company formed on or after the effective date of the regulation shall file a report within 14 calendar days of the date it was formed as specified by a secretary of state or similar office. Proposed 31 CFR 1010.380(a)(1)(ii) specifies that any entity that becomes a foreign reporting company on or after the effective date of the regulation shall file a report within 14 calendar days of the date it first became a foreign reporting company. Both proposed rules are intended to minimize the compliance burden by providing a bright-line rule as well as a reasonable period of time for newly formed or registered reporting companies to collect and report information from their beneficial owners and company applicants. At the same time, FinCEN seeks to compile a timely and highly useful database of beneficial ownership information available to law enforcement and other authorized users. FinCEN believes that allowing 14 days for such initial reporting to FinCEN will provide newly formed or registered reporting companies reasonable time to collect the information specified in proposed 31 CFR 1010.380(b)(1) from their beneficial owners and company applicants and to enter the required information about the company, its beneficial owners, and its company applicants into a form provided by FinCEN. Because the entity will be newly formed or registered, FinCEN anticipates that much of the required information will be readily available to the reporting company, and that the burden on the reporting company to collect and provide this information within 14 calendar days will be minimal. FinCEN also believes that requiring initial reports to be filed relatively quickly will help make the BOI reporting process a natural part of the formation or registration process, furthering the CTA's objective to ''set a clear, Federal standard for incorporation practices.'' [146] However, based on comments received in response to the ANPRM, FinCEN is aware there may be special circumstances in which a 14-calendar-day deadline to file an initial report is insufficient or impractical.[147] FinCEN welcomes additional comments on whether the 14-day deadline for newly formed or registered reporting companies to file an initial report is reasonable, and on whether there are situations in which this time is likely to be insufficient and proposals to address such situations.

For entities formed or registered before the effective date of the regulations, the CTA requires filing of beneficial owner and company applicant information ''in a timely manner,'' but no later than two years after the effective date of the final regulations. Proposed 31 CFR 1010.380(a)(1)(iii) would require any domestic reporting company created before the effective date of the regulation and any entity that became a foreign reporting company before the effective date of the regulation to file a report not later than one year after the effective date of the regulation. This approach balances the need for effective outreach and notice to preexisting companies with the need to collect

[146] CTA, Section 6406(5)(A).

[147] For example, one commenter noted that it may take longer than 14 days for an entity to complete necessary registrations or approvals that would exclude the entity from the definition of a ''reporting company.''

beneficial information in a timely manner and ensure a level playing field between all legal entities that constitute reporting companies.

A one-year reporting deadline is designed to provide reporting companies sufficient time to receive notice of the reporting requirement, conduct appropriate due diligence to determine the company applicant and beneficial owners, collect the required information from the beneficial owners and company applicants, and provide the required information about the company, its beneficial owners, and its company applicants to FinCEN. FinCEN intends to work with secretaries of state or similar offices and to leverage other communication channels to ensure that reporting companies in existence prior to the effective date of the regulations receive timely notice of and guidance on their BOI reporting obligations. In proposing a one-year deadline, FinCEN has sought to ensure that the database is highly useful to law enforcement by obtaining BOI for existing entities as soon as possible while also minimizing burdens on reporting companies and secretaries of state and similar offices that will need adequate time to comply with the new rules. FinCEN invites comments on whether the one-year period for preexisting reporting companies to file their initial report is reasonable.

Proposed 31 CFR 1010.380(a)(1)(iv) would require entities that are not reporting companies by virtue of one or more exemptions to file a report within 30 calendar days after the date on which the entity no longer meets any exemption criteria.[148] Whenever an entity does not meet the criteria for an exemption and otherwise qualifies as a reporting company, it becomes subject to the CTA's requirement that ''each reporting company shall submit to FinCEN a report'' of its BOI.[149] Although the CTA specifies when newly formed and existing reporting companies must file their reports,[150] it does not in most cases specify when a report must be filed by a previously exempt entity.[151] FinCEN believes that 30 days from the date an exemption ceases to apply is a reasonable time for once-exempt entities to file an initial report with FinCEN. Specifically, FinCEN believes that keeping the database updated and accurate is essential to ensuring it is highly useful and that 30 days provides sufficient time for entities that previously evaluated their eligibility for an exemption from the reporting requirements and claimed such an exemption to collect and file the required BOI with FinCEN. Again, FinCEN invites comments on whether this proposed timeframe is reasonable.

ii. Update or Correction of Reports

The provision at 31 U.S.C. 5336(b)(1)(D) requires reporting companies to update information submitted in prior reports to FinCEN in a timely manner, and not later than one year after the date on which there is a change with respect to any of the information described in 31 U.S.C. 5336(b)(2). The CTA also provides a safe harbor for persons who inadvertently submit inaccurate information in a report to FinCEN if they, among other things, voluntarily and promptly file a corrected report no later than 90 days after the submission of the inaccurate report.

FinCEN proposes to provide reporting companies with 14 calendar days to correct any inaccurate information filed with FinCEN from the date on which the inaccuracy is discovered and 30 calendar days to update with FinCEN information that has changed after filing. Specifically, proposed 31 CFR 1010.380(a)(3) would require reporting companies to file a report to correct inaccurately filed information within 14 calendar days after the date on which the reporting company becomes aware or has reason to know that *any* required information contained in any report that the reporting company filed with FinCEN was inaccurate when filed and remains inaccurate. This would include information about any beneficial owner and the reporting company. FinCEN believes 14 calendar days provides adequate time for a reporting company, after it knows or has reason to know that it has made an inaccurate filing, to conduct appropriate due diligence and correct the information. This time frame is intended to be consistent with the 14-calendar-day timeframe for a newly formed or registered reporting company to file an initial report with FinCEN. FinCEN believes quickly correcting errors is essential for fulfilling Congress's instruction that BOI reported to the agency be ''accurate, complete, and highly useful.''[152] FinCEN anticipates this deadline will present a low burden on a reporting company that has discovered that inaccurate information has inadvertently been filed. It also provides incentives to reporting companies to ensure that accurate information is filed at the time an initial or updated submission is made to FinCEN, which is consistent with the broader goal of maintaining an accurate database for law enforcement and other authorized users.

Proposed 31 CFR 1010.380(a)(3) also notes that a corrected report filed under this paragraph within this 14-day period shall be deemed to satisfy 31 U.S.C. 5336(h)(3)(C)(i)(I)(bb)[153] if filed within 90 calendar days after the date on which an inaccurate report is filed.

The CTA provides that the deadline for updating information established by regulations must be ''in a timely manner'' but not later than one year after there was a change in the information. FinCEN is proposing a 30-calendar-day deadline for updating information that was accurate when filed but has subsequently changed. Specifically, proposed 31 CFR 1010.380(a)(2) would require reporting companies to file an updated report within 30 calendar days after the date on which there is any change with respect to any information previously submitted to FinCEN, including any change with respect to who is a beneficial owner of a reporting company, as well as any change with respect to information reported for any particular beneficial owner or applicant. This proposed rule would also apply to a reporting company that subsequently becomes eligible for an exemption from

[148] The trigger date is delayed by statute 180 days for legal entities described in section 501(c) of the Internal Revenue Code that lose their tax exemption. 31 U.S.C. 5336(a)(11)(xix)(I), proposed 31 CFR 1010.380(d)(2)(xix)(A).

[149] 31 U.S.C. 5336(b)(1)(A).

[150] 31 U.S.C. 5336(b)(1)(B); 5336(b)(1)(C).

[151] The CTA specifies that a report must be filed at the time an entity no longer meets the criteria for the subsidiary exemption and the grandfathered inactive business exemption. *See* 31 U.S.C. 5336(b)(2)(D), (E). However, in light of the express obligation in section 5336(b)(1)(A) for *all* reporting companies to file reports, FinCEN does not interpret the provisions focused on those two exemptions as relieving reporting companies of a filing obligation when they no longer meet the criteria for other exemptions. While the provisions focused on those two exemptions are arguably unnecessary in light of the general filing obligation, Congress may have included those provisions to make itself clear, as it may have had particular concern about those two exemptions. *See, e.g., Loving* v. *IRS,* 742 F.3d 1013, 1019 (D.C. Cir. 2014) (recognizing that, despite the general desire to avoid surplusage, ''lawmakers, like Shakespeare characters, sometimes employ overlap or redundancy so as to remove any doubt and make doubly sure'').

[152] 31 U.S.C. 5336(b)(4)(b)(ii).

[153] The provision at 31 U.S.C. 5336(h)(3)(C) provides that a person shall not be subject to civil or criminal penalties under 31 U.S.C. 5336(h)(3)(A) if the person has reason to believe that any report submitted by that person to FinCEN contains inaccurate information and, in accordance with regulations issued by the Secretary, voluntarily and promptly, and in no case later than 90 days after the date on which the person submitted the report, submits a report containing corrected information. However, this safe harbor does not apply if, at the time the person submits the report, the person acts for the purpose of evading the reporting requirements and has actual knowledge that any information contained in the report is inaccurate.

the reporting requirement after the filing of its initial report. One commenter noted it is important to avoid ambiguity as to whether a change in information superseded by subsequent changes within the 30-calendar-day window must be reported. That is to say, if a reporting company has a change in substantial control that triggers the 30-calendar-day window (*e.g.,* Individual A becomes a beneficial owner because they exercise substantial control over the reporting company), and then another change in substantial control within the 30-calendar-day window (*i.e.,* Individual A ceases to exercise substantial control over the reporting company), is the reporting company obliged to report anything about Individual A? In this situation, the proposed rule would require two separate reports from the reporting company, noting the addition and then the removal of Individual A as a beneficial owner. The first report would be due within 30 calendar days of Individual A gaining substantial control over the reporting company; the second report would be due within 30 days of Individual A ceasing to exercise substantial control over the reporting company.

FinCEN considers that keeping the database current and accurate is essential to keeping it highly useful, and that allowing reporting companies to delay mandatory updates by more than 30 days—or allowing them to report updates on an annual basis—could cause a significant degradation in accuracy and usefulness of the BOI. FinCEN also believes that a 30-calendar-day deadline is necessary to limit the possible abuse of shelf companies—*i.e.,* entities formed as generic corporations without assets and then effectively assigned to new owners. The longer updates are delayed, the longer a shelf company can be ''off the shelf'' without notice to law enforcement of the company's new beneficial owners, and without any notice to financial institutions that they should scrutinize transactions involving the company from the perspective of its new beneficial owners. FinCEN has considered the costs of the compliance burden that the 30-calendar-day timeframe may place on reporting companies in the regulatory analysis in Section VI below. To minimize those costs while ensuring that the database be highly useful, and also recognizing that this requirement is not based on when a reporting company knows or has reason to know that information in a prior report has changed, FinCEN proposes allowing 30 days for such filings, as opposed to the 14 calendar days provided for the correction of inaccurate reports. FinCEN believes the 30 day timeframe is sufficient time for a reporting company to identify and report updates to the information previously submitted to FinCEN. FinCEN recognizes that several commenters recommended a 180-day or 1-year period to allow updates of reports, and some suggested that FinCEN only use a shorter period for changes in beneficial owners while retaining a longer period for changes in the information reported about a particular beneficial owner. FinCEN selected a 30-calendar-day deadline rather than a longer deadline to update reports in an effort to consider both the burden on reporting companies and the desire of both law enforcement and financial institutions to have a database that is as up-to-date as possible.

The CTA further requires Treasury to conduct a review, in consultation with the Attorney General and the Secretary of Homeland Security, to evaluate the timing of updates to reports against the backdrop of benefits to law enforcement and burdens to filers.[154] FinCEN thus solicits comments on the burdens that the requirement to correct inaccurate information within 14 days and to update changed information within 30 days would impose on reporting companies, on the degree to which the accuracy and usefulness of the database depend upon prompt updates, and on any other relevant topics regarding the proposed rule's approach to changes or updates to a reporting company's reportable information.

Proposed 31 CFR 1010.380(a)(2)(i) provides that if a reporting company becomes exempt after filing an initial report, this change will be deemed a change requiring an updated report. The CTA does not expressly require a reporting company to file a report indicating that it has become exempt. Nevertheless, FinCEN believes the authority to require such a report is implicit in the CTA. As explained above, the express requirement in 31 U.S.C. 5336(b)(2)(A) to identify beneficial owners and applicants for each reporting company implies a requirement to identify the associated company. It likewise implies a requirement that the company identify itself *as a reporting company.* This implied representation that a company reporting its beneficial owners is in fact a reporting company is therefore among the information that 31 U.S.C. 5336(b)(2)(A) requires to be reported, albeit implicitly. And when there is a change with respect to any such information, 31 U.S.C. 5336(b)(1)(D) requires a report that updates the information relating to the change. FinCEN thus believes that it is consistent with the CTA to require a reporting company to file a report indicating that it has become exempt. Having notice that an entity that was a reporting company subsequently became eligible for an exemption to the definition of a ''reporting company'' will help FinCEN preserve enforcement resources by allowing it to focus on reporting companies that failed to report, rather than on entities that had previously filed reports but that became exempt from the requirement.

Proposed 31 CFR 1010.380(a)(2)(ii) provides that if an individual is a beneficial owner of a reporting company because the individual owns at least 25 percent of the ownership interests of the reporting company, and such beneficial owner dies, a change with respect to the required information will be deemed to occur when the estate of a deceased beneficial owner is settled. This proposed rule is intended to clarify that a reporting company is not required to file an updated report to notify FinCEN of the death of a beneficial owner. However, when the estate of a deceased beneficial owner is settled either through the operation of the intestacy laws of a jurisdiction within the United States or a testamentary deposition, the reporting company is required to file an updated report removing the deceased former beneficial owner and, to the extent appropriate, identifying any new beneficial owners. Moreover, the other provisions of proposed 31 CFR 1010.380(b)(1) and (d) would still apply—namely, that the reporting company would be required to report any beneficial owner who meets the substantial control or ownership components of the proposed rule as a result of another beneficial owner's death. This proposed rule is intended promote efficiency and limit the burden on reporting companies by reducing the number of updates that a reporting company must file in the event of the death of a beneficial owner.

As noted above, FinCEN is still developing reporting protocols and relevant forms, and is not proposing a final format or mechanism of reporting at this time. FinCEN will prescribe the forms and instructions for filing the required reports, consistent with the final rules. Reporting companies will not have to submit their own letters to report information to FinCEN.

[154] *See* 31 U.S.C. 5336(b)(1)(E).

F. Reporting Violations

The provision at 31 U.S.C. 5336(h)(1) makes it unlawful for any person to ''willfully provide, or attempt to provide, false or fraudulent beneficial ownership information . . . to FinCEN'' or to ''willfully fail to report complete or updated beneficial ownership information to FinCEN.'' The CTA further provides for civil and criminal penalties for any person violating that obligation.[155] Such person shall be liable for a civil penalty of up to $500 for each day a violation continues or has not been remedied, and may be fined up to $10,000 and imprisoned for up to two years, or both, for a criminal violation.[156]

Proposed 31 CFR 1010.380(g) adopts the language of 31 U.S.C. 5336(h)(1) and clarifies four potential ambiguities. First, the proposed regulations clarify that the term ''person'' includes any individual, reporting company, or other entity. Second, the proposed regulations clarify that the term ''beneficial ownership information'' includes any information provided to FinCEN under this section. Third, the proposed regulations clarify that a person ''provides or attempts to provide beneficial ownership information to FinCEN,'' within the meaning of section 5336(h)(1), if such person does so directly or indirectly, including by providing such information to another person for purposes of a report or application under section. While only reporting companies are directly required to file reports or applications with FinCEN, individual beneficial owners and company applicants may provide information about themselves to reporting companies in order for the reporting companies to comply with their obligations under the CTA. The accuracy of the database may therefore depend on the accuracy of the information supplied by individuals as well as reporting companies, making it essential that such individuals be liable if they willfully provide false or fraudulent information to be filed with FinCEN by a reporting company.

Finally, the proposed regulations clarify that a person ''fails to report'' complete or updated beneficial ownership information to FinCEN, within the meaning of section 5336(h)(1), if such person directs or controls another person with respect to any such failure to report, or is in substantial control of a reporting company when it fails to report. While the CTA requires reporting companies to file reports and prohibits failures to report, it does not appear to specify who may be liable if required information is not reported. Because section 5336(h)(1) makes it unlawful for ''*any* person'' to fail to report, and not just a reporting company, this obligation may be interpreted as applying to responsible individuals in addition to the companies themselves. To the extent an individual willfully directs a company not to report or willfully fails to report while in substantial control of a reporting company, potential penalties against such individuals may be necessary to ensure that companies comply with their obligations. This is essential to achieving the CTA's primary objective of preventing malign actors from using legal entities to conceal their ownership and activities. Malign actors who form entities and fail to report required beneficial ownership information may not be deterred by penalties applicable only to such entities. Absent individual liability, malign actors might seek to create new entities to replace old ones whenever an entity is subject to liability, or might otherwise attempt to use the corporate form to insulate themselves from the consequences of their willful conduct.

One commenter suggested exploring the idea of the termination of entities that willfully refuse to file. However, the commenter did not identify what authority under the CTA would permit FinCEN to take such action. FinCEN also notes that several commenters expressed a desire for FinCEN to take a conservative approach to enforcement of the statute, at least initially, for instance by being clear that FinCEN will not impose fines except in the case of other illegal activity or that FinCEN will take a very flexible compliance approach during the early stages of implementation. FinCEN will consider these comments in the exercise of its enforcement discretion and welcomes additional comments on this subject.

G. Definitions

As previously noted, many of the terms for this proposed rule are defined in 31 U.S.C. 5336. With the exceptions of the definitions discussed separately above and below, FinCEN has followed those meanings as set out by Congress, with some minor clarifications.

Under proposed 31 CFR 1010.380(f)(1), the term ''employee'' would have the meaning given it in 26 CFR 54.4980H–1(a)(15). The CTA does not expressly define the term ''employee,'' but the proposed definition is established and familiar given its use in the Affordable Care Act.[157] Using the definition here promotes regulatory consistency.

Proposed 31 CFR 1010.380(f)(2) would retain the statutory definition and define ''FinCEN identifier'' as the unique identifying number assigned by FinCEN to a legal entity or individual under this section.

Proposed 31 CFR 1010.380(f)(3) would define ''foreign person'' as a person who is not a United States person.

Proposed 31 CFR 1010.380(f)(4) would define ''Indian Tribe'' as any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe as set forth in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5130).

Under proposed 31 CFR 1010.380(f)(5), an individual is lawfully admitted for permanent residence if such individual has been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws and such status not having changed as set forth in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)).

Proposed 31 CFR 1010.380(f)(6) would define ''operating presence at a physical office within the United States'' to mean that an entity regularly conducts its business at a physical location in the United States that the entity owns or leases, that is not the place of residence of any individual, and that is physically distinct from the place of business of any other unaffiliated entity.

Proposed 31 CFR 1010.380(f)(7) would define a ''pooled investment vehicle'' as: (i) Any investment company, as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)); or (ii) any company that would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of that Act (15 U.S.C. 80a-3(c)); *and* is identified by its legal name by the applicable investment adviser in the Form ADV (or successor form) filed with the U.S. Securities and Exchange Commission.

Proposed 31 CFR 1010.380(f)(8) would define ''senior officer'' to mean any individual holding the position or exercising the authority of a president, secretary, treasurer, chief financial officer, general counsel, chief executive officer, chief operating officer, or any

[155] 31 U.S.C. 5336(h)(3)(A).

[156] *Id.*

[157] *See* 26 U.S.C. 4980H.

other officer, regardless of official title, who performs a similar function.

As noted previously, proposed 31 CFR 1010.380(f)(9) would define ''state'' as any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands, and any other commonwealth, territory, or possession of the United States.

Proposed 31 CFR 1010.380(f)(10) would define the term ''United States person'' as having the meaning given the term in section 7701(a) of the Internal Revenue Code of 1986.

H. Effective Date

The CTA authorizes FinCEN to determine the effective date of the BOI reporting rule. FinCEN does not propose an effective date in this proposed regulation, but seeks views on the timing of the effective date and any potential factors to be considered. FinCEN is committed to identifying the soonest possible effective date after publication of the final rule. FinCEN recognizes that the collection of beneficial ownership information is critical to protecting U.S. national security and other interests and will advance efforts to counter money laundering, terrorist financing, and other illicit activity. It will also bring the United States into compliance with international AML/CFT standards and support U.S. leadership in combatting corruption and other illicit finance. A timely effective date will help to achieve national security and law enforcement objectives and support Congress' goals in enacting the CTA.

FinCEN also notes that certain practical steps must be completed prior to the effective date and the initiation of the collection of information, and it is undertaking significant work towards achieving a timely effective date. These steps include the design and build of a new IT system—the Beneficial Ownership Secure System, or BOSS—to collect and provide access to BOI. Upon the CTA's enactment, FinCEN began a process for BOSS program initiation and acquisition planning that will lead to the development of a detailed planning and implementation document. Once greater progress is made towards the final reporting rule and a parallel rulemaking effort relating to access to and disclosure of BOI, which will provide concrete guidance on the design and build of the BOSS, FinCEN will move expeditiously to the execution phase of the project, which will include several technology projects that will be executed in parallel.

The effective date for the final reporting rule will also turn on several additional factors, such as: (1) How long reporting companies, and small businesses in particular, need to comply with the new rules; (2) the time needed for secretaries of state and Tribal authorities to understand the new requirements and to update their websites and other documentation to notify reporting companies of their obligations under the CTA; and (3) the anticipated timeline for revising the CDD Rule, which is triggered by the effective date of the final reporting rule. Secretaries of state anticipate that they will need to field a high volume of questions and devote significant resources to addressing reporting companies' concerns, even with a delayed effective date that provides sufficient time to educate reporting companies about their responsibilities, distribute guidance, and ensure that reporting mechanisms are fully functional and user-friendly. Absent a coordinated effort with state- and Tribe-level authorities, a reporting requirement could create confusion and unintended liability for businesses. FinCEN intends to conduct ongoing outreach with stakeholders, including secretaries of state and Indian Tribes, trade groups, and others, to ensure coordinated efforts to provide notice and sufficient guidance to all potential reporting companies. However, FinCEN welcomes comments on how long other stakeholders such as secretaries of state and local authorities will need to provide notice of and guidance on the BOI reporting requirements to reporting companies.

V. Request for Comment

FinCEN continues in this NPRM to seek comment on how best to implement the reporting requirements of the CTA, and responsive comments can now focus on the proposed reporting rule that FinCEN has developed. FinCEN seeks comment from all parts of the public and Federal Government, with respect to the proposed rule as a whole and specific provisions discussed above.

FinCEN invites comment on any and all aspects of the proposed rule, and specifically seeks comments on the following questions:

Understanding the Rule

1. How can the organization of the rule text be improved to make it easier to understand and implement?

2. How can the language of the rule text be simplified or streamlined to make it easier to understand and implement?

Reporting Requirement

3. In general, is the description of the information FinCEN is proposing to require reporting companies to report about a beneficial owner and company applicant sufficiently clear? If not, what additional clarification should FinCEN provide? Are there other categories of information FinCEN should collect about beneficial owners and company applicants, taking into consideration the statutory language of the CTA? Is there additional information that would be useful for FinCEN to collect, but which would require further authorization by Congress?

4. Is it clear what the requirement to report a beneficial owner's residential address ''for tax residency purposes'' means? If not, how could the regulatory language be clarified? Are there cases where a respondent could have difficulty providing tax residency information, or where other residence information would be more generally valuable than tax residency information?

5. In general, is the description of the information FinCEN is proposing to require reporting companies to report about themselves sufficiently clear? If not, what additional clarification should FinCEN provide? Is there additional information about a reporting company that FinCEN should collect to ensure that it can identify and distinguish between different reporting companies, and to allow for effective searching of the beneficial ownership database?

6. What value can FinCEN reasonably expect from its proposed voluntary mechanism for collecting TINs of beneficial owners and company applicants? How can such information enhance the overall value of the information collected under this reporting requirement? Are there potentially negative consequences to a voluntary collection of this data? For instance, do businesses have particular concerns about providing or not providing such information?

7. Does FinCEN have the authority under the CTA to require that a person filing a report or application with FinCEN pursuant to proposed 31 CFR 1010.380(b) certify that the report is accurate and complete?

8. In general, is the term ''business street address'' sufficiently clear on its face, or does it require further clarification to avoid the reporting of P.O. boxes or the addresses of formation agents, agents for the service of process, and other third parties as a reporting company's ''business street address''? Would it improve the clarity of the reporting requirement to substitute the

term ''street address of the reporting company's principal place of business''?

9. Should the reporting requirement for foreign reporting companies be more specific with respect to the reporting of a business address? If so, should it specify provision of a U.S. business street address if possible, a principal place of business (even if outside the United States), or some other alternative?

10. Is the process by which FinCEN is providing notice to the public about the specific reporting requirements of this regulation sufficiently clear and deliberate to give interested parties adequate notice, opportunity to comment, and opportunity to prepare to comply with the requirements?

FinCEN Identifier

11. Are the proposed requirements for obtaining a FinCEN identifier from FinCEN and using a FinCEN identifier sufficiently clear?

12. If an individual beneficial owner has obtained a FinCEN identifier and provided its FinCEN identifier to a reporting company, should a reporting company be required, rather than merely permitted, to use the FinCEN identifier in lieu of the four pieces of identification information (*i.e.,* name, date of birth, street address, and unique identification number) the reporting company must report to FinCEN for the individual beneficial owner, as is proposed in the rule?

Special Reporting Rules

13. Proposed 31 CFR 1010.380(b)(3) sets out special reporting rules. Two of these are mandated by the CTA—the use of the FinCEN identifier, and the special rule for foreign pooled investment vehicles. FinCEN created the third and fourth—the special rule for minor children and deceased company applicants—to clarify the core reporting requirements and ensure that they are workable considering the unanticipated consequences of certain statutory language. Are any other special reporting rules necessary to make the core reporting requirements, or the rule as a whole, work better? Please explain the necessity and propose regulatory language. In doing so, FinCEN encourages commenters to explain how their proposals are consistent with the text of the CTA.

14. As noted in the previous question, proposed 31 CFR 1010.380(b)(3)(iv) contains a special reporting rule applicable to situations in which the company applicant for a reporting company is deceased. Is it sufficient for FinCEN to permit a reporting company to report that fact, together with any information that the reporting company actually knows about its company applicant, or should FinCEN require other information?

Beneficial Owners

15. Proposed 31 CFR 1010.380(d) interprets the CTA as providing for a relatively broad approach to the definition of beneficial ownership. How burdensome will this approach be for reporting companies? How useful will it be for national security, intelligence, and law enforcement activities? In addition to responding generally to this question, please provide specific considerations and data related to costs and burdens.

16. One component of the proposed definition of beneficial owner is an individual who ''exercises substantial control over the reporting company.'' Is the definition of ''substantial control'' sufficiently clear for reporting companies to be able to understand and use it? In addition to responding generally to this question, please consider the following specific questions:

i. Are there any indicators that are not sufficiently clear? What additional clarification could make it easier to consider these indicators when determining whether an individual exercises substantial control? Please propose regulatory language.

ii. Does the catch-all provision (''any other form of substantial control over the reporting company'') enable a reporting company to identify the individual(s) in substantial control of the reporting company? What would the impact on be on the usefulness, accuracy, or completeness of information in the database if the definition of ''substantial control'' lacked such a catch-all provision?

iii. Are there any additional indicators of substantial control that FinCEN should consider expressly including in the regulatory definition?

17. The statutory definition of beneficial owner also includes an individual ''owns or controls at least 25 percent of the ownership interests.'' Is the approach to first define ''ownership interests'' useful? In addition to responding generally to this question, please consider the following specific questions:

i. Is the proposed definition of ''ownership interests'' sufficiently clear for reporting companies to be able to understand and use it? What additional clarification could make it more useful? Please propose explanatory regulatory language.

ii. Are there any aspects of the proposed rule on the determination of whether an individual owns or controls 25 percent of the ownership interests of a reporting company that are not sufficiently clear? What additional clarification could make it easier to calculate whether one owns or controls 25 percent of the ownership interests? Please propose explanatory regulatory language.

18. Are there any aspects of the exceptions that are not sufficiently clear? What additional clarification could make it easier to determine whether an individual is excluded from the definition of beneficial owner?

19. FinCEN expects that the definition of beneficial owner is broad enough that every reporting company will have at least one beneficial owner to report. Is that expectation reasonable, and if not, what mechanism should FinCEN establish or what changes should FinCEN make to the proposed rule to make certain that every reporting company reports at least one beneficial owner?

Company Applicant

20. Is the proposed definition of company applicant sufficiently clear in light of current law and current company filing and registration practices, or should FinCEN expand on this definition? If so how?

Reporting Company

21. Is the proposed definition of ''reporting company'' sufficiently clearly to avoid confusion about whether an entity does or does not meet this requirement? If not, what additional clarifications could make it easier to determine whether this requirement applies to a particular entity?

22. FinCEN's proposed definitions of domestic and foreign reporting company reference ''the secretary of state or a similar office'' that is involved in filings that create entities or register entities, respectively. Does this distinction result in different ''similar offices'' being applicable for domestic and foreign reporting companies?

23. The proposed rule defines ''reporting company'' to include all domestic corporations and limited liability companies based on FinCEN's understanding that all corporations and limited liability companies are created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian Tribe. Are there any states or Indian Tribes where corporations or limited liability companies are not created by a filing of a document with a secretary of state or a similar office?

24. In general, FinCEN believes the phrase ''other similar entity created by

the filing of a document with a secretary of state or similar office'' in the context of the definition of ''domestic reporting company'' would likely include limited liability partnerships, limited liability limited partnerships, business trusts (a/k/a statutory trusts or Massachusetts trusts), and most limited partnerships, because such entities appear typically to be created by a filing with a secretary of state or similar office. However, FinCEN understands that state and Tribal laws may differ on whether certain other types of legal or business forms—such as general partnerships, other types of trusts, and sole proprietorships—are created by a filing. Are there any states or Indian Tribes where general partnerships, other types of trusts, or sole proprietorships are created by the filing of a document with a secretary of state or similar office?

25. FinCEN's proposed definition of foreign reporting company requires that the foreign entity is ''registered to do business'' in any state or Tribal jurisdiction. FinCEN understands that this threshold may be interpreted differently across U.S. jurisdictions. What activities would require foreign (non-U.S.) companies to register in a U.S. jurisdiction before they may conduct business in that jurisdiction, and what discrepancies exist in these standards across the jurisdictions?

26. In general, are the proposed exemptions from the definition of ''reporting company'' sufficiently clear, or are there aspects of any of the defined exemptions that FinCEN should clarify, similar to the exposition of the inactive business exemption? If so, how?

27. Is the term ''full-time employee'' explained sufficiently clearly in the large operating company exemption?

28. Is the term ''operating presence at a physical office within the United States,'' which is used in the large company exemption and other exemptions, defined sufficiently clearly? Is it appropriate that the term is defined to exclude a physical location that is also an individual's residence? If not, why not? Should the term include any other limitations or exclusions?

29. Are there any exemptions from the definition of ''reporting company'' that should be defined more broadly or more narrowly? If so, which ones, why, and how?

30. In addition to the proposed exemptions from the definition of ''reporting company,'' are there any other categories of entities that are not currently subject to an exemption from the definition of ''reporting company'' that FinCEN should consider for exemption and, if so, why?

Other Definitions

31. While Congress defined many of the CTA's key terms within the statute, some—like ''public utility''—were left to FinCEN to interpret. If any of FinCEN's proposed definitions for these currently undefined terms warrant revision, which ones, why, and how?

32. Are there any undefined terms in the proposed rule for which FinCEN did not provide definitions, but should? If so, which terms, why should FinCEN define them, and how?

Timing of Reports and Updates

33. FinCEN believes the proposed timeframes for reporting, correcting, and updating information to be reported to FinCEN are within FinCEN's legal authority to propose, and are appropriate to ensure that the BOI collected is current, useful, and accurate without making the reporting requirement unduly burdensome. Is there any respect in which these timeframes should be altered because alteration is necessary to conform with the CTA or other law? Should any timeframes be altered because gains in ensuring information is current and accurate outweighs the burden imposed? Should any timeframes be altered because the burden imposed outweighs the gains in ensuring information is current and accurate?

i. In particular, does the proposed timeline of one year for existing reporting companies to file an initial report impose undue burdens on reporting companies, secretaries of state, or other stakeholders? Is a longer timeline necessary? If so, why?

ii. By contrast, is a shorter timeline necessary? If so, why?

34. FinCEN has proposed that a reporting company that ceases to be entitled to an exemption from the definition of reporting company (under one or more of proposed exemptions in 31 CFR 1010.380(c)(2)(i) through (xxiii)), report to FinCEN within 30 days after it no longer meets those criteria. Is it appropriate that all reporting company exemptions be handled in the same way? If not, explain how and why different exemptions should be handled differently.

35. The proposed rule would require that a reporting company submit a corrected report to FinCEN not later than 14 days after the date that the reporting company knows or has reason to know that any information in a report submitted to FinCEN under this section was not correct when filed and remains incorrect. The rule also explains how the statutory safe harbor of the CTA for incorrect information will be applied. Are these proposed provisions an appropriate implementation of the requirements of the CTA? If not, why not?

36. Should FinCEN require reporting companies that have terminated their legal existence report this to FinCEN? If terminated entities are not required to report their termination, how should FinCEN be made aware of their termination, to properly administer its record retention obligations?

37. The proposed rule would require a reporting company that subsequently meets the criteria for any exemption under 31 CFR 1010.380(c)(2)(i) through (xxiii) after the filing of an initial report to file an updated report within 30 days. Is 30 days sufficient to enable such legal entities to file such reports? Is it too long?

38. Is the burden that a 30-day update requirement would impose on reporting companies justified by the degree to which the accuracy and usefulness of the database depend upon prompt updates? Are there other factors that FinCEN should consider in reviewing update timelines in consultation with the Departments of Justice and Homeland Security, as mandated by the CTA?

Reporting Violations

39. Is FinCEN's articulation of what constitutes a reporting violation under the CTA sufficiently clear?

Effective Date of the Rule

40. How much time is needed before the rule is effective to enable jurisdictions within the United States, reporting companies, and other stakeholders to incorporate any necessary changes into their systems and other procedures in tandem with other routine updates, and thereby enable reporting companies to reduce implementing costs? Should FinCEN consider a long effective date, and if so, why? Should FinCEN consider a shorter effective date, and if so, why?

Please note that questions for comment specific to the Regulatory Analysis section that follows may be found at the end of that section.

VI. Regulatory Analysis

FinCEN has analyzed the proposed rule as required under Executive Orders 12866 and 13563, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act. FinCEN's analysis assumed the baseline scenario is the current regulatory framework, which has no beneficial ownership disclosure requirements to FinCEN. Thus, any estimated costs and benefits as a result

of the proposal are new relative to maintaining the current framework. Pursuant to the Regulatory Flexibility Act, FinCEN's analysis concluded that the proposed rule would have a significant economic impact on a substantial number of small entities. Furthermore, pursuant to the Unfunded Mandates Reform Act, FinCEN concluded that the proposed rule, if implemented, would result in an expenditure of $158 million or more annually by state, local, and Tribal governments or by the private sector.[158]

A. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This proposed rule has been designated a ''significant regulatory action'' and economically significant under section 3(f) of Executive Order 12866. Accordingly, the proposed rule has been reviewed by the Office of Management and Budget (OMB).

This proposed rule is necessary to comply with and implement the CTA. As described in the preamble, this proposed rule is consistent with the CTA's statutory mandate that the Secretary of the Treasury by regulation prescribe procedures and standards governing reports and the FinCEN identifier described in the CTA. The CTA states that the regulations shall be promulgated to the extent practicable: (1) To minimize burdens on reporting companies associated with the collection of BOI, including by eliminating duplicative requirements; and (2) to ensure that the BOI reported to FinCEN is accurate, complete, and highly useful. As also described throughout the preamble, FinCEN has carefully weighed these considerations while developing the proposed rule. The implementation of the CTA would promote the President's objective to combat illicit activity in the United States, including money laundering related to the financing of terrorism, corruption, proliferation, and other crimes.[159] The proposed rule avoids undue interference with state, local, and Tribal governments. While such governments are important partners and consultative parties in the implementation of the CTA, as noted in the law itself, the proposed rule minimizes the interference with these governments (see alternative considered below).

i. Costs

The primary cost to the public associated with the proposed rule results from multiple information collection requirements. Pursuant to the proposed rule, reporting companies would be required to submit to FinCEN an initial report that contains certain identifying information for the reporting company, each identified beneficial owner, and each company applicant, as well as copies of acceptable identification documents for each identified beneficial owner and each company applicant. Reporting companies would also be required to update these reports. Individuals requesting a FinCEN identifier would be required to submit initial requests to FinCEN and update the identifying information associated with their FinCEN identifier.[160] Finally, foreign pooled investment vehicles would be required to submit reports to FinCEN identifying a beneficial owner and update such information. A detailed analysis of the potential costs associated with these proposed information collection requirements is included in the Paperwork Reduction Act section below (see Tables 6 and 7 below). The net present value of the total cost over a 10-year time horizon at a seven percent discount rate for these information collections is approximately $3.4 billion. At a three percent discount rate, the net present value is approximately $3.98 billion as the aggregate cost estimate of the proposed rule. FinCEN estimates that it would cost each of the 25 million domestic and foreign reporting companies that are estimated to currently exist approximately $45 apiece to prepare and submit an initial report in the first year that the BOI reporting requirements are in effect. In comparison, the state formation fee for creating a limited liability company could cost between $40 and $500, depending on the state.[161]

Administering the regulation would also entail potential costs to FinCEN. Such costs include information technology (IT) development and ongoing annual maintenance, as well as processing electronic submissions of BOI data.[162] FinCEN estimates that initial IT development costs would be $33 million[163] with an additional $31 million per year required to maintain the new BOI systems and the underlying FinCEN technology being leveraged to support the new capabilities.

FinCEN may incur additional costs, besides those estimated above, while promoting compliance with the BOI reporting requirements, potentially including providing training on the requirements, publishing documents such as guidance and frequently asked questions (FAQs), and conducting outreach to and answering inquiries from the public. FinCEN does not currently have specific estimates for these costs, but estimates that there would be relatively modest personnel costs of less than $10 million associated with the reporting rule in both Fiscal Year 2022 and Fiscal Year 2023, with continuing recurring costs of roughly the same magnitude for ongoing outreach and enforcement thereafter.

FinCEN and other government agencies may also incur costs in enforcing compliance with the regulation. FinCEN does not currently

[158] The Unfunded Mandates Reform Act requires an assessment of mandates with an annual expenditures of $100 million or more, adjusted for inflation. The gross domestic product (GDP) deflator in 1995, the date of the Unfunded Mandates Reform Act, is $71.868, while in 2020 it was $113.625. Thus, the inflation adjusted estimate for $100 million is $113.625/71.868 × 100 = $158 million.

[159] Fighting corruption was identified as a Presidential priority in a Presidential Memorandum published on June 3, 2021. The memorandum specifically mentions bringing transparency to the United States and global financial systems. The White House, *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest,* (June 3, 2021), available at *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/.*

[160] FinCEN is not separately calculating a cost estimate for entities requesting a FinCEN identifier, but rather FinCEN has included those costs as a part of the costs of submitting the BOI reports.

[161] The fee for Articles of Organization of a domestic limited liability company in Kentucky is $40. Kentucky Secretary of State, *Business Filings Fees,* available at *https://sos.ky.gov/bus/business-filings/Pages/Fees.aspx* The fee for a Certificate of Registration for a limited liability company in Massachusetts is $500. Massachusetts Secretary of State, *Corporations Division Filing Fees,* available at *https://www.sec.state.ma.us/cor/corfees.htm.* FinCEN also identified a website that provides the fees for all states, as a point of reference. *See* IncFile, *Review State Filing Fees & LLC Costs,* available at *https://www.incfile.com/state-filing-fees.*

[162] FinCEN would also incur costs in administering access to BOI, but those costs will be considered in detail in a separate notice for the BOI access regulations.

[163] FinCEN's cost estimates will continue to evolve as more information about systems requirements and development costs become known. For example, the requirement to include scanned images of acceptable identification documents will increase the cost of system development and implementation.

have estimates for these costs, and they are not included in the estimates above. FinCEN plans to identify non-compliance with BOI reporting requirements [164] by leveraging a variety of data sources, both internal and external. Because the external data sources may include third parties, FinCEN requests comment on what external data sources would be appropriate for FinCEN to leverage in identifying non-compliance with the BOI reporting requirements and what potential costs may be incurred by such third parties, particularly state, local, and Tribal authorities and financial institutions. If the external data sources include third party commercial data, FinCEN assesses that the cost associated with accessing these databases would be modest and incremental, given that FinCEN regularly maintains access to such databases but may need to request additional licenses for employees. After identifying non-compliance, FinCEN may initiate outreach to the entity, work with law enforcement to investigate non-compliance, or initiate an enforcement action. FinCEN's enforcement of the BOI reporting requirements would also involve coordination with law enforcement agencies. These law enforcement agencies may also incur costs (time and resources) while conducting investigations into non-compliance. FinCEN anticipates that costs to law enforcement agencies that have access to the BOI data would be assessed in the BOI access regulations, and therefore is not estimating them here.

The proposed rule does not impose direct costs on state, local, and Tribal governments. However, state, local, and Tribal governments would incur indirect costs in connection with the implementation of the proposed rule. For example, such governments would likely be the initial point of outreach for some companies with questions on how to comply with the reporting requirement. FinCEN anticipates taking measures to minimize the costs associated with such questions. These measures would include providing clear FinCEN guidance directly to the public on BOI reporting requirements, which may help to diminish the number of questions from the public. FinCEN would also provide guidance materials to state, local, and Tribal governments that they could use and distribute in response to questions, which would minimize those governments' need to develop their own guidance materials at their own cost. FinCEN received comments to the ANPRM which discussed such possible costs; they are summarized in the Unfunded Mandates Reform Act section below. FinCEN encourages additional comments that discuss, and if possible estimate, the costs to state, local and Tribal governments under the proposed rule.

ii. Benefits

There are several potential benefits associated with this proposed rule. These benefits are interrelated and likely include improved and more efficient investigations by law enforcement, U.S. financial institutions, and other authorized users, which in turn may strengthen national security, enhance financial system transparency and integrity, and align with international financial standards.

The U.S. 2018 National Money Laundering Risk Assessment (NMLRA) estimates that domestic financial crime, excluding tax evasion, generates approximately $300 billion of proceeds for potential laundering.[165] Criminal actors may use entities to send or receive funds, or otherwise assist in the money laundering process to legitimize the illegal funds. For example, an entity may act as a shell company—which usually has no employees or operations—and hold assets to obscure the identity of the true owner, or act as a front company which generates legitimate business proceeds to commingle with illicit earnings. Trade-based money laundering, for example, often leverages such front companies.[166] FinCEN is not able to provide estimates of the amount of proceeds that flow through money laundering schemes that use entities given lack of data,[167] but entities are frequently used in money laundering schemes and provide a layer of anonymity to the natural persons involved in such transactions.[168]

Identifying the owners of these entities is a crucial step to all parties that investigate money laundering. The NMLRA notes that, according to federal law enforcement agencies, misuse of entities poses a significant money laundering risk, and that law enforcement efforts to uncover the true owners of companies can be resource-intensive, especially when those ownership trails lead overseas or involve numerous layers of ownership.[169] However, there is currently no systematic way to obtain information on the beneficial owners of entities in the United States.

The proposed rule is expected to help address the lack of BOI critical for money laundering investigations. Improved visibility into the identities of the individuals who own or control entities may enhance law enforcement's ability to investigate, prosecute, and disrupt the financing of international terrorism, other transnational security threats, and other types of domestic and transnational financial crime, when entities are used to engage in such activities. Other authorized users in the national security and intelligence fields would likewise be expected to benefit from the use of this data. The BOI database may also increase investigative efficiency and thus decrease the cost to law enforcement of investigations that require or benefit from identifying the owners of entities. These anticipated benefits are supported by ANPRM comments from those that represent the law enforcement community, some of whom expressed the opinion that the availability of BOI would provide law enforcement at every level with an important tool to investigate the misuse of shell companies and other entities used for criminal activity. To the extent these investigations may become more effective, money laundering in the United States may become more

[164] This would include identifying potential non-compliance with the proposed rule through reporting of false information or through failing to file an initial or updated report when required.

[165] U.S. Department of the Treasury, *National Money Laundering Risk Assessment* (2018), p. 2, available at *https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf#:~:text=The%202018%20National%20Money%20Laundering%20Risk%20Assessment%282018%20NMLRA%29,participated%20in%20the%20development%20of%20the%20risk%20assessment.*

[166] *Id.*, p. 29. Trade-based money laundering involves a cycle of money brokers and exporters of goods to disguise and move illicit funds. The sale of the goods effectively launders the money and provides payment to illicit actors in local currency. Merchants who receive payment for their goods may be unaware they are participating in a money laundering scheme, but some willingly accept such funds and are complicit. *Id.*, p. 3.

[167] For example, the Government Accountability Office's 2020 report on trade-based money laundering noted that specific estimates of the amount of such activity globally are unavailable, but it is likely one of the largest forms of money laundering. Government Accountability Office, *Trade-based Money Laundering* (April 2020), p. 19, available at *https://www.gao.gov/assets/gao-20-333.pdf.*

[168] Please see the discussion of this topic in the Background section of the preamble, which describes in greater detail the money laundering concerns with legal entities and disguised beneficial owners, as well as the Department of the Treasury's efforts to address the lack of transparency in legal entity ownership structures.

[169] U.S. Department of the Treasury, *National Money Laundering Risk Assessment* (2018), p. 4, available at *https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf#:~:text=The%202018%20National%20Money%20Laundering%20Risk%20Assessment%282018%20NMLRA%29,participated%20in%20the%20development%20of%20the%20risk%20assessment.*

difficult. Making any method of money laundering more difficult in the U.S. would improve the national security of the United States by increasing barriers for illicit actors to covertly enter and act within the U.S. financial system.[170] This may serve to deter the use of U.S. entities for money laundering purposes.

Second, since the collection of BOI would shed light upon the beneficial owners of U.S. entities, which may also provide insight into overall ownership structures, the proposed rule may promote a more transparent, and consequently more secure, economy. Financial institutions with authorized access to such data would have key data points—including potentially additional beneficial owners, given the differences between the definition in the proposed rule and the CDD Rule—available for their customer due diligence processes, which may decrease customer due diligence and other compliance burdens.[171] FinCEN also expects increased transparency in ownership structures of entities to increase financial system integrity by reducing the ability of certain actors to hide monies through shell companies and other entities with obscured ownership information. This may discourage inefficient capital allocation designed primarily for non-business reasons, such as paying for professional services to set up and potentially capitalizing intermediate legal entities designed solely to obscure the relationship between a legal entity and its owners. In addition, the IRS could obtain access to BOI for tax administration purposes, which may provide benefits for tax compliance.

Third, the BOI reporting requirements would have the benefit of aligning the United States with international AML/CFT standards, which would bolster support for such standards and strengthen cooperation with our partners, including the sharing of BOI, subject to appropriate protocols consistent with the CTA, in transnational investigations, tax enforcement, and the identification of national and international security threats.

The benefits of the proposed rule are difficult to quantify, but the prior description of these benefits point to their significance. FinCEN's CDD Rule also did not quantify the benefits of collecting BOI, but rather included a breakeven analysis that concluded the CDD Rule would only have to reduce annual real illicit activity by between 0.16 percent (roughly $0.38 billion in 2016, rising to 0.47 billion in 2025) and 0.6 percent (roughly $1.46 billion in 2016, rising to $1.81 billion in 2025) to yield a positive net benefit.[172] While the CDD Rule and proposed BOI rule require submission of BOI under different circumstances and to different parties, the breakeven analysis of the CDD Rule suggests that even a small percentage reduction in money laundering activities as a result of the proposed BOI rule could result in economically significant net benefits. FinCEN does not currently propose a breakeven analysis for the proposed BOI rule herein, as it continues to collect information on potential costs and benefits of the proposed rule through the rulemaking process. FinCEN requests comment on data or methods that may inform estimates of potential benefits in this case.

iii. Alternatives

The proposed rule is statutorily mandated, and therefore FinCEN has very limited ability to implement alternatives. However, FinCEN considered certain significant alternatives that would be available under the statute.

One alternative would be to require reporting companies to submit BOI to FinCEN indirectly, by submitting the information to their jurisdictional authority who would then transmit it to FinCEN. In this case, jurisdictions would need to develop IT that would ultimately transmit data to FinCEN.[173] As a lower bound estimate, if FinCEN assumes that jurisdictions would only incur 10 percent of FinCEN's stated initial IT development costs of approximately $33 million, then each jurisdiction would incur approximately $3.3 million in development costs. As an upper bound estimate, if FinCEN assumes that jurisdictions would incur close to 100 percent of the stated costs, then each of the jurisdictions could incur as much as approximately $33 million for IT development, plus additional ongoing data maintenance costs. At either end of the range, this scenario would impose significant costs on state or local governments.

FinCEN requested comment in the ANPRM on questions regarding the collection of BOI through partnership with state, local, and Tribal governments. In response to the ANPRM, several state authorities commented that they should not be involved in the process of collecting and transmitting BOI to FinCEN. Some states noted that they did not gather or index ownership information, and that states might need to change their statutes, and possibly engage in additional rulemaking to establish a system for collecting BOI and sharing such information with FinCEN. One state noted that the CTA requires FinCEN, not individual states, to collect, store, and protect the information collected, and that there is no obligation in the CTA that a state adopt new legislation in order to aid in the delivery of BOI. Another state that currently collects some ownership information (office, director, and member information for most business entities) stated that reporting this information to FinCEN would ''end up causing more problems than it solves'' because the owner information reported to the state, such as a ''member'' of an LLC, may not be the same individual that would be reported to FinCEN as a beneficial owner under the CTA's requirements. Other states noted technical challenges with providing BOI to FinCEN, such as limitations in sharing images due to file sizes, which would require changes to states' filing systems. One state noted that these types of changes could easily cost a million dollars or more. For all of these reasons, FinCEN decided not to propose an alternative in which reporting companies would submit BOI to their jurisdictional authority. However, FinCEN continues to consider whether there are feasible opportunities to partner with state authorities on the BOI reporting requirement, particularly where states already collect BOI, and FinCEN welcomes comments on this subject.[174]

[170] The CTA states that FinCEN may disclose BOI upon receipt of a request from a federal agency on behalf of a law enforcement agency, prosecutor, or judge of another country, including a foreign central authority or competent authority (or like designation), under prescribed conditions. 31 U.S.C. 5336(c)(2)(B)(ii). Therefore, the sharing of BOI with international partners may also result in more efficient investigations of money laundering on a global scale, and also help U.S. law enforcement understand global money laundering networks that affect the United States.

[171] It is worth noting that the CDD Rule also promotes transparency in ownership structures of legal entities, and thereby strengthens the U.S. economy and national security. However, the CTA's BOI reporting requirement may improve upon these benefits by requiring that BOI be collected earlier in the life cycle of a company, at the time of company formation, rather than when the company opens a bank account. The CTA would also apply to a broader range of entities, since the CDD Rule covers only those institutions subject to financial institution customer due diligence requirements (*e.g.,* those with accounts at such institutions).

[172] 81 FR 29432.

[173] FinCEN further assumes under this alternative analysis that FinCEN would be responsible for aggregating this BOI, consistent with the CTA.

[174] One jurisdiction recommended that FinCEN receive copies of registry databases on a fixed schedule in order to compare the number of FinCEN filers with the numbers from corporate registrars across the country. Another state raised numerous questions about relying on existing state

Finally, as explained in more detail below, FinCEN considered alternatives while shaping the specific reporting requirements of the rule, including: (1) The length of the initial reporting period; and (2) the length of time to file an updated report. These alternatives and their cost differences, as well as FinCEN's rationale for not selecting the alternative, is discussed in the Paperwork Reduction Act section below (see Table 8).

B. Regulatory Flexibility Act

The Regulatory Flexibility Act[175] (RFA) requires an agency either to provide an initial regulatory flexibility analysis (IRFA) with a proposed rule or certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would apply to a substantial number of small entities. FinCEN has attempted to minimize the burden on reporting companies to the greatest extent practicable, but the proposed rule may nevertheless have a significant economic impact on small entities required to disclose beneficial owners. Accordingly, FinCEN has prepared an IRFA. FinCEN welcomes comments on all aspects of the IRFA. A final regulatory flexibility analysis will be conducted after consideration of comments received during the comment period.

i. Statement of the Need for, and Objectives of, the Proposed Rule

The CTA establishes a new federal framework for the reporting, storage, and disclosure of BOI. In enacting the CTA, Congress has stated that this new framework is needed to set a clear federal standard for incorporation practices; protect vital U.S. national security interests; protect interstate and foreign commerce; better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity; and bring the United States into compliance with international AML/CFT standards.[176] Section 6403 of the CTA amends the BSA by adding a new section at 31 U.S.C. 5336 that requires the reporting of BOI at the time of formation or registration of a reporting company, along with protections to ensure that the reported BOI is maintained securely and accessed only by authorized persons for limited uses. The CTA requires the Secretary to promulgate implementing regulations that prescribe procedures and standards governing the reporting and use of such information, to include procedures governing the issuance of FinCEN identifiers for BOI reporting. The CTA requires FinCEN to maintain BOI in a secure, non-public database that is highly useful to national security, intelligence, and law enforcement agencies, as well as federal functional regulators. The proposed rule would require certain entities to report to FinCEN information about the reporting company, its beneficial owners (the individuals who ultimately own or control the reporting companies) and the company applicant of the reporting company, as required by the CTA.

ii. Small Entities Affected by the Proposed Rule

To assess the number of small entities affected by the proposed rule, FinCEN separately considered whether any small businesses, small organizations, or small governmental jurisdictions, as defined by the RFA, would be impacted. FinCEN concludes that small businesses would be substantially impacted by the proposed rule. Each of these three categories is discussed below.

In defining ''small business'', the RFA points to the definition of ''small business concern'' from the Small Business Act.[177] This small business definition is based on size standards (either average annual receipts or number of employees) matched to industries.[178] Under the proposed rule, small businesses would be ''reporting companies'' required to submit BOI reports to FinCEN.[179] There are 23 types of entities that are exempt from submitting BOI reports to FinCEN,[180] but none of these exemptions apply directly to small businesses. In fact, many of the statutory exemptions, such as exemptions for large operating companies and highly regulated businesses, would apply to larger businesses. For example, the large operating companies exemption applies to entities that have more than 20 full-time employees in the United States; more than $5 million in gross receipts or sales from sources inside the United States; and have an operating presence at a physical office in the United States.[181] Using the SBA's 2019 definition of small business across all 1,037 industries (by 6-digit NAICS code), there are only 46 categories of industries whose SBA definition of small would be lower than this statutory exemption of more than 20 million employees and $5 million in gross receipts/sales. And these were predominantly related to agricultural categories. All other SBA definitions of small entity well exceeded the thresholds stated in the statutory exemption for large operating companies. Therefore, FinCEN assumes that all entities estimated to be reporting companies are small, for purposes of this analysis. FinCEN estimates that there are approximately 25 million existing reporting companies and 3 million new reporting companies formed each year.[182] As mentioned

policies and procedures, and noted that doing so would be challenging, but did not directly oppose this type of arrangement.

[175] 5 U.S.C. 601 *et seq.*

[176] CTA, Section 6402(5).

[177] *See* 5 U.S.C. 601(3).

[178] *See* U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes (NAICS)* (August 19, 2019), available at *https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.*

[179] Domestic reporting companies are defined in the proposed rule as corporations, limited liability companies, or other entities that are created by the filing of a document with a secretary of state or similar office under the law of a state or Indian Tribe. Foreign reporting companies are defined in the proposed rule as corporations, limited liability companies, or other entities that are formed under the law of a foreign country and registered to do business in any state or Tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a state or Indian Tribe. Both definitions are consistent with statutory definitions of these terms in the CTA. *See* 31 U.S.C. 5336(a)(11)(A) and proposed 31 CFR 1010.380(c)(1).

[180] FinCEN has proposed including the 23 exemptions that are statutorily mandated. *See* 31 U.S.C. 5336(a)(11)(B) and proposed 31 CFR 1010.380(c)(2).

[181] 31 U.S.C. 5336(a)(11)(xxi), and proposed 31 CFR 1010.380(c)(2)(xxi).

[182] FinCEN estimated these numbers by relying upon the most recent available data, 2018, of the annual report of jurisdictions survey administered by the International Association of Commercial Administrators in which Colorado, Delaware, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, North Carolina, Ohio, Oregon, Texas, Wisconsin, and Wyoming were asked the same series of questions on the number of total existing entities and total new entities in their jurisdictions by entity type. *See* International Association of Commercial Administrators, *Annual Report of Jurisdictions Survey—2018 Results,* (2018), available at *https://www.iaca.org/annual-reports/.* Please note this underlying source does not provide information on the number of small businesses in the aggregate entity counts, or on the revenue or number of employees of the entities in the data. FinCEN used the reported state populations, total existing entities per state, and new entities in a given year per state to calculate per capita ratios of total existing and new entities in a year for each state. FinCEN then calculated a weighted average of the per capita ratio of the 14 states to estimate a weighted per capita average for the entire United States (see Table 1 below). FinCEN then multiplied this estimated weighted average by the current U.S. population to estimate the total number of existing entities and the number of new entities in a year. FinCEN then estimated the number of exempt entities by estimating each of the relevant 23 exempt entity types. Last, FinCEN subtracted the estimated number of exempt entities from its prior estimations. This results in an approximate estimate of 25 million reporting companies currently in existence and 3 million new reporting companies per year. To review this analysis, including all sources and numbers, please see the Paperwork Reduction Act section below.

before, FinCEN assumes for purposes of estimating costs to small businesses that all reporting companies are small businesses. Such a general descriptive statement on the number of small businesses to which the rule would apply is specifically permitted under the RFA, when, as here, greater quantification is not practicable or reliable.[183] FinCEN has made this assumption in part to ensure that its IRFA does not underestimate the economic impact on small businesses. FinCEN solicits comment on whether there is a more precise way to estimate the number of small businesses that will meet the definition of reporting company with exemptions considered.

In defining ''small organization,'' the RFA generally defines it as any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.[184] FinCEN anticipates that the proposed rule would not affect ''small organizations,'' as defined by the RFA because the CTA exempts any organization that is described in section 501(c) of the Internal Revenue Code of 1986 (determined without regard to section 508(a) of such Code) and exempt from tax under section 501(a) of such Code, and because the proposed rule incorporates this exemption.[185] Therefore, any small organization, as defined by the RFA, would not be a reporting company.

In defining ''small governmental jurisdiction[s],'' the RFA generally defines it as governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.[186] FinCEN does not anticipate at this time that the proposed rule would directly affect any ''small governmental jurisdictions,'' as defined by the RFA. The CTA exempts entities that exercise governmental authority on behalf of the United States or any such Indian Tribe, state, or political subdivision from the definition of reporting company, and the proposed rule would incorporate verbatim the CTA's exemption language.[187] Therefore, small governmental jurisdictions would be uniformly exempt from reporting pursuant to the proposed rule. FinCEN is aware that certain small governmental jurisdictions may be among the state and local authorities that incur costs as they address questions on the BOI reporting rule. FinCEN does not have adequate information to estimate these possible burdens. As noted above, FinCEN would take all possible measures to minimize the costs associated with questions from the public directed at state and local government agencies and offices. In addition, FinCEN specifically solicits comments that discuss, and if possible estimate, what those costs may be, what types of small governmental jurisdictions could expect to face such costs, whether small governmental jurisdictions may face costs that are different in kind from those which larger jurisdictions may face, and how FinCEN could mitigate the burden on small governmental jurisdictions.

iii. Compliance Requirements

FinCEN recognizes that the proposed rule would impose costs on small entities to comply with the BOI reporting requirements. These costs could include: (1) Gathering relevant BOI for both initial and updated BOI reports; (2) hiring or utilizing compliance, legal, or other resources for expert advice on filing requirements; and (3) training of personnel to file the report. Possible costs of the reporting requirement are also discussed in the ANPRM comments from representatives of the small business community. One comment noted that optimizing the implementation process of the proposed rule is the most important step that FinCEN can take to reduce compliance costs for small business owners. This commenter stated that the costs to businesses of reporting the name, date of birth, address, and government ID number of a company's owner are ''incredibly low,'' citing a UK Government study on beneficial ownership reporting[188] and assuming that the United States will have a similar experience. However, the commenter stated that making the filing process modern, efficient, and integrated with state and Tribal incorporation practices would ensure a negligible compliance cost for businesses. The comment emphasized that the best opportunity to minimize small business compliance cost would be to integrate the BOI filing as seamlessly as possible into existing state-level incorporation processes. The comment also noted that technology, such as pre-verifying submitted information and requiring electronic filing, would minimize business costs during filing. A separate comment supported similar recommendations, stating that to reduce the cost of compliance for small businesses, FinCEN could collaborate with authorities in all 50 states to integrate the FinCEN filing process into existing corporate formation and registration processes; verify data as it is entered in the system; provide plenty of opportunities to learn about the BOI reporting requirement; and create a searchable hub of information on the requirements. An additional comment noted that using familiar processes with minimal burdens would protect small businesses; the same comment also stated that FinCEN should conduct a small business impact analyses of the proposed regulation.

FinCEN did consider an alternative scenario in which reporting companies would submit BOI to their state authority in the Executive Orders 12866 and 13563 section above. Ultimately, FinCEN decided not to propose this alternative. FinCEN would strive to minimize costs by ensuring that small businesses are aware of the reporting requirement. Table 9 below illustrates how a reduction in the time burden for reporting the required information would decrease costs for reporting companies.

Another comment stated that the reporting requirements would create significant unintended consequences with new burdens and complexity for nearly 4.9 million American small businesses, resulting in an additional $5.7 billion in regulatory paperwork.[189] The comment further stated that the reporting requirement is not necessary because the information is already collected and proposed that a simple alternative would be to allow FinCEN to review information provided to the IRS in tax filings. To the extent that similar information may be reported to the IRS, the disclosure of taxpayer information is limited by statute, and the IRS generally does not have the authority to disclose such information for the purposes specified in the CTA.

As noted previously, FinCEN estimates that small businesses across multiple industries would be subject to these requirements. Assuming that all reporting companies are small businesses, the burden hours for filing

[183] The RFA provides that an agency may provide a more general descriptive statement of the effects of a proposed rule if quantification is not practicable or reliable. 5 U.S.C. 607.

[184] 5 U.S.C. 601(4).

[185] 31 U.S.C. 5336(a)(11)(xix)(I), and proposed 31 CFR 1010.380(c)(2)(xix).

[186] 5 U.S.C. 601(5).

[187] 31 U.S.C. 5536(a)(11)(ii)(II) and proposed 31 CFR 1010.380(c)(2)(ii).

[188] FinCEN cites to the UK study within this NPRM. *See* United Kingdom Department for Business, Energy & Industrial Strategy, *Review of the Implementation of the PSC Register,* (March 2019), p. 16, available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822823/review-implementation-psc-register.pdf.*

[189] The comment does not provide the sources for these estimates.

BOI reports would be 32,800,422 [190] in the first year of the reporting requirement (as existing small businesses come into compliance with the proposed rule) and 9,468,510 [191] in the years after. FinCEN estimates that the total cost of filing BOI reports is approximately $1.26 billion [192] in the first year and $364 million [193] in the years after. FinCEN estimates it would cost the 25 million domestic and foreign reporting companies that are estimated to currently exist approximately $45 each to prepare and submit an initial report for the first year that the BOI reporting requirements are in effect.[194] FinCEN intends that the reporting requirement would be accessible to the personnel of reporting companies who would need to comply with these regulations and would not require specific professional skills or expertise to prepare the report. However, FinCEN is aware that some reporting companies may seek legal or other professional advice in complying with the BOI requirements. FinCEN seeks comment on whether small businesses anticipate requiring professional expertise to comply with the BOI requirements described herein and what FinCEN could do to minimize the need for such expertise.

iv. Duplicative, Overlapping, or Conflicting Federal Rules

There are no Federal rules that directly and fully duplicate, overlap, or conflict with the proposed rule. FinCEN recognizes that the CTA requires the Administrator for Federal Procurement Policy to revise the Federal Acquisition Regulation maintained under 41 U.S.C. 1303(a)(1) to require any contractor or subcontractor that is subject to the reporting requirements of the CTA and proposed rule to disclose the same information to the Federal Government as part of any bid or proposal for a contract that meets the threshold set in 41 U.S.C. 134.[195] FinCEN would collaborate with the Administrator for Federal Procurement Policy and other Government agencies as necessary to reduce, to the extent possible, any duplication of the CTA requirements. Additionally, Section 885 of the NDAA includes a separate beneficial ownership disclosure requirement in the database for federal agency contract and grant officers.

FinCEN is aware that the IRS collects taxpayer information that may include information related to beneficial ownership, such as information on entity ownership structure and identifying information about such owners and entities. However, disclosure of taxpayer information is limited by statute, and the IRS generally does not have authority to disclose such information for the purposes specified in the CTA.

FinCEN is also aware that financial institutions subject to the CDD Rule are required to collect some BOI from legal entities that establish new accounts. However, the CDD Rule does not require these financial institutions to file a report of that BOI with FinCEN, and FinCEN has long viewed the CDD Rule and BOI reporting at entity formation as distinct.[196] Furthermore, the CTA requires that the CDD Rule be revised, retaining the general requirement for financial institutions to identify and verify the beneficial owners of legal entity customers but rescinding the specific requirements of 31 CFR 1010.230(b)–(j). The CTA explicitly identifies three purposes for this revision: to bring the rule into conformity with the AML Act as a whole, including the CTA; to account for the fact that financial institutions would have access to BOI reported to FinCEN ''in order to confirm the [BOI] provided directly to the financial institutions'' for AML/CFT and customer due diligence purposes; and to reduce unnecessary or duplicative burdens on financial institutions and customers. This revision must be accomplished within one year after the effective date of the BOI reporting rule.

v. Significant Alternatives That Reduce Burden on Small Entities

Given that FinCEN assumes that all reporting companies would be small entities, the alternatives discussion in the Paperwork Reduction Act section below (see Table 8), which analyzes alternatives to the specific reporting requirements of the rule, describes in greater detail several alternatives that would reduce the burden on small entities.[197] A brief overview of the alternative analysis is summarized in this section. The alternative scenarios considered include: (1) The length of the initial reporting period; and (2) the length of time to file an updated report.

In the first alternative, FinCEN lengthened the timeframe in which initial reports may be submitted by companies that are in existence when the eventual final rule comes into effect. Specifically, FinCEN lengthened the current proposal's BOI compliance requirement from one year to two years, which is permissible under the CTA.[198] After applying several more assumptions, including but not limited to assuming half of the existing reporting companies would file their initial BOI report in Year 1 and the other half would file in Year 2, FinCEN estimated that the cost of the proposed rule would be approximately $637 million less in Year 1 and approximately $358 million more in Year 2 under this alternative scenario of extending the compliance timeframe from one to two years. This would translate into a decreased net present value cost over a ten-year horizon by approximately $281 at a three percent discount rate or $283 million at a seven percent discount rate.

In the second alternative, FinCEN lengthened the timeframe for updated reports from the proposed 30 days to one year, which is again permissible under the CTA.[199] After applying several assumptions, including but not limited to assuming updates would be ''bundled,'' meaning that a reporting company would submit one updated report to account for multiple updates, which would in turn result in an increased burden of filing due to increased information per report, FinCEN estimated that the total cost of the proposed rule would be approximately $238 million at a seven percent discount rate or $293 million at a three percent discount rate less in net present value over a ten-year horizon under this alternative scenario of increasing the timeframe for updated reports.

Additionally, FinCEN considered an alternative scenario in the Executive Orders 12866 and 13563 section above

[190] 30,186,029 hours to file initial BOI reports + 2,614,392 hours to file updated BOI reports. Please see the Paperwork Reduction Act section below for the underlying analysis related to these burden hour estimates.

[191] 3,764,381 hours to file initial BOI reports + 5,704,129 hours to file updated BOI reports. Please see the Paperwork Reduction Act section below for the underlying analysis related to these burden hour estimates.

[192] $1,160,332.854.17 to file initial BOI reports + $100,495,669.61 to file updated BOI reports. FinCEN estimated cost using a loaded wage rate of $38.44 per hour. Please see the Paperwork Reduction Act section below for the underlying analysis related to these cost estimates.

[193] $144,700,558.43 to file initial BOI reports + $219,263,279.14 to file updated BOI reports. FinCEN estimated cost using a loaded wage rate of $38.44 per hour. Please see the Paperwork Reduction Act section below for the underlying analysis related to these cost estimates.

[194] $1,160,332,854.17/25,873,739 reporting companies = $44.85, approximately $45.

[195] 31 U.S.C. 5336(c)(1).

[196] *See, e.g.,* 81 FR 29398, 29401 (discussion of multipronged strategy in the implementing notice for the CDD Rule).

[197] The alternative scenario discussed in the Executive Orders 12866 and 13563 section above that relies on states to collect BOI is not expected to reduce burden on small entities.

[198] *See* 31 U.S.C. 5336(b)(1)(B).

[199] *See* 31 U.S.C. 5336(b)(1)(D).

in which reporting companies would submit BOI to FinCEN indirectly, by submitting the information to their jurisdictional authority who would then transmit it to FinCEN. Some commenters to the ANPRM noted that this alternative would decrease the compliance burden on small entities. However, FinCEN ultimately decided not to propose this alternative for the reasons stated above. FinCEN welcomes comment on any significant alternatives that would minimize the impact of the proposed rule on small entities and still accomplish the objectives of the CTA.

C. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) [200] requires that an agency prepare a statement before promulgating a rule that may result in expenditure by the state, local, and Tribal governments, in the aggregate, or by the private sector, of $158 million or more in any one year.[201] Section 202 of the UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule, which FinCEN has completed in the Executive Orders 12866 and 13563 section above and the Paperwork Reduction Act section below. This rule in its proposed form may result in the expenditure by state, local, and Tribal governments, in the aggregate, or by the private sector, of $158 million or more.

The proposed rule is being promulgated to implement the CTA. The primary cost of the private sector complying with the proposed rule is captured in the Paperwork Reduction Act section below, which amount to a net present value for a 10-year time horizon at a seven percent discount rate of approximately $3.4 billion. The net present value at a three percent discount rate is approximately $3.98 billion. Both of these amounts exceed the threshold under UMRA. Additional discussion on the proposed rule's costs and benefits may be found in the Executive Orders 12866 and 13563 section above. While state, local and Tribal governments do not have direct costs mandated to them by the proposed rule, state, local, and Tribal governments may incur indirect costs under the proposed rule, including if they wish to expend funds to provide notice and assistance to filers.[202]

FinCEN received multiple ANPRM comments that described possible costs that state, local, and Tribal governments could incur,[203] such as:

- Collecting or reporting additional BOI data to FinCEN;
- Generating a unique identifier that would link BOI reports with state documents;
- Sending customers notice about the BOI reporting requirement by mail or email;
- Adding an internet link to office website and/or on publications sent to new business filers; and
- Sharing language/information provided by FinCEN to customers.

As noted above, various comments stated that collecting and reporting additional BOI data to FinCEN would require a change to state law and development of a new processing system, both of which would generate significant costs and burden. One comment from a state government stated these type of changes could easily cost a million dollars or more for a single state government. Some other comments from state authorities also noted technological limitations with sharing existing records with FinCEN. State-level collection and reporting of additional BOI data was strongly opposed by multiple commenters, including state governments. However, it is worth noting that some private sector comments argued for incorporating BOI reporting with existing state registration processes. For example, one private sector comment noted that FinCEN's best opportunity to minimize small business compliance cost is to integrate the FinCEN filing as seamlessly as possible into existing state-level incorporation processes. This alternative is considered more fully in the Executive Orders 12866 and 13563 section above.

Commenters from state offices stated that mailing a paper notice to representatives of entities registered in their jurisdiction is a significant cost, and that most filing offices only have a mailing address for the registered agent of a business entity. One secretary of state comment estimated the cost of annual mailings at more than $300,000, which would increase along with the total amount of active entities. Some secretary of state comments also specified that secretaries of state should provide notice only to domestic entities in their jurisdiction, not foreign business entities, and that such reminders should coincide with the states' report filing period. However, one private sector commenter proposed that state offices send reminders of the requirement via mail.

Multiple secretary of state commenters supported a requirement that states add an internet link to their office website and/or on publications sent to new business filers, with language provided by FinCEN to ensure all states share the same information and that directs customers to FinCEN for questions.

Some secretary of state comments noted that state agencies would not have the legal expertise, authority, or resources to respond to questions about the BOI reporting requirements. Therefore, they argued, FinCEN should circulate the required periodic notices to reporting (and potentially exempt) entities, and every such periodic notice must have clear and prominently displayed contact information for FinCEN. One secretary of state comment noted that providing states with FinCEN-branded materials to help differentiate from secretary of state-branded communication is important and may help deflect some questions from states directly to FinCEN. A comment from a secretary of state stated that it anticipates that staff time would be devoted to responding to calls and emails from business entities regarding compliance with the rule, but additional staffing is not expected. The comment stated that FinCEN can minimize burdens on agencies receiving business filings in part by providing sufficient resources for such agencies to direct business entities to in response to inquiries. Another secretary of state noted that template language from FinCEN is helpful, but they wanted to retain flexibility to tailor the information. One commenter representing Tribal interests noted that Indian Tribes first should be given the opportunity to identify whether or not the Tribe is capable of sharing reporting obligations and/or internet links and what may be necessary for the Tribe to carry out the obligations of the CTA and

[200] *See* 2 U.S.C. 1532(a).

[201] The UMRA threshold is $100 million per year adjusted for inflation, which is currently $158 million per year.

[202] The CTA states that as a condition of funds made available under the CTA, each state and Indian Tribe shall, not later than 2 years after the effective date of the regulations, take the following actions: (1) Periodically notifying filers—including at the time of any initial formation or registration of an entity, assessment of an annual fee, or renewal of any license to do business in the United States and in connection with state or Indian Tribe corporate tax assessments or renewals, notification to filers of their requirements as reporting companies and provider—with a copy of the reporting company form or an internet link to that form; and (2) updating the websites, forms relating to incorporation, and physical premises of the office to notify filers of the BOI reporting requirements, including by providing an internet link. 31 U.S.C. 5336(e)(2)(A). The provision of these funds depends on availability of appropriations. However, states and Indian Tribes may wish to provide information about the BOI reporting requirement regardless of the availability of such funds.

[203] FinCEN also received comments from state, local, and Tribal governments that related to other topics; however, these comments are not summarized herein.

the final promulgated rules and regulations, among other items. FinCEN welcomes additional comments describing these items in more detail and ways in which FinCEN may address them in its rule.

FinCEN appreciates the issues the commenters raised regarding the possibility of state, local, and Tribal governments incurring indirect costs due to the BOI reporting requirement, particularly in the form of compliance questions being directed to such authorities. State, local, and Tribal governments play an important role in spreading awareness to entities, many of which may have no knowledge of FinCEN or about the new BOI reporting requirements. FinCEN endeavors to make publicly available clear and concise guidance documents. FinCEN will work closely with state, local, and Tribal governments to ensure effective outreach strategies for implementation of the eventual final rule.[204] Additionally, FinCEN has a call center (the Regulatory Support Section) which will receive incoming inquiries relating to the CTA and its implementation. Finally, FinCEN considered and ultimately decided not to propose an alternative that would have relied upon state, local, and Tribal governments in the collection and reporting of BOI.

FinCEN is not aware at this time of disproportionate budgetary effects of this proposed rule upon any particular regions of the nation or particular state, local, or Tribal governments; urban, rural or other types of communities; or particular segments of the private sector.[205] The wide-reaching scope of the reporting company definition means that the proposed rule would apply to entities across multiple private sector segments, types of communities, and nationwide regions. FinCEN acknowledges that there is potential variance in the concentration of reporting companies by region due to variation in corporate formation rates and laws. FinCEN also acknowledges that the statutory exemptions to the reporting company definition may in practice result in segments of the private sector not being affected by the proposed rule; thereby causing those that are affected to be disproportionately so compared to exempt entities. FinCEN welcomes any estimates on how such regions, and the regions' related governments, could be disproportionately affected by this proposed rule. FinCEN also welcomes any input on estimated disproportionate budgetary effects for particular segments of the private sector.

FinCEN does not at this time have accurate estimates that are reasonably feasible regarding the effect of the proposed rule on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services.

D. Paperwork Reduction Act

The new reporting requirements in this proposed rule are being submitted to OMB for review in accordance with the Paperwork Reduction Act of 1995[206] (PRA). Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. Written comments and recommendations for the proposed information collection can be submitted by visiting *www.reginfo.gov/public/do/PRAMain.* Find this particular document by selecting ''Currently Under Review—Open for Public Comments'' or by using the search function. Comments are welcome and must be received by February 7, 2022. In accordance with the requirements of the PRA and its implementing regulations, 5 CFR part 1320, the following details concerning the collections of information are presented to assist those persons wishing to comment.

As noted above, the primary cost for entities associated with the proposed rule would result from the requirement that reporting companies must file a BOI report with FinCEN, and update those reports as appropriate. FinCEN has also estimated costs that may be incurred related to individuals who may choose to apply for a FinCEN identifier, and related to foreign pooled investment vehicles that would need to submit a report to FinCEN, as well as the costs that would be incurred to update the information contained in those applications and reports.

i. Filing BOI Reports

There are three factors that FinCEN has considered in estimating the number of reporting companies that would file BOI reports under the rule, all of which contain uncertainty: (1) The total number of entities that *could* be reporting companies (*i.e.,* estimating the total number of corporations, limited liability companies, and other entities); (2) how many of those entities would be exempt from the definition of a reporting company (*i.e.,* removing from the estimates of total number of entities those that are estimated to satisfy relevant exemptions); and (3) how often those entities that meet the definition of reporting company would need to update their initial reports.[207] FinCEN welcomes comments on all aspects of this analysis.

a. Total Number of Entities That Could be Reporting Companies

The first step in this analysis is for FinCEN to estimate the number of domestic entities, regardless of the entity type,[208] that are in existence at the effective date of the regulation and that are newly created each year. As noted above, FinCEN assumes that the number of new entities each year equals the number of dissolved entities. FinCEN also must estimate the number of foreign entities already registered to do business in one or more jurisdictions within the United States at the effective date of the regulation and the number that are newly registered each year. FinCEN also assumes that the number of new foreign registered businesses is balanced by the number of existing foreign registered businesses that terminate. FinCEN does not have definitive counts of these entities but has identified information from the following sources as relevant to its initial estimates; none of this

[204] Multiple ANPRM comments from state authorities spoke to the feasibility of adding an internet link to their websites.

[205] Though entities that have chosen complex ownership structures are likely to face higher burden, FinCEN is not aware of a particular segment of the private sector that this would disproportionately affect.

[206] *See* 44 U.S.C. 3506(c)(2)(A).

[207] FinCEN recognizes that reporting companies may also dissolve annually, but FinCEN assumes that the number of entities created and dissolved each year is roughly the same, and therefore the number of overall reporting companies is not likely to vary greatly year-to-year. This assumption is supported by Figure 3 of the SBA's Office of Advocacy 2020 Small Business Profile Report (*See* U.S. Small Business Administration Office of Advocacy, *2020 Small Business Profile,* (2020) available at *https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf*), which shows very little change, on average, to the net entity count. And in the instances in time that observe a large change in growth, there is an opposite and roughly equal in magnitude growth change in the immediately subsequent time period. FinCEN does account for an annual number of *initial* reports from newly created reporting companies in its estimates but assumes that each new entity is balanced by a reporting company which dissolves in the overall count of reporting companies.

[208] While the proposed definition of ''domestic reporting company'' is any entity that is a corporation, limited liability corporation, or other entity that is created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian Tribe, FinCEN is not limiting its estimate of domestic entities to specific entity types or to entities that are created by such a filing. This simplifies the analysis but may produce overall estimates of costs that exceed the actual costs.

information can be used without caveats:

• *FATF:* In its 2016 mutual evaluation of the United States, FATF noted that there are ''no precise statistics on the exact number of legal entities,'' but cited estimates that there are around 30 million legal entities in the United States, with about two million new formations every year.[209]

• *CDD Rule:* In the CDD Rule, FinCEN estimated 8 million new legal entity bank accounts are opened per year.[210] However, this number could include multiple accounts for any given entity, and not all entities open a bank account annually.

• *Census data:* FinCEN reviewed statistics published by the U.S. Census Bureau, particularly from the Statistics of U.S. Businesses (SUSB). However, FinCEN is not aware of a methodology that may be applied to ''carve out'' entities that meet the definition of reporting companies from the SUSB data. FinCEN has relied upon Census data in some instances below related to estimates of exempt entities.

• *State statistics:* FinCEN reviewed online publications from state governments that provided statistics on business entities, including statistics on total active companies and new company formations. However, the information appeared to only be available from a limited number of states. Furthermore, the categories of reported statistics are not consistent and each state may have unique company definitions that make it difficult to assess which entities would fall under the proposed rule. FinCEN also reviewed comments to the ANPRM that included some relevant estimates reported by state authorities.[211]

• *International Association of Commercial Administrators (IACA) 2018 annual reports survey:* FinCEN reviewed the most recent iteration, 2018, of the annual report of jurisdictions survey administered by the IACA[212] in which Colorado, Delaware, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, North Carolina, Ohio, Oregon, Texas, Wisconsin, and Wyoming, were asked the same series of questions on the number of total entities and total new entities in their jurisdictions by entity type and responded with statistical data.

While these sources do not provide a complete picture of entities in the United States, they are useful in providing an approximate range for estimation and for highlighting the likely variation among states in numbers of reporting companies. Overall, the sources FinCEN reviewed suggest that tens of millions of entities may be subject to the proposed rule. FinCEN believes that the IACA 2018 annual reports survey data is the most relevant information for estimating the total number of existing domestic reporting companies. The survey provides consistency in format and response among multiple states.[213] The survey specifically includes data on the number of corporations, professional corporations, nonprofit corporations, limited liability companies, and partnerships. FinCEN acknowledges that this data may not exactly match the definition of ''domestic reporting company'' in the proposed rule, and may have other limitations.[214] In addition, FinCEN is not able to confirm whether trusts that may qualify as reporting companies are counted within the IACA data because they are not specified in a category. FinCEN welcomes comments that provide estimations on the number of trusts and other particular types of entities that may fall under the proposed rule.[215]

To leverage the IACA 2018 annual reports survey data in order to estimate total domestic reporting companies, FinCEN conducted the following analysis:

1. FinCEN first transcribed data reported by each of the states listed above in response to questions 1–18 of the survey.[216] FinCEN did not transcribe

[209] FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures United States Mutual Evaluation Report* (2016), p. 34 (Ch. 1), available at *https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf* . These estimations were also relied upon by the Congressional Research Service. *See* Congressional Research Service, *Beneficial Ownership Transparency in Corporate Formation, Shell Companies, Real Estate, and Financial Transactions* (July 8, 2019), available at *https://fas.org/sgp/crs/misc/R45798.pdf.* FATF's 2006 Mutual Evaluation of the United States estimated, based on information from the International Association of Commercial Administrators provided by Delaware state officials, that in 2004 there were 13,484,336 active legal entities registered in the 50 states in the U.S. FATF, *Mutual Evaluation of the United States* (2006), p. 13 (Ch. 1), available at *https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf.*

[210] 81 FR 29398, 29436.

[211] FinCEN received such comments from Colorado, Connecticut, Indiana, Iowa, Kentucky, Massachusetts, North Carolina, and Pennsylvania. Some of the states provided estimates of total active companies and the average number of new companies formed annually. FinCEN welcomes further comments on these statistics, and also requests that any reported statistics explain what entity types are included, whether the counts include entities foreign and domestic to the jurisdiction, and if possible, whether the statistics include: (1) Only entities that would be defined as a ''reporting company'' in the proposed rule; and (2) any entities that would be included in the 23 exemption categories.

[212] *See* International Association of Commercial Administrators, *Annual Report of Jurisdictions Survey—2018 Results,* (2018), available at *https://www.iaca.org/annual-reports/.*

[213] FinCEN notes that four of the states that provided estimates of entities in their jurisdiction in their ANPRM comment letters also responded to the 2018 IACA survey: Colorado, Indiana, Massachusetts, and North Carolina. FinCEN used the estimates reported in the IACA survey for its analysis, rather than the estimates in the comment letters, for purposes of consistency. Additionally, FinCEN understands that the IACA data is narrowed to companies that are in good standing or active and specific entity types, both of which make the overall estimates more applicable to the ''reporting company'' category.

[214] For example, FinCEN cannot identify the precise number of general partnerships from the IACA count to the extent a state reported on the number of general partnerships—since the numbers were not reported separately by the reporting states. FinCEN assumes that some states did not include general partnerships in these statistics because they may not be required to register with the secretaries of state, and therefore may not be in the underlying data source. In a comment to the ANPRM, the Ohio Secretary of State noted that general partnerships follow a different process. Michigan's Department of Licensing and Regulatory Affairs also noted in a comment that co-partnerships do not file with the state-level office, but with the relevant County Clerk. FinCEN did compare the estimates of partnerships in IACA's data with 2018 IRS data that shows 527,595 domestic general partnerships and 446,713 limited partnerships, totaling 974,308 partnerships. The IRS data also includes numbers of partners, which could provide insight into the number of beneficial owners reported for these entities. *See* IRS, *Statistical Tables—By Entity Type,* available at *https://www.irs.gov/statistics/soi-tax-stats-partnership-statistics.* FinCEN compared these numbers with an estimate of total partnerships based on IACA's data, using the per capita analysis described below, which resulted in approximately 1.7 million partnerships. FinCEN notes that the IRS numbers, which are over 50 percent general partnerships, are lower than FinCEN's estimate using IACA data. However, FinCEN understands that IRS data only includes partnerships that filed tax returns. Therefore, even with the potential inclusion of general partnerships, IACA's data is more inclusive and a better data source for purposes of the reporting company estimation.

[215] IRS data from 2014 shows that the total number of returns for complex trusts, simple trusts, grantor trusts, decedent's estates, qualified disability trusts, Chapter 7 bankruptcy estates, split-interest trusts, qualified funeral trusts, Chapter 11 bankruptcy estates, and pooled income funds is 3,170,667. *See* IRS, *SOI Tax Stats—Fiduciary Returns—Sources of Income, Deductions, and Tax Liability—Type of Entity,* available at *https://www.irs.gov/statistics/soi-tax-stats-fiduciary-returns-sources-of-income-deductions-and-tax-liability-by-type-of-entity.*

[216] The questions (Q) are the following: Q1 Jurisdiction; Q2 Total population of your Jurisdiction; Q3 Total number of Corporations and Professional Corporations; Q4 Total number of Nonprofit Corporations; Q5 Total number of Limited Liability Companies; Q6 Total Number of Partnerships (GPs, LPs, LLPs, etc. . . .); Q7 Total number of registered Corporations and Professional Corporations; Q8 Total number of registered Nonprofit Corporations; Q9 Total number of registered Limited Liability Companies; Q10 Total number of registered Partnerships (GPs, LPs, LLPs, etc. . . .); Q11 Total number of new Corporations and Professional Corporations; Q12 Total number of new Nonprofit Corporations; Q13 Total number of new Limited Liability Companies; Q14 Total number of new Partnerships (GPs, LPs, LLPs, etc. . . .); Q15 Total number of new Foreign Corporations and Professional Corporations; Q16 Total number of new Foreign Nonprofit

the responses to the other questions because they did not relate to the number of entities.

2. FinCEN then considered which data to total in order to estimate the: (1) Total number of existing entities; and (2) total number of new entities within a year.

a. FinCEN totaled the numbers reported for Q3 (Corporations and Professional Corporations), Q4 (Nonprofit Corporations), Q5 (limited liability companies), and Q6 (Partnerships) for each state in order to estimate the existing entities as of 2018. FinCEN did not total the responses to Q7–Q10, which are ''registered'' companies, because FinCEN assumes that those registered entities are foreign to the state in question.[217] As noted above, the counts for Q6 may include general partnerships for some jurisdictions which may not be considered reporting companies; however, because they are grouped with limited partnerships and limited liability partnerships in this survey, FinCEN is retaining this number as part of its estimate.

b. FinCEN totaled the numbers reported for Q11–Q14—data that mirrors the categories from Q3–Q6—for each state in order to estimate the new entities created in one year (2018). One of the survey respondents, Wyoming, did not provide responses to these questions. FinCEN did not total the responses to Q15–Q18, which relate to ''new [f]oreign'' entity types, because FinCEN understands that ''foreign'' entities counted here could be entities formed in another state. Therefore, there could be double-counting across states if an entity is formed in one state and registered in others.

3. FinCEN next created a table listing each state, the population reported by each state in response to Q2,[218] the totals for Q3–Q6 (total entities), and totals for Q11–Q14 (new entities). FinCEN then calculated a per capita rate of total entities and a per capita rate of new entities by dividing the population by these totals; see Table 1.

TABLE 1—DOMESTIC ENTITIES PER CAPITA ANALYSIS

State	Population	Total entities	New entities	Per capita total entities	Per capita new entities
Colorado	5,761,252	641,174	112,165	0.11129074	0.019468859
Delaware	967,171	1,372,130	213,697	1.418704655	0.220950587
Hawaii	1,420,000	120,779	14,626	0.085055634	0.0103
Illinois	12,770,000	802,880	98,303	0.062872357	0.007697964
Indiana	6,700,000	406,408	51,135	0.06065791	0.00763209
Louisiana	4,680,000	423,755	52,389	0.09054594	0.011194231
Massachusetts	6,902,000	351,363	41,029	0.050907418	0.005944509
Michigan	9,995,915	831,973	100,550	0.0832313	0.010059109
North Carolina	10,350,000	647,632	88,052	0.06257314	0.00850744
Ohio	11,730,719	838,850	89,495	0.071508831	0.007629096
Oregon	4,191,000	1,319,082	110,694	0.314741589	0.026412312
Texas	29,100,000	1,761,695	236,505	0.060539347	0.00812732
Wisconsin	5,795,000	419,644	43,495	0.07241484	0.007505608
Wyoming	568,125	155,010		0.272844884	

4. FinCEN then calculated a weighted average (weighted by population) for both per capita estimates to find a weighted average per capita rate for the United States.

a. The weighted average per capita rate for total companies is: 0.090978702.

b. The weighted average per capita rate for new companies is: 0.011345597.[219]

5. Finally, FinCEN estimated the total companies and new companies per year by multiplying the per capita rates by the U.S. population as of 2021:[220]

a. Total entities estimate: 30,247,071.10.

b. Total new entities per year estimate: 3,771,993.58.

While the IACA data provides a window into the total number of domestic entities, FinCEN turned to other sources to identify possible estimates for the number of foreign (non-U.S.) entities that are registered to do business in the United States, and therefore would be a reporting company for purposes of the proposed rule.[221] FinCEN is proposing the following estimate based on tax filing data, although FinCEN acknowledges that this data may not exactly match the definition of ''foreign reporting company'' in the proposed rule. In 2018 there were approximately 22,000 partnership tax returns filed by foreign partnerships.[222] Using the same scaling process as noted above, the estimate for

Corporations; Q17 Total number of new Foreign Limited Liability Companies; Q18 Total number of new Foreign Partnerships (GPs, LPs, LLPs, etc. . . .).

[217] The prior year of the IACA survey (2017) worded questions differently than the 2018 survey. For example, the 2017 survey included ''the total number of domestic and foreign for-profit corporations and professional corporations on file (in good standing or active)'' as Q6. FinCEN assumes that this question covers the same entities as Q3 (''total number of Corporations and Professional Corporations'') and Q7 (''total number of registered Corporations and Professional Corporations'') in the 2018 survey. Given this, FinCEN assumes that the number of ''registered'' entities in the 2018 survey aligns with foreign entities. FinCEN understands foreign in this context to mean outside of the jurisdiction, but potentially still within the United States. In order to avoid double-counting the same entity across multiple states, FinCEN is not including ''registered'' entities in its analysis. At least one state in the 2018 survey, Illinois, specified that their numbers in response to Q3 included domestic and foreign companies. However, FinCEN is retaining Illinois in its analysis for consistency. Illinois' per capita average is lower than the weighted per capita average, which alleviates any concern that it would create a significant upward bias in the nationwide weighted average (see Table 1).

[218] Wisconsin specified that its population estimate was from 2017.

[219] Wyoming is excluded from this calculation since it did not provide statistics on new companies.

[220] FinCEN assumes that there is proportional growth between the population and formation of new entities over time for purposes of estimating the total number of existing and registered entities as of today. Although this assumption is arguably in tension with the assumption of zero net company formation in subsequent years, neither assumptions plays a significant role in estimation of total costs over the time period analyzed.

[221] Although some of the IACA questions referenced ''foreign'' entities, as noted above FinCEN understands that those numbers may include entities formed in *another state* and entities formed in *another country.* FinCEN is only interested in the latter number for these purposes, which cannot be derived from IACA data in the same way that FinCEN derived the number of entities formed *in each state.*

[222] FinCEN understands that, in the vast majority of cases, foreign partnerships file a U.S. partnership tax return because they engage in a trade or business in the United States; however, this may not always be the case.

2021 is 22,263.39.[223] In addition, in 2018 an estimated 21,000 foreign corporations filed the Form 1120–F (''U.S. Income Tax Return of a Foreign Corporation'')—scaled for 2021 to 21,251.42.[224] Adding these two estimates (22,263.39 + 21,251.42) results in an overall estimate of approximately 43,514.81 foreign entities operating in the United States that may be subject to BOI reporting requirements. To estimate new foreign companies annually, FinCEN multiplied the estimate of total foreign companies as of 2021 (43,514.81) by the ratio of estimated new entities to total entities based on the IACA data analysis above (3,771,993.58/30,247,071.10). The estimation is approximately 5,426.56.

Therefore, it is reasonable, given the data reviewed and these considerations, to estimate that there are 30,290,586 existing companies that *could* be reporting companies. It is also reasonable to estimate that there are 3,777,420 new companies per year that *could* be reporting companies.

b. Entities That Are Not Exempt From the Definition of a Reporting Company

As to FinCEN's second estimate, the number of entities that would be reporting companies would be less than 100 percent of the entities that *could* be reporting entities because some of the entities that comprise the total number of entities would be exempt from the definition of ''reporting company'' pursuant to one or more of the exemptions found at proposed 31 CFR 1010.380(c)(2)(i)–(xxiii).

In order to estimate the number of exempt entities to subtract from the first estimate of entities that are estimated to be corporations, limited liability companies, or other entities, FinCEN considered the following:

1. A reasonable estimate for the number of existing entities under each of the exemptions.

2. Whether each of the entities described in the exemptions: (1) Meet the proposed definition of ''reporting company'' (*i.e.,* is the exempt entity formed or registered by filing with the secretary of state or similar office); and (2) is included in the IACA annual reports survey estimates (*i.e.,* does the exempt entity fall into a category reported by the states in the IACA annual reports survey used to estimate the number of corporations, limited liability companies, or other entities as described above).

3. Whether there is overlap between exemption categories, and whether the number of entities that overlap can be estimated.

To address the first item, the number of existing entities under each of the exemptions, FinCEN conducted research and outreach to multiple stakeholders to identify a reasonable estimate for each exemption. When the data was historical, FinCEN ''scaled'' the estimate to 2021, scaling the estimate based on overall U.S. population growth from the date of the estimate to June 2021. FinCEN considered whether the data underlying FinCEN's estimate of exempt entities in each exemption category aligns with the proposed definition of the exemption in this NPRM. The sources used for these estimates should not be viewed as encompassing all entities that may be captured under the definition. Additionally, the sources should not be understood to convey any interpretation of the exemptions' definitions. FinCEN identified sources for estimates using what it believes to be the best data available *related to* the exemption in question, and welcomes other sources or clarifications on these estimates that may be provided through the rulemaking process. Furthermore, these estimates are based on multiple data sources that may not always align; meaning that the data source for an exemption may not only or totally include the entities subject to the exemption that are included in the total companies' estimate. Each exemption estimate is considered in detail below.

1. *Securities and Exchange Commission (SEC) reporting issuers:* FinCEN proposes relying upon the World Bank's data of listed domestic companies in the United States as of 2019. Listed domestic companies, including foreign companies that are exclusively listed,[225] are those that have shares listed on an exchange at the end of the year. Investment funds, unit trusts, and companies whose only business goal is to hold shares of other listed companies, such as holding companies and investment companies, regardless of their legal status, are excluded. A company with several classes of shares is counted once. Only companies admitted to listing on the exchange are included. This estimate is 4,266.[226] FinCEN scaled this number to 4,294.89.[227]

2. *Governmental authorities:* FinCEN proposes relying upon the U.S. Census Bureau's 2017 Census of Governments for this estimate. FinCEN accessed the publicly available zip file ''Table 1. Government Units by State: Census Years 1942 to 2017'' and the ''Data'' Excel file included therein. The Excel file lists the total number of Federal, state, and local government units in the United States as of 2017 as 90,126.[228] FinCEN scaled this number to 91,741.49;[229] FinCEN welcomes comments regarding whether this is a category that is less likely to scale by population.

3. *Banks:* FinCEN accessed the number of Federal Deposit Insurance Corporation (FDIC)-insured entities as of October 20, 2021, through the ''Institution Directory'' on FDIC's Data Tools website. FinCEN searched for active institutions anywhere in the United States, which resulted in 4,916 institutions.[230] FinCEN also considered whether to include uninsured entities that are required to implement written AML program as a result of a final rule issued on September 15, 2020,[231] in this estimate; however, given that the exemption may or may not apply to these entities, FinCEN is not including them at this time.

4. *Credit unions:* There are 4,999 federally insured credit unions as of October 20, 2021.[232]

5. *Depository institution holding companies:* According to a report from

---

[223] 22,000 × 1.011972411.

[224] 21,000 × 1.011972411.

[225] This estimate may therefore include entities that are not part of the ''total entities'' previously calculated. However, FinCEN assesses that the number of foreign companies included is sufficiently small to be trivial.

[226] *See* The World Bank Data, *Listed domestic companies, total—United States,* available at *https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?locations=US.*

[227] This was calculated by multiplying the estimate by a ''2019 scaling factor'' of 1.006772611. The scaling factor was calculated by dividing the U.S. population as of July 1, 2019 (330,226,709) by the U.S. population as of June 27, 2021 (332,463,206). These population estimates were found at the Census Bureau's population clock. *See* U.S. Census Bureau, *U.S. and World Population Clock,* available at *https://www.census.gov/popclock/.*

[228] *See* U.S. Census Bureau, *Table 1. Government Units by State: Census Years 1942 to 2017,* available at *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[229] This was calculated by multiplying the estimate by a ''2017 scaling factor'' of 1.017924839. The scaling factor was calculated by diving the U.S. population as of July 1, 2017 (326,608,796) by the U.S. population as of June 27, 2021 (332,463,206). These population estimates were found at the Census Bureau's population clock. *See* U.S. Census Bureau, *U.S. and World Population Clock,* available at *https://www.census.gov/popclock/.*

[230] *See* FDIC, *Details and Financials—Institution Directory,* available at *https://www7.fdic.gov/idasp/advSearchLanding.asp.*

[231] *See* 85 FR 57129.

[232] Data available at FINDRs.

the Federal Reserve, as of the fourth quarter of 2020 there are 3,638 bank holding companies and 11 savings and loan holding companies (7 insurance and 4 commercial).[233] This totals 3,649.

6. *Money transmitting businesses:* According to the FinCEN Money Services Business (MSB) Registrant Search Page, there are 24,124 registered MSBs as of October 15, 2021.[234] Please note this count includes MSBs that are registered for activity including, but not limited to, money transmission. This count does not include MSB agents that would not be within the scope of the exemption since they are not registered with FinCEN.

7. *Brokers or dealers in securities:* According to the SEC, the number of broker-dealers as of the end of the first quarter of 2021 is 3,532.

8. *Securities exchanges and clearing agencies:* The SEC provided the following estimates of exchanges and clearing agencies in August 2021: 24 national securities exchanges and 14 clearing agencies, which includes Proposed Rule Change Filings and Advance Notice Filings, totaling 38.

9. *Other Exchange Act registered entities:* The SEC provided the following estimates of other 1934 Act entities in August 2021: Two securities information processors, the Consolidated Quotation System and the Unlisted Trading Privileges (competing consolidators are not yet required to be registered, but the transition period and compliance dates begin this year); one national securities association, FINRA; 525 municipal advisors (FinCEN did not include in this count 21 banks that are municipal securities dealers due to the bank exemption estimated above); nine nationally recognized statistical rating organizations; two security-based swap repositories; three OTC derivatives dealers; and 373 registered transfer agents as of mid-2018. Totaling these estimates, 2 + 1 + 525 + 9 + 2 + 3 + 373 = 915. SEC also noted that security-based swap dealers and execution facilities would be included in this exemption in the future, but registration is not yet required.[235]

10. *Investment companies or investment advisers:* According to information provided by the SEC, there are 2,773 registered investment companies (number of trusts, not funds) and 14,381 registered investment advisers as of June 30, 2021. This totals 17,154.

11. *Venture capital fund advisers:* According to information provided by the SEC, there are 1,498 exempt reporting advisers utilizing the exemption from registration as an adviser solely to one or more venture capital funds as of June 30, 2021.

12. *Insurance companies:* According to the Treasury Department's Federal Insurance Office, there are 4,738 insurance companies, which include the following U.S. insurance underwriting entities by type: 3,471 members of an insurance group; 1,103 standalone; and 164 alien surplus lines. These totals were aggregated using a best efforts scrubbing approach applied to a S&P Global regulatory filings dataset on July, 2, 2021 and, for that reason, should be regarded as estimates or broadly indicative of the sector.

13. *State licensed insurance producers:* According to the National Association of Insurance Commissioners' website, as of January 26, 2021 there were more than 236,000 business entities licensed to provide insurance services in the United States.[236]

14. *Commodity Exchange Act registered entities:* The Commodity Futures Trading Commission (CFTC) provided the following breakdown of companies related to this exemption as of July 2021. For part I: Designated Contract Market (16); Swap Execution Facility (20); Designated Clearing Organization (15); and Swap Data Repository, Provisionally-registered (3)—totaling 54. For part II: Futures Commission Merchant (61); Introducing Broker in Commodities (1,055); Commodity Pool Operators (1,266); Commodity Trading Advisory (1,757); Retail Foreign Exchange Dealer (4); Swap Dealer, Provisionally-registered (109); and Major Swap Participant (0)—totaling 4,252. These totals combined equal 4,306.

15. *Accounting firms:* FinCEN searched the Public Company Accounting Oversight Board's (PCAOB) Registered Firms list, accessible on their website, and identified 851 firms as of October 20, 2021.[237] FinCEN searched for firms in the United States, Northern Mariana Islands, and Puerto Rico and totaled those with the status of ''Currently Registered'' or ''Withdrawal Pending.''

16. *Public utilities:* FinCEN relies upon the U.S. Census Bureau's 2018 Statistics of U.S. Businesses (SUSB) data for this estimate. FinCEN accessed the publicly available 2018 SUSB annual data tables by establishment industry and the ''U.S. & states, 6-digit NAICS'' Excel file. The Excel file lists the total firms in the United States with the NAICS code of 22: Utilities as 6,028.[238] SUSB data only includes entities that reported employees in the reporting year. FinCEN understands that firms may operate in multiple NAICS code industries; therefore this number could include firms that partly operate as utilities and partly as other types of exempt entities. Additionally, each ''firm'' in Census data may include multiple entities. FinCEN scaled this estimate to 6,100.17.[239]

17. *Financial market utilities:* According to the designated financial market utilities listed on the Federal Reserve's website, there are eight such entities.[240] While the website has not been updated since January 29, 2015, FinCEN understands this estimate is still applicable.

18. *Pooled investment vehicles:* According to information provided by SEC, as of June 30, 2021 there were 114,765 pooled investment vehicle clients reported by registered investment advisers. Of these, 5,671 are registered with a foreign financial regulatory authority. FinCEN subtracted these for a total of 109,094.[241]

19. *Tax-exempt entities:* FinCEN relies upon IACA survey data, which requested specific counts of nonprofits. FinCEN used the same per capita methodology described with respect to the IACA survey numbers above to identify an estimate of total nonprofits. FinCEN identified the total number of nonprofit corporations reported by each

[233] Federal Reserve Board of Governors, *Supervision and Regulation Report* (April 2021), p. 33, available at *https://www.federalreserve.gov/publications/files/202104-supervision-and-regulation-report.pdf.*

[234] *See* FinCEN MSB Registrant search page, accessed from *https://www.fincen.gov/msb-registrant-search.*

[235] SEC also provided data regarding its general exemption authority pursuant to Section 36 of the 1934 Act: Maybe 30 entities have been granted exemptions from registration over the years, and many were temporary, and maybe 300 entities did not have to register due to exemptions from defined terms granted under this authority. However, these are rough estimates, and given their relatively small value, FinCEN is not including them in the estimate of this exemption.

[236] NAIC, *Producer Licensing,* (January 26, 2021), available at *https://content.naic.org/cipr_topics/topic_producer_licensing.htm.*

[237] *See* PCAOB, *Registration, Annual and Special Reporting,* available at *https://rasr.pcaobus.org/Search/Search.aspx.*

[238] *See* U.S. Census Bureau, *U.S. & states, 6-digit NAICS,* (2018), available at *https://www.census.gov/data/tables/2018/econ/susb/2018-susb-annual.html.*

[239] This was calculated by multiplying the estimate by a ''2018 scaling factor'' of 1.011972411.

[240] Federal Reserve Board of Governors, *Designated Financial Market Utilities,* (January 29, 2015), available at *https://www.federalreserve.gov/paymentsystems/designated_fmu_about.htm.*

[241] This estimate may not account for foreign pooled investment vehicles advised by banks, credit unions, or broker-dealers. FinCEN requests any available information on estimates of pooled investment vehicles advised by such entities.

state that responded to the 2018 IACA survey, and then calculated a per capita rate for each state by dividing the number of nonprofit corporations by state population. FinCEN then calculated a weighted average per capita, and multiplied this average by the U.S. population in 2021 to obtain an estimate of the number of nonprofits in the U.S. This estimate is 2,826,260.79.

20. *Entities assisting a tax-exempt entity:* FinCEN could not find an estimate for these entities, and a comment to the ANPRM suggested that the public is also not aware of a possible estimate; therefore, to calculate this estimate, FinCEN assumes that approximately a quarter of the entities in the preceding exemption would have a related entity that falls under this exemption, totaling 706,565.20.[242] FinCEN welcomes comments on this assumption.

21. *Large operating companies:* This estimate is based on tax information. There were approximately 231,000 employers' tax filings in 2019 that reported more than 20 employees and receipts over $5 million.[243] FinCEN scaled this number to 232,564.47.[244]

22. *Subsidiaries of certain exempt entities:* According to a commercial database provider, as of 2021 there were 239,892 businesses in the United States that were majority-owned subsidiaries, either with a parent company inside or outside of the United States. While this estimate is not refined further to consider only wholly-owned subsidiaries of certain exempt entities, FinCEN is still providing this estimate for a point of reference.

23. *Inactive entities:* FinCEN is not proposing an estimate for this exemption given lack of available data. FinCEN also assumes that inactive companies are not included in the estimates from the IACA annual reports survey,[245] so there is no need to subtract this exemption from the prior estimate. However, there are likely to be some companies on corporate registries in the United States that fall under this exemption; such companies that were included in the 2018 IACA survey responses would impact FinCEN's estimates by increasing the total number of reporting companies. FinCEN solicits comments on an estimate of these companies, and whether FinCEN's assumption that inactive companies are not included in the numbers estimated herein is accurate.

After identifying these estimates, FinCEN further considered whether each of the entities described in the exemptions: (1) Meet the proposed definition of ''reporting company''; and (2) is included in the IACA annual reports survey estimates. FinCEN understands that some of the exempt categories may not register with the secretaries of state or similar offices in certain jurisdictions. For example, banks, credit unions, and insurance companies may only be required to register with the state regulator and not with the secretaries of state in certain jurisdictions.[246] Additionally, governmental authorities are more likely to be chartered directly by a legislative body rather than formed by registration with a secretary of state. Because of this, FinCEN assesses that these entities are not included in the IACA annual reports survey estimates, and therefore do not need to be subtracted from the total companies' estimate. As previously noted, FinCEN also assumes that inactive companies are *generally* not included in the IACA annual reports survey estimates, and that in response to this survey, states provided counts of entities ''in good standing or active.''

FinCEN also considered whether the exemption categories were likely to overlap, and therefore include counts of the same entities that would result in a duplicative subtraction. For example: A variety of entities, such as public utilities, SEC reporting issuers, and brokers/dealers in securities, could be large operating companies with more than 20 employees and $5 million in gross receipts/sales; certain subsidiaries of exempt entities may themselves be exempt entities; or specific exemptions may overlap, such as insurance companies and state-licensed insurance producers. Another scenario could be that the exemption estimates include entities that are not in the IACA annual reports survey (such as a bank that is a large operating company with more than 20 employees and $5 million in gross receipts/sales), resulting in an unnecessary subtraction.

Estimating the precise number of overlap for each of these possibilities and other potential overlaps is difficult due to lack of data. Critically, however, FinCEN assumes that any overlap would have a relatively minor effect on the burden estimate as a whole. With that in mind, FinCEN has not attempted to estimate each category of overlap.[247] However, FinCEN welcomes comment on any material inaccuracies that not estimating these overlaps more precisely may cause, and suggestions for mitigation.

Table 2 contains a list of exemptions and the estimates to be subtracted from the total number of reporting companies estimated based on IACA data.

---

[242] 2,826,260.79 X 0.25.

[243] The gross receipts include all receipts from activities conducted directly by the entity, including foreign sales to the extent that the entity has a branch in a foreign country. However, it would not include, for example, the gross receipts earned by a foreign subsidiary of the entity.

[244] This was calculated by multiplying the estimate by a ''2019 scaling factor'' of 1.006772611.

[245] IACA's 2017 survey specified in its questions that entities be in good standing or active. FinCEN assesses that this same expectation applies to the 2018 survey, but recognizes that does not mean no such companies were included.

[246] For example, Indiana's Secretary of State's website notes that its forms are not for use by insurance corporations or financial institutions, and that the appropriate state agency (Department of Insurance or Department of Financial Institutions) should be contacted for filings instructions. *See* Indiana Secretary of State, *Business Forms,* available at *https://www.in.gov/sos/business/division-forms/business-forms/.*

[247] FinCEN considered whether it may be able to address the overlap between the large operating company exemption and the public utility exemption that was calculated using SUSB data. Because the SUSB data may be filtered by employee size, FinCEN could remove from the estimate the number of entities with greater than 20 employees. However, this estimate would be imprecise given that SUSB data does not consider the threshold of $5 million gross receipts/sales.

TABLE 2—EXEMPTION ESTIMATES TO BE SUBTRACTED

Exemption No.	Exemption description	Final estimate [248]
1	SEC reporting issuers	4,294.89
5	Depository institution holding companies	3,649
6	Money transmitting businesses	24,124
7	Brokers or dealers in securities	3,532
8	Securities exchanges and clearing agencies	38
9	Other Exchange Act registered entities	915
10	Investment companies or investment advisers	17,154
11	Venture capital fund advisers	1,498
13	State-licensed insurance producers	236,000
14	Commodity Exchange Act registered entities	4,306
15	Accounting firms	851
16	Public utilities	6,100.17
17	Financial market utilities	8
18	Pooled investment vehicle	109,094
19	Tax-exempt entities	2,826,260.79
20	Entities assisting a tax-exempt entity	706,565.20
21	Large operating companies	232,564.47
22	Subsidiaries of certain exempt entities	239,892

Given this analysis, FinCEN estimates that the total number of exempt entities is approximately 4,416,847. Subtracting this number from the first estimate of entities that could be reporting companies, FinCEN estimates that there are 25,873,739 entities that would meet the definition of a reporting company with exemptions considered. To estimate new exempt companies annually, FinCEN multiplied the estimate of total exempt companies, 4,416,847, by the overall ratio of new entities to total entities from the per capita calculations based on IACA data (3,771,993.58/30,247,071.10). The resulting estimate of new exempt entities is approximately 550,807.7. Therefore, FinCEN estimates that there would be 3,226,613 new entities per year that meet the definition of reporting company with exemptions considered. FinCEN welcomes comment on whether the method it has used to estimate the number of new entities that are eligible for an exemption from the definition of reporting company—that is, by assuming that number would be proportionate to the share of existing entities that are eligible for an exemption—is sound.

FinCEN assumes that each reporting company would make one initial BOI report; FinCEN does not separately calculate the burden of the need to issue a corrected report where mistaken information was initially reported, but that can be considered as part of the estimate of the cost per initial report. Given the proposed implementation period of one year to comply with the rule for entities that were formed or registered prior to the effective date of the final rule, FinCEN assumes that all of the entities that meet the definition of reporting company would submit their initial BOI reports in Year 1, totaling 25,873,739 reports. While new reporting companies may be created during this year as well, FinCEN assumes that companies are created and dissolved at roughly the same rate; therefore, FinCEN assumes as many new companies would file as old companies would dissolve and not file within the first year. In Year 2 and beyond, FinCEN estimates that the number of initial BOI reports would be 3,226,613, which is the same estimate as the number of new entities per year that meet the definition of reporting company.

c. Number of BOI Updated Reports

FinCEN considered multiple data sources in order to estimate the number of BOI reports that may be updated on an annual basis. These updates would require additional burden and cost to filers. FinCEN first considered whether it may be able to apply data from the District of Columbia (DC), which recently imposed beneficial ownership reporting requirements in January 2020 on owners with more than 10 percent ownership and certain control persons.[249] FinCEN received information from the DC Department of Consumer and Regulatory Affairs (DCRA) during outreach related to the NPRM regarding the number of updates to this reporting. DCRA reported that since the effective date of their beneficial ownership requirement, there have been 24,865 new entity filings and 69,019 biennial reports from existing entities received. There were 567 amendments filed by the new entities in this timeframe, approximately 2 percent, and approximately 55,200 biennial corrections filed, about 80 percent. FinCEN understands that the biennial corrections could account for existing entities that are reporting their beneficial ownership for the first time since the effective date, rather than solely counting updates or corrections to previously reported information. Thus, given the differences in how DC defines ''beneficial owner'' and uncertainties as to whether the data on biennial reports reflects updated or initial reports, FinCEN reviewed other sources in order to estimate BOI updated reports.

[248] This table includes the ''scaled for 2021'' estimate for those with historical data sources.

[249] The Background section in this preamble includes more information on DC's requirements. *See* DC Code sec. 29–102.01.

FinCEN considered likely triggers for updated reports and the likelihood of these events, in order to estimate the number of updates. FinCEN assessed that the most likely causes for updates to reporting companies' initial reports are: (1) Change in address of a beneficial owner or applicant; (2) death of a beneficial owner; or (3) a management decision resulting in a change in beneficial owner.[250] In order to estimate the likelihood of these updates on a monthly basis, given that the proposed rule requires updates within 30 days, FinCEN approximated probabilities for these causes from other sources:

1. Change in address: According to the Census Bureau's Geographic Mobility data, 29,780,000 people one year or older moved from 2019–2020.[251] This is approximately 8.9824695 percent of the 2020 U.S. population.[252] Therefore, FinCEN assesses that 8.9824695 percent of beneficial owners may have a change in address within a year, resulting in an updated BOI report.

2. Death: FinCEN utilized data published in the Social Security Administration's 2019 Period Life Table to estimate this probability.[253] FinCEN narrowed the range of ages to 30–90 and calculated the median probability of death for males (0.011447) and females (0.00688). FinCEN then averaged these numbers, resulting in a 0.9164 percent probability of death within a year.

3. Management decision: Changes to beneficial ownership due to management decisions could encompass items such as a sale of an ownership interest or a change in substantial control (the removal, change, or addition of a beneficial owner with substantial control). FinCEN is not aware of a current data source that could accurately estimate such updates to BOI, though FinCEN invites comment on an appropriate way to estimate these numbers. FinCEN is assuming that 10 percent of beneficial owners may change within a year due to management decisions.

Totaling these estimated probabilities, there is an approximately 20 percent probability of a change for a given beneficial owner resulting in an updated BOI filing within a year.[254] FinCEN divided this by 12 to find the monthly probability of an update: 1.6582 percent.

Given that each BOI report may contain multiple beneficial owners, each of which could contribute to a change resulting in an updated report, FinCEN reviewed data published by the UK in a 2019 study on their BOI reporting requirements.[255] The UK requirements define beneficial owners (People with Significant Control, or PSC) as those that directly or indirectly hold more than 25 percent of shares or voting rights in a company, has the right to appoint or remove the majority of the board of directors, or otherwise exercises significant influence or control.[256] The UK study reported the following distribution of the number of reported beneficial owners per report: 0 (8 percent of reports); 1 (43 percent); 2 (37 percent); 3 (9 percent); 4 (2 percent); 5 to 10 (2 percent); and don't know (1 percent).[257]

In order to use this distribution for its estimation purposes, FinCEN is modifying the percentage of reports with one beneficial owner to 50 percent. This is to account for the fact that the beneficial ownership requirements proposed herein would not include an option for zero reported beneficial owners. Increasing the estimate of the percentage of reports with one beneficial owner is reasonable because FinCEN assumes that many of the reporting companies would be small businesses with simple ownership structures.[258] FinCEN is adding 7 percent to the distribution for one beneficial owner rather than 9 percent (the total of the 0 beneficial owners and ''don't know'' responses in the UK's study) in order to ensure that the distribution totals 1. Additionally, FinCEN averaged 5, 6, 7, 8, 9, 10 to calculate 7.5 beneficial owners for the distribution category labeled in the UK study as ''5 to 10'' beneficial owners, although this is likely a high estimate of the true number in the UK data given the otherwise left-skewed nature of the distribution based on the available data. Please see the following table:

TABLE 3—ESTIMATED DISTRIBUTION OF BENEFICIAL OWNERS PER REPORT

Number of beneficial owners per report	Estimated distribution
1	0.50
2	0.37
3	0.09
4	0.02
7.5	0.02

[250] There may be other causes for updating BOI reports, such as change of beneficial owner or applicant name, expiration of the provided identification number document, or change in the identifying information for the reporting company, such as address or name/DBA. However, FinCEN assesses that these changes would occur at a relatively minor rate compared to the reasons described above. In particular, FinCEN understands that a renewed driver's license is likely to have the same identification number as the previously submitted expired document, and therefore is less likely to require an updated report. FinCEN welcomes comments that address whether there are, and if so which, states that do not follow this convention. FinCEN also assumes that reports notifying FinCEN that a reporting company has become eligible for an exemption from the reporting requirement would be negligible burden and has not separately estimated it.

[251] *See* U.S. Census Bureau, *Table 1. General Mobility, by Race and Hispanic Origin and Region, and by Sex, Age, Relationship to Householder, Educational Attainment, Marital Status, Nativity, Tenure, and Poverty Status: 2019 to 2020—United States,* available at *https://www.census.gov/data/tables/2020/demo/geographic-mobility/cps-2020.html.* The total movers, in thousands, is 29,780.

[252] The U.S. population on July 1, 2020 was 331,534,662 according to the Census Bureau. *See* U.S. Census Bureau, *U.S. and World Population Clock,* available at *https://www.census.gov/popclock/.* The percentage was calculated by: (29,780,000/331,534,662) × 100 = 8.9824695.

[253] *See* Social Security Administration, Actuarial Life Table, *Period Life Table, 2019,* available at *https://www.ssa.gov/oact/STATS/table4c6.html.*

[254] As a point of comparison, the UK found that 10 percent of businesses reported a change in beneficial ownership information following an initial report. United Kingdom Department for Business, Energy & Industrial Strategy, *Review of the Implementation of the PSC Register,* (March 2019), *p. 16,* available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822823/review-implementation-psc-register.pdf.*

[255] The UK study used a ''mixed-method'' research approach, which consisted of a quantitative survey with 500 businesses and in-depth qualitative interviews with 30 stakeholder organizations and 2 members of staff from Companies House. United Kingdom Department for Business, Energy & Industrial Strategy, *Review of the implementation of the PSC Register,* (March 2019), p. 4, available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822823/review-implementation-psc-register.pdf.*

[256] *Id.,* p. 8.

[257] *Id.,* p. 14.

[258] For purposes of the IRFA above, FinCEN assumes that all reporting companies will be small entities. However, there may be reporting companies that are small, but have complex ownership structures. Therefore, FinCEN assumes here that ''many'' reporting companies will be small with a simple ownership structure.

FinCEN calculated the number of updated reports using the following general approach. FinCEN assumed that 1/12 of the initial reports that must be filed by reporting companies in existence on the effective date of the proposed rule would be filed in each month of the one year implementation period. The first month of implementation is assumed to have zero updated reports. To estimate the number of updated reports in the second month of implementation, FinCEN multiplied the estimated distribution by (1/12) of the estimated initial reports within the first year, which is the estimated distribution of initial report filings in the first month with varying levels of beneficial owners reported. FinCEN then multiplied each element of the distribution by $1-(1-0.016582)\wedge N$, where N is the number of beneficial owners on the respective line of the distribution; this is the probability that a given company with N beneficial owners would experience a change in at least one beneficial owner's reportable information in each month.[259] This assumes that changes for a beneficial owner would be independent from changes for other beneficial owners of the same company. The following table provides the estimated number of updated reports for the second month of implementation using the described methodology:

TABLE 4—ESTIMATED NUMBER OF BENEFICIAL OWNERSHIP UPDATED REPORTS IN YEAR 1, MONTH 2

Number of beneficial owners per report	Estimated distribution	Estimated number of updated reports
1	0.50	[260] 17,877
2	0.37	[261] 26,239
3	0.09	[262] 9,494
4	0.02	[263] 2,790
7.5	0.02	[264] 5,083
Total		61,483

FinCEN replicated this analysis for each remaining month of the first year. The estimated initial reports monthly increase was captured by increasing the (1/12) ratio in the above equation. Therefore, the equations in the prior table remained the same per month with the following change to (1/12): 2/12 (Month 3); 3/12 (Month 4); 4/12 (Month 5); 5/12 (Month 6); 6/12 (Month 7); 7/12 (Month 8); 8/12 (Month 9); 9/12 (Month 10); 10/12 (Month 11); and 11/12 (Month 12). The total of all monthly estimates for Year 1 calculated in this fashion is 4,057,848 updated reports. Estimated monthly updated reports for all subsequent months were calculated using the same equation, but with a 12/12 ratio of initial reports (all initial reports). This estimate is approximately 737,790.50, multiplied by 12 for an annual estimate of 8,853,486 updated reports.

FinCEN conducted similar analysis to estimate the number of updates to applicant information on a monthly basis.[265] FinCEN assessed that the most likely causes for updates to reporting companies' initial reports involving an applicant is a change in address. Given data referenced above, there is an 8.9824695 percent probability of a change in address in a year, with a monthly probability of 0.0074854. FinCEN assumes that a probable distribution of the number of applicants per report is 90 percent with one applicant and 10 percent with two applicants. Using this probability and distribution, FinCEN calculated the monthly number of updates related to an applicant by using the same calculation as beneficial owner updated reports.

TABLE 5—ESTIMATED NUMBER OF APPLICANT UPDATED REPORTS IN YEAR 1, MONTH 2

Number of applicants per report	Estimated distribution	Estimated number of updated reports
1	0.90	[266] 14,526
2	0.10	[267] 3,216
Total		17,742

The total of all monthly estimates for Year 1 calculated in this fashion is 1,170,937 updated reports. Estimated monthly updated reports for all subsequent months were calculated using the same equation, but with a 12/12 ratio of initial reports (all initial reports). This estimate is approximately 212,897.60 multiplied by 12 for an annual estimate of 2,554,771 updated reports. Combining the estimates of beneficial ownership and applicant updates, FinCEN estimates 5,228,785 updated reports in Year 1 and 11,408,257 updated reports in Year 2 and beyond. FinCEN welcomes comments on the appropriateness of this analysis for calculating the total required number of updated reports.

[259] Assuming that the probability of change in a given period for a single beneficial owner is p, then the probability of no change of a single beneficial owner is $(1-p)$. The probability of a company with one beneficial owner having a change is therefore $1-(1-p)$. The probability of a company with two beneficial owners having a change is $1-(1-p)\wedge 2$, etc.

d. Estimated PRA Burden of BOI Reports

Reporting Requirements: The proposed rule would require certain entities to report to FinCEN information about the reporting company, their beneficial owners and company applicants, in accordance with the CTA.[268] Entities would also be required to update the information in these reports as needed. The collected information would be maintained by FinCEN in a database accessible to authorized users.

OMB Control Number: 1506–XXXX..

Frequency: As required.[269]

Description of Affected Public: Domestic entities that are corporations, limited liability companies, or other entities that are created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian Tribe or foreign entities that are corporations, limited liability companies, or other entities which are: (1) Formed under the law of a foreign country; and (2) registered to do business in any state or Tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the laws of a state or Indian Tribe. The proposed regulation does not require corporations, limited liability companies, or other entities that are described in any of 23 specific exemptions from the general definition to file BOI reports.

Estimated Number of Respondents: As explained in detail above, the number of entities that are reporting companies is difficult to estimate. FinCEN assumes that existing entities that meet the definition of reporting company and are not exempt would submit their initial BOI reports in Year 1. Therefore, the estimated number of initial BOI reports in Year 1 is 25,873,739. In Year 2 and beyond, FinCEN estimates that the number of initial BOI reports would be 3,226,613, which is the same estimate as the number of new entities per year that meet the definition of reporting company and are not exempt. FinCEN estimates that 5,228,785 updated reports would be filed in Year 1, and 11,408,257 such reports would be filed in Year 2 and beyond.

Estimated Time per Respondent: Most of the information required to be reported to FinCEN is basic information that reporting companies would have access to as part of conducting their business. FinCEN estimates the average burden of the reporting BOI as 70 minutes per response (20 minutes to read the form and understand the requirement, 30 minutes to identify and collect information about beneficial owners and applicants, 20 minutes to fill out and file the report, including attaching a scanned copy of an acceptable identification document for each beneficial owner and applicant). FinCEN estimates the average burden of updating such reports as 30 minutes per update (20 minutes to identify and collect information about beneficial owners or applicants and 10 minutes to fill out and file the update).

Estimated Total Reporting Burden Hours: FinCEN estimates that during Year 1, the filing of initial BOI reports would result in approximately 30,186,029 burden hours per year on reporting companies.[270] In Year 2 and beyond, FinCEN estimates that the filing of initial BOI reports would result in 3,764,381 burden hours annually on new reporting companies.[271] FinCEN estimates that filing BOI updated reports in Year 1 would result in approximately 2,614,392 burden hours on reporting companies.[272] In Year 2 and beyond, the estimated number of burden hours is 5,704,129.[273]

Estimated Total Reporting Cost: To estimate the average cost, FinCEN used the estimate of an average cost of $27.07 per hour, the mean hourly wage for all employees[274] from the May 2020 National Occupational Employment and Wage Estimates report[275] and multiplied by a private industry benefits factor of 1.42[276] to estimate a fully loaded wage rate of $38.44 per hour. The estimated cost of filing initial BOI reports in Year 1 is $1,160,332,854.17 per year.[277] The estimated cost of filing initial BOI reports annually in Year 2 and beyond is $144,700,558.43.[278] The estimated cost of filing updated reports in Years 1 is $100,495,669.61 per year.[279] The estimated cost of filing updated reports annually in Year 2 and beyond is $219,263,279.14.[280] FinCEN estimates that it will cost each reporting company approximately $45 to prepare and submit an initial report for the first year that the BOI reporting requirements are in effect.[281]

ii. Individuals Applying for a FinCEN Identifier

Reporting Requirements: The proposed rule would require the collection of information from individuals in order to issue them a FinCEN identifier.[282] This is a voluntary collection. Per the CTA, individuals are required to provide their full name, date of birth, current street address, a unique identifying number from an acceptable identification document; furthermore, consistent with the CTA, FinCEN is proposing to require individuals to provide a scanned image of that document in order to receive a FinCEN identifier.[283] An individual is also required to submit updates of their identifying information as needed. FinCEN would store such information in its BOI database for access by authorized users.

OMB Control Number: 1506–XXXX

Frequency: As required.

Description of Affected Public: In terms of estimating the number of individuals requesting a FinCEN identifier, FinCEN acknowledges that anyone with an acceptable identification document could apply for a FinCEN identifier under the proposed rule. However, the primary incentives

---

[268] *See* 31 U.S.C. 5336(b) and proposed 31 CFR 1010.380(b).

[269] For BOI reports, there is an initial filing and subsequent filings are required as information changes.

[270] (25,873,739 × 70)/60.

[271] (3,226,613 × 70)/60. While this calculation equals 3,764,382, FinCEN's model includes decimal points that result in the total of 3,764,381.

[272] (5,228,785 × 30)/60.

[273] (11,408,257 × 30)/60.

[274] FinCEN's selection of the ''all employees'' estimate is reflective of its goal to develop the BOI reporting requirement so that a range of businesses' ordinary employees, with no specialized knowledge or training, may file the reports. Additionally, the CDD Rule also used the weighted average hourly wage for all employees from the National Occupational Employment and Wage Estimates report to estimate client costs in opening a new account. 81 FR 29437.

[275] *See* U.S. Bureau of Labor Statistics, *National Occupational Employment and Wage Estimates,* (May 2020), available at *https://www.bls.gov/oes/current/oes_nat.htm.*

[276] The ratio between benefits and wages for private industry workers is $10.83 (hourly benefits)/$25.80 (hourly wages) = 0.42. The benefit factor is 1 plus the benefit/wages ratio, or 1.42. *See* U.S. Bureau of Labor Statistics, *Table 4. Employer Costs for Employee Compensation for private industry workers by occupational and industry group,* (March 2021), available at *https://www.bls.gov/news.release/ecec.t04.htm.*

[277] 30,186,029 × $38.44. While this calculation equals $1,160,350,954.76, FinCEN's model includes decimal points that result in the total of $1,160,332,854.17.

[278] 3,764,381 × $38.44. While this calculation equals $144,702,805.64, FinCEN's model includes decimal points that result in the total of $144,700,558.43.

[279] 2,614,392 × $38.44. While this calculation equals $101,535,108.48, FinCEN's model includes decimal points that result in the total of $100,495,669.61.

[280] 5,704,129 × $38.44. While this calculation equals $219,266,718.76, FinCEN's model includes decimal points that result in the total of $219,263,279.14.

[281] $1,160,332,854.17/25,873,739 = $44.85, approximately $45.

[282] FinCEN is not separately calculating a cost estimate for entities requesting a FinCEN identifier, because FinCEN assumes this would be part of the process and cost already estimated in submitting the BOI reports.

[283] 31 U.S.C. 5336(b)(3)(A)(i) and proposed 31 CFR 1010.380(b)(5).

for individual beneficial owners to apply for a FinCEN identifier are likely data security (an individual may desire not to send personal information to a reporting company but rather prefer to file that data with FinCEN directly); administrative efficiency where an individual is likely to be identified as a beneficial owner of numerous reporting companies; and anonymity from reporting companies that are not directly owned, but are indirectly owned through another entity, by the individual. FinCEN assesses that there may be less incentive for individuals who only directly own reporting companies to obtain FinCEN identifiers because their identity is already known to the reporting company. Company applicants that are responsible for registering many reporting companies may have incentive to request a FinCEN identifier in order to limit the number of companies with access to their personal information. This reasoning assumes that there is a one-to-many relationship between the company applicant and reporting companies.

Estimated Number of Respondents: Given the cases described above, which are based on FinCEN's speculation of possible incentives for individuals to obtain a FinCEN identifier, FinCEN estimates the number of individuals that would apply for a FinCEN identifier may be relatively low. FinCEN is estimating that number to be approximately 1 percent of the reporting company estimates above. FinCEN assumes that, similar to reporting companies' initial filings, there would be an initial influx of applications for a FinCEN identifier (primarily by those beneficial owners with complex corporate structures) that would then decrease to a smaller annual rate of requests. Therefore, FinCEN estimates that 258,737 individuals would apply for a FinCEN identifier during Year 1 [284] and 32,266 individuals would apply for on a FinCEN identifier annually moving forward.[285] To estimate the number of updated reports for individuals' FinCEN identifier information per year, FinCEN used the same methodology explained in the BOI report estimate section to calculate, and then total, monthly updates. However, FinCEN only applied the monthly probability of 0.0074854 (8.9824695 percent, the annual likelihood of a change in address, divided by 12 to find a monthly rate), as this was the sole probability of those previously estimated that would result in a change to individual identifying information.[286] This analysis estimated 10,652 updates in Year 1 and 23,241 in Year 2 and beyond.

Estimated Time per Respondent: FinCEN anticipates that initial FinCEN identifier applications would require approximately 20 minutes (10 minutes to read the form and understand the information required and 10 minutes to fill out and file the request, including attaching a scanned copy of an acceptable identification document), given that the information to be submitted to FinCEN would be readily available to the person requesting the FinCEN identifier. FinCEN estimates that updates would require 10 minutes (10 minutes to fill out and file the update).

Estimated Total Reporting Burden Hours: FinCEN estimates the total burden hours of individuals initially applying for a FinCEN identifier during Year 1 to be 86,246.[287] In years after this period, FinCEN estimates that individuals applying for a FinCEN identifier would result in 10,755 burden hours annually.[288] FinCEN estimates that the burden hours of individuals updating FinCEN identifier related information would be 1,775 in Year 1 [289] and 3,874 in Year 2 and beyond.[290]

Estimated Total Reporting Cost: To estimate the average cost, FinCEN used the May 2020 fully loaded wage rate of $38.44 per hour for all employees. FinCEN estimates the total cost of individuals initially applying for a FinCEN identifier during Year 1 to be $3,315,236.73.[291] In Year 2 and beyond, FinCEN estimates that individuals initially applying for a FinCEN identifier would result in an annual cost of $413,430.17.[292] FinCEN estimates that the cost of updating individual FinCEN identifier information would be $68,243.57 in Year 1 [293] and $148,895.06 in Year 2 and beyond.[294]

iii. Foreign Pooled Investment Vehicle Reports

Reporting Requirements: The proposed rule requires that any entity that would be a reporting company but for the pooled investment vehicle exemption and is formed under the laws of a foreign country shall file with FinCEN a written certification that provides identification information of an individual that exercises substantial control over the pooled investment vehicle. This requirement is being implemented in accordance with the CTA.[295] FinCEN would maintain this information in its BOI database for access by authorized users.

OMB Control Number: 1506–XXXX.

Frequency: As required.

Description of Affected Public: Any entity that would be a reporting company but for the pooled investment vehicle exemption [296] and is formed under the laws of a foreign country.

[284] Assuming that individuals applying for FinCEN identifiers would generally request the identifier around the time when the company files its initial BOI report, one percent of the estimated initial BOI reports in Year 1 (25,873,739) is 258,737.

[285] One percent of the estimated new reporting companies annually (3,226,613) is 32,266.

[286] FinCEN understands that other circumstances may cause an update to be submitted for an individual's identifying information linked to a FinCEN identifier, but is using this probability as a rough estimate.

[287] (258,737 × 20)/60.

[288] (32,266 × 20)/60.

[289] (10,652 × 10)/60.

[290] (23,241 × 10)/60.

[291] 86,246 × $38.44. While this calculation equals $3,315,296.24, FinCEN's model includes decimal points that result in the total of $3,315,236.73.

[292] 10,755 × $38.44. While this calculation equals $413,422.20, FinCEN's model includes decimal points that result in the total of $413,430.17.

[293] 1,775 × $38.44. While this calculation equals $68,231.00, FinCEN's model includes decimal points that result in the total of $68,243.57.

[294] 3,874 × $38.44. While this calculation equals $148,916.56, FinCEN's model includes decimal points that result in the total of $148,895.06.

[295] 31 U.S.C. 5336(b)(2)(C) and proposed 31 CFR 1010.380(b)(3)(iii).

[296] This applies to any pooled investment vehicle that is operated or advised by a person that is an exempt bank, credit union, broker or dealer, registered investment company or adviser, or venture capital fund adviser. A pooled investment vehicle is defined in the CTA as any investment company as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–(a)); or any company that would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of that Act; and is identified by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the SEC. 31 U.S.C. 5336(a)(10).

Estimated Number of Respondents: Based on information provided by the SEC, FinCEN estimates that at least 8,884 entities would be obligated to make initial reports when the proposed rule would come into effect.[297] Assuming that these entities file initial reports in Year 1, the estimated number of initial reports in Year 1 is 8,884. In years after this period, FinCEN estimates that the number of entities required to file reports would be approximately 1,108.[298] To estimate the number of updated reports per year, FinCEN used the same methodology explained in the BOI report estimate section to calculate, and then total, monthly updates. However, FinCEN did not account for differing numbers of beneficial owners per report, given the requirement is to report one beneficial owner. This analysis estimated 810 updates in Year 1 and 1,768 in Year 2 and beyond.

Estimated Time per Respondent: The information required to be reported to FinCEN is basic information that reporting companies would have access to as part of conducting their business. In addition, this requirement is likely less costly than the prior BOI reporting requirement because it only requires the identification and reporting of one beneficial owner with substantial control (not ownership). Therefore, FinCEN estimates the burden of the reporting the report as 40 minutes per response (10 minutes to read the form and understand the requirement, 20 minutes to identify and collect information about beneficial owners, 10 minutes to fill out and file the report and attach a scanned copy of an acceptable identification document). FinCEN estimates the burden of updating or correcting such reports as 20 minutes per update (10 minutes to identify and collect information about beneficial owners and 10 minutes to fill out and file update).

Estimated Total Reporting Burden Hours: FinCEN estimates the total burden hours for Year 1 to be 5,923 hours.[299] After this period, FinCEN estimates the annual burden hours to be 739 hours.[300] FinCEN estimates that the burden hours of updating reports would be 270 in Year 1,[301] and 589 in Year 2 and beyond.[302]

Estimated Total Reporting Cost: To estimate the average cost, FinCEN used the May 2020 fully loaded wage rate of $38.44 per hour for all employees. The estimated total cost for initial reports in Year 1 is $227,663.75.[303] After this period, FinCEN estimates the annual cost to be $28,391.05.[304] FinCEN estimates that the cost of updating reports would be $10,381.80 in Year 1[305] and $22,651.20 in Year 2 and beyond.[306]

iv. Total Burden and Cost

The following table totals the burden and cost estimated in the prior sections.

TABLE 6—TOTAL BURDEN AND COST

Information collection	Count of reports	Burden hours	Cost
Year 1			
Initial BOI reports	25,873,739	30,186,029	$1,160,332,854.17
Updates for BOI	5,228,785	2,614,392	[307] 100,495,669.61
Initial identifier applications	258,737	86,246	3,315,236.73
Updates for identifiers	10,652	1,775	68,243.57
Initial foreign pooled investment vehicle reports	8,884	5,923	227,663.75
Updates for foreign pooled investment vehicles	810	270	10,381.80
Totals	31,381,608	32,894,635	$1,264,450,049.62
Year 2 and Beyond			
Initial BOI reports	3,226,613	3,764,381	$144,700,558.43
Updates for BOI	11,408,257	5,704,129	[308] $219,263,279.14
Initial identifier applications	32,266	10,755	413,430.17
Updates for identifiers	23,241	3,874	148,895.06
Initial foreign pooled investment vehicle reports	1,108	739	28,391.05
Updates for foreign pooled investment vehicles	1,768	589	22,651.20
Totals	14,693,252	9,484,467	364,577,205.05

The following table shows a summary of total cost over ten years. FinCEN is selecting the time period of ten years, a relatively short time period given that the requirement is permanent. This is because FinCEN cannot predict how the burden and cost of compliance may change after it is widely adopted by reporting companies. Please note, there are no non-labor costs associated with this collection of information because FinCEN assumes that active businesses already have the necessary equipment and tools to comply with the proposed regulatory requirements.

TABLE 7—TOTAL COSTS OVER TEN YEARS

Year	Total cost
Year 1	$1,264,450,049.62
Year 2	364,577,205.05
Year 3	364,577,205.05
Year 4	364,577,205.05

[297] As of June 30, 2021, registered investment advisers reported 5,671 pooled investment vehicle clients registered with a foreign financial regulatory authority and venture capital fund advisers reported 3,213 advised private funds registered with a foreign financial regulatory authority. These two counts total 8,884. However, this estimate may not account for foreign pooled investment vehicles advised by banks, credit unions, or broker-dealers. FinCEN requests any available information on estimates of foreign pooled investment vehicles advised by such entities.

[298] FinCEN calculated the estimated foreign pooled investment vehicle filers per year (8,884) by the ratio of estimated new entities to total entities based on the IACA data analysis above (3,771,993.58/30,247,071.10).

[299] (8,884 × 40)/60.

[300] (1,108 × 40)/60.

[301] (810 × 20)/60.

[302] (1,768 × 20)/60.

[303] 5,923 × $38.44. While this calculation equals $227,680.12, FinCEN's model includes decimal points that result in the total of $227,663.75.

[304] 739 × $38.44. While this calculation equals $28,407.16, FinCEN's model includes decimal points that result in the total of $28,391.05.

[305] 270 × $38.44. While this calculation equals $10,378.80, FinCEN's model includes decimal points that result in the total of $10,381.80.

[306] 589 × $38.44. While this calculation equals $22,641.16, FinCEN's model includes decimal points that result in the total of $22,651.20.

TABLE 7—TOTAL COSTS OVER TEN YEARS—Continued

Year	Total cost
Year 5	364,577,205.05
Year 6	364,577,205.05
Year 7	364,577,205.05
Year 8	364,577,205.05
Year 9	364,577,205.05
Year 10	364,577,205.05

In addition, FinCEN calculated the net present value of cost for a 10-year horizon at discount rates of seven and three percent,[309] totaling approximately $3.4 billion and $3.98 billion, respectively (see Table 8 below for exact figures). FinCEN calculated the cost over a ten-year horizon to capture the immediate impact, but expects that from Year 2 onwards the annual aggregate costs would be the same in each subsequent year.

v. Alternative Scenario Analyses

FinCEN considered alternatives while shaping the specific reporting requirements of the rule, including: (1) The length of the initial reporting period; and (2) the length of time to file an updated report. The analyses of these alternatives rely upon the analysis used thus far in the PRA cost estimate. Each alternative is considered fully below.

In the first alternative, FinCEN considered whether to lengthen the timeframe in which initial reports may be submitted by companies that are in existence when the eventual final rule comes into effect. The CTA states that existing companies shall submit a BOI report to FinCEN ''in a timely manner, and not later than 2 years after the effective date of the regulations'' addressed by this proposed rule.[310] FinCEN currently proposes that existing companies submit a BOI report one year after the effective date, which is ''not later than 2 years''; however, given that the CTA permits FinCEN to select up to a two-year period for initial reports of companies that already exist when the final rule comes into effect, FinCEN compared the cost to the public for these two scenarios.

FinCEN assumed that if the reporting period was two years, half of the existing reporting companies would file their initial BOI report in Year 1 and the other half would file in Year 2. The same logic was applied to individuals applying for FinCEN identifiers and submitting foreign pooled investment vehicle reports: Half of the initial applications or reports would be filed in Year 1, and the other half in Year 2. FinCEN also assumed that updated reports would increase at an incremental rate throughout the two-year period, and therefore calculated the number of updated reports by extending the methodology described above to a 24-month timeframe (rather than a 12-month timeframe). This comparison shows that the cost of the rule is approximately $637 million less in Year 1 with this change, and approximately $358 million more in Year 2, but then is the same in following years. This also decreased the ten-year horizon net present value by approximately $281 million at a three percent discount rate or $283 million at a seven percent discount rate. However, the benefits of a one-year reporting period would outweigh the increase in cost during Year 1 of the rule. The public would bear the cost of initial report filings regardless and FinCEN has sought to maximize the usefulness of the database to law enforcement by obtaining BOI for existing entities as soon as possible.

In the second alternative, FinCEN considered whether to lengthen the timeframe for updated reports from 30 days to one year. The CTA states that updated reports shall be filed ''not later than 1 year after the date on which there is a change.''[311] FinCEN currently proposes that updates be submitted 30 days after the change date, which is ''not later than 1 year''; however, given that the CTA permits FinCEN to select up to a one-year timeframe, FinCEN compared the cost to the public of these two scenarios. FinCEN assumed that permitting updates to be reported within one year would result in updates being ''bundled,'' meaning that a reporting company could submit one updated report to account for multiple updates, as opposed to reporting each update singularly as would likely be the case under the 30-day reporting requirement. FinCEN therefore assumed that there would be approximately half as many updated reports overall if the timeframe is lengthened to one year. FinCEN also assumed that because more information may be reported on a ''bundled'' report, the burden of filing an update would increase. FinCEN increased the estimated burden for an updated BOI report to be 50 minutes, rather than the 30 minutes estimate for 30-day updated reports.[312] FinCEN estimated that increasing the timeframe for updated reports results in a net present value cost decrease by approximately $238 million at a seven percent discount rate or $293 million at a three percent discount rate. However, the benefits of having information updated on a monthly basis, which would make the database current and accurate and by extension highly useful, outweigh these costs. As noted in Section IV above, allowing reporting companies to report updates on an annual basis could cause a significant degradation in accuracy and usefulness of the BOI. FinCEN also believes that a 30-calendar-day deadline is necessary to limit the possible abuse of shelf companies—*i.e.,* entities formed as generic corporations without assets and then effectively assigned to new owners. The longer updates are delayed, the longer a shelf company can be ''off the shelf'' without notice to law enforcement of the company's new beneficial owners, and without any notice to financial institutions that they should scrutinize transactions involving the company from the perspective of its new beneficial owners.

The following table provides the detailed cost estimates for the proposed rule, as well as the two alternatives discussed. Please note that ''NPV'' refers to the net present value of cost for a ten-year time horizon, which is calculated at two different discount rates.

[309] These discount rates were applied based on OMB guidance in Circular A–4. *See* Office of Management and Budget, *Circular A–4* (September 17, 2003), available at *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.*

[310] *See* 31 U.S.C. 5336(b)(1)(B).

[311] *See* 31 U.S.C. 5336(b)(1)(D).

[312] There may also be a burden decrease to reporting companies that FinCEN does not separately account for in its estimate: If the timeframe for updated reports is increased to one year, reporting companies that choose to regularly survey their beneficial owners for information changes would not have to reach out on a monthly basis to request any updates from beneficial owners. FinCEN has not accounted for this burden other than in the time required to collect information for an updated report, but welcomes comment on its significance, and the extent it may vary depending based on the permissible update period selected. FinCEN's cost estimates for updated reports also does not currently account for decrease in cost that may be associated with increased use of FinCEN identifiers. If individuals request FinCEN identifiers, reporting companies would not be required to update the individuals' information on the BOI form; individuals with FinCEN identifiers would update their own information with FinCEN directly, consistent with the requirements of the proposed rule.

TABLE 8—COST COMPARISON OF ALTERNATIVES

Timeframe	Proposed rule	Alt. 1	Alt. 2
Year 1	$1,264,450,049.62	$626,598,761.41	$1,247,700,771.35
Year 2	364,577,205.05	723,017,733.35	328,033,325.19
Years 3+	364,577,205.05	364,577,205.05	328,033,325.19
NPV 7%	3,401,640,386.12	3,118,593,526.06	3,163,471,093.78
NPV 3%	3,983,580,464.64	3,702,171,944.94	3,691,071,816.82

In addition to the three scenarios described, FinCEN also compared how the estimated cost changed if more or less burden per report were assumed. A summary table of this comparison is included below. This illustrates that the time burden is a significant component of the overall cost of the rule. This highlights the importance of training, outreach, and compliance assistance in the implementation of this rule in order to decrease the burden and cost to the public.

TABLE 9—COST COMPARISON FOR BURDEN CHANGES

	Proposed burden	More time	Less time
Minutes to file initial BOI report	70	120	45
Minutes to file BOI update	30	60	15
Minutes to file identifier application	20	45	20
Minutes to file identifier update	10	30	10
Minutes to file initial foreign pooled investment vehicle report	40	90	30
Minutes to file update foreign pooled investment vehicle report	20	45	15
Year 1	$1,264,242,966.42	$2,197,972,962.43	$799,607,136.88
Years 2+	$364,517,497.03	$687,963,718.01	$203,220,746.46
NPV 7%	$3,401,083,288.12	$6,243,192,863.55	$1,984,707,941.90
NPV 3%	$3,982,928,060.37	$7,334,498,451.60	$2,312,530,100.97

Finally, FinCEN compared how the estimated cost changed if the benefits factor was increased from 1.42 to 2. FinCEN is conducting this analysis due to the Department of Health and Human Services 2016 ''Guidelines for Regulatory Impact Analysis,'' which recommends that employees undertaking administrative tasks while working should have an assumed benefits factor of 2, which accounts for overhead as well as benefits.[313] This increased the fully loaded wage rate to approximately $54.14. A summary table of this comparison is included below. FinCEN welcomes comment on the appropriate overhead factor FinCEN should use to estimate the burden of the proposed rule.

TABLE 10—COST COMPARISON OF INCREASED BENEFITS FACTOR

Timeframe	Proposed rule—benefits factor 1.42	Comparison—benefits factor 2
Year 1	$1,264,450,049.62	$1,780,915,562.85
Years 2+	364,577,205.05	513,489,021.20
NPV 7%	3,401,640,386.12	4,791,042,797.35
NPV 3%	3,983,580,464.64	5,610,676,710.76

Overall, FinCEN acknowledges that all costs cited herein are based on estimates and welcomes comments illuminating additional considerations or offering estimates, whether they contrast or align with those made above. FinCEN requests that such comments provide a breakdown of the estimates, the reasoning behind costs and numbers provided, and sources when applicable. This will help FinCEN integrate such information into the analysis.

vi. Questions for Comment

General Request for Comments Under the Paperwork Reduction Act: Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget 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 technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

Other Requests for Comment. In addition, FinCEN generally invites comment on the accuracy of FinCEN's regulatory analysis. FinCEN specifically requests comment on the following, most of which are mentioned in the preceding text.

[313] *See* Department of Health and Human Services, *Guidelines for Regulatory Impact Analysis,* (2016), p. 33, available at *https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//171981/HHS_RIAGuidance.pdf.*

1. What are likely data sources for identifying non-compliance with BOI reporting requirements? What potential costs may be incurred by third parties, particularly state, local, and Tribal authorities and financial institutions, through this process?

2. Are there data or methods available for estimating potential benefits generated by this rule?

3. Is there is a precise way to estimate the number of small businesses that would meet the definition of reporting company with exemptions considered?

4. Are there additional points to add to FinCEN's discussion of possible costs to state, local, and Tribal governments under the proposed rule, including specific estimates of costs if available?

i. In particular, are there specifics FinCEN should add to its discussion of costs to small governmental jurisdictions, pursuant to the Regulatory Flexibility Act? Particularly, what costs might these jurisdictions incur, what types of small governmental jurisdictions could expect to face such costs, whether small governmental jurisdictions may face costs that are different in kind from those which larger jurisdictions may face, and how FinCEN could mitigate the burden on small governmental jurisdictions.

5. Is it feasible for state or Tribal governments that collect BOI to transmit that information to FinCEN by way of existing or revised procedures?

i. In the alternative scenario analysis, is FinCEN's estimate of potential costs to states from collecting and transmitting BOI to FinCEN accurate?

6. Would reporting companies prefer to file BOI via state or Tribal governments rather than directly with FinCEN?

7. Are there available data sources to determine the total number of trusts, and to determine what portion of the total are created or registered with a secretary of state or similar office?

8. Do small businesses anticipate requiring professional expertise to comply with the BOI requirements described herein and what could FinCEN do to minimize the need for such expertise or accurately estimate for such a cost?

9. Are there any significant alternatives that would minimize the impact of the proposed rule on small entities while accomplishing the objectives of the CTA?

10. Are there certain regions that would be disproportionately impacted by the proposed rule, due to corporation formation practices or laws, or another reason? Are there likely disproportionate budgetary effects for particular segments of the private sector in complying with the proposed rule?

11. Is there a way in which FinCEN can make the overall BOI burden estimate, or some component of the burden estimate, more accurate? How could burden of complying with the proposed collection of information be minimized, including through the application of automated collection techniques or other forms of information technology?

12. Are there additional data sources or ways to clarify or improve FinCEN's estimation of the number of existing entities that qualify for each exemption? Specifically:

ii. Is the governmental authorities exemption category less likely to scale by population?

iii. FinCEN does not have data on the number of entities assisting a tax-exempt entity and instead assumes approximately a quarter of the entities in the preceding exemption (*i.e.,* tax-exempt entities) would have a related entity that falls under this exemption. Is this a reasonable assumption to make to estimate the number of entities assisting a tax-exempt entity?

iv. Is any commenter able to offer an estimation of inactive companies? In light of the lack of data on such entities, is it reasonable for FinCEN to assume that inactive companies are not included in the IACA data used to estimate the number of reporting entities?

13. Is FinCEN's approach of not precisely estimating overlapping entity exemptions reasonable? Is there reason to believe that not precisely estimating may result in material inaccuracies?

14. Is FinCEN's methodology for estimating the number of new entities eligible for an exemption from the definition of a reporting company, that is, by assuming that number would be proportionate to the share of existing entities that are eligible for an exemption, reasonable and appropriate?

15. Is there data or a better methodology to appropriately estimate the quantity of updates to BOI due to changes in beneficial ownership as a result of management's decision (*e.g.,* such as from a sale of an ownership interest or a change in substantial control)?

16. Do some states change a driver's license number when a driver's license is renewed? If so, which states?

17. Is FinCEN's methodology for calculating the total number of updated reports reasonable and appropriate?

18. Is any commenter able to provide data or information for the estimation of the number of foreign pooled investment vehicles that are advised by banks, credit unions, or broker-dealers?

19. Are FinCEN's per-report burden estimates reasonable?

20. Does FinCEN need to account in a specific way for the burden of tracking potential changes in beneficial owner or company applicant information? If so, how?

21. What is the appropriate factor that FinCEN should use to estimate the burden of the proposed rule beyond wage costs? Is a factor of 1.42 based on FinCEN's analysis of Bureau of Labor Statistics data appropriate? Is a factor of 2 based on the Department of Health and Human Services' guidance more appropriate because of its inclusion of overhead? Would a factor of 2 be an accurate estimate of benefits and overhead for the proposed rule or is that overhead factor excessive?

22. Are FinCEN's overall cost estimates reasonable and accurate, and if not, what other cost estimates would be?

List of Subjects in 31 CFR Part 1010

Administrative practice and procedure, Aliens, Authority delegations (Government agencies), Banks and banking, Brokers, Business and industry, Commodity futures, Currency, Citizenship and naturalization, Electronic filing, Federal savings associations, Federal-States relations, Foreign persons, Holding companies, Indian—law, Indians, Indians—tribal government, Insurance companies, Investment advisers, Investment companies, Investigations, Law enforcement, Penalties, Reporting and recordkeeping requirements, Small businesses, Securities, Terrorism, Time.

Authority and Issuance

For the reasons set forth in the preamble, part 1010 of chapter X of title 31 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1010—GENERAL PROVISIONS

■ 1. The authority citation for part 1010 is revised to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5336; title III, sec. 314 Pub. L. 107–56, 115 Stat. 307; sec. 701 Pub. L. 114–74, 129 Stat. 599; sec. 6403, Pub. L. 116–283, 134 Stat. 3388.

■ 2. Add § 1010.380 to read as follows:

§ 1010.380 Reports of beneficial ownership information.

(a) *Reports required*—(1) *Initial report.* Each reporting company shall file an initial report in the form and manner specified in paragraph (b) of this section as follows:

(i) Any domestic reporting company formed on or after [effective date of final rule] shall file a report within 14 calendar days of the date it was formed as specified by a secretary of state or similar office.

(ii) Any entity that becomes a foreign reporting company on or after [effective date of the final rule] shall file a report within 14 calendar days of the date it first becomes a foreign reporting company.

(iii) Any domestic reporting company created before [effective date of the final rule] and any entity that became a foreign reporting company before [effective date of the final rule] shall file a report not later than [one year after effective date of the final rule].

(iv) Any entity that no longer meets the criteria for an exemption under paragraph (c)(2) of this section shall file a report within 30 calendar days after the date that it no longer meets the criteria for any such exemption.

(2) *Updated report.* A reporting company shall file an updated report in the form and manner specified in paragraph (b)(4) of this section within 30 calendar days after the date on which there is any change with respect to any information previously submitted to FinCEN, including any change with respect to who is a beneficial owner of a reporting company and any change with respect to information reported for any particular beneficial owner or applicant.

(i) If a reporting company meets the criteria for any exemption under paragraph (c)(2) of this section subsequent to the filing of an initial report, this change will be deemed a change with respect to information previously submitted to FinCEN, and the entity shall file an updated report.

(ii) If an individual is a beneficial owner of a reporting company because the individual owns at least 25 percent of the ownership interests of the reporting company and such individual dies, a change with respect to required information will be deemed to occur when the estate of a deceased beneficial owner is settled, either through the operation of the intestacy laws of a jurisdiction within the United States or through a testamentary deposition. The updated report shall remove the deceased former beneficial owner and, to the extent appropriate, identify any new beneficial owners.

(3) *Corrected report.* A reporting company shall file a corrected report in the form and manner specified in paragraph (b) of this section within 14 calendar days after the date on which such reporting company becomes aware or has reason to know that any required information contained in any report under this section was inaccurate when filed and remains inaccurate. A corrected report filed under this paragraph (a)(3) within this 14-day period shall be deemed to satisfy 31 U.S.C. 5336(h)(3)(C)(i)(I)(bb) if filed within 90 calendar days after the date on which an inaccurate report is filed.

(b) *Form and manner of reports.* Each report or application submitted under this section shall be filed with FinCEN in the form and manner that FinCEN shall prescribe in the forms and instructions for such report or application, and each person filing such report shall certify that the report is accurate and complete.

(1) *Initial report.* An initial report of a reporting company shall include the following information:

(i) For the reporting company:

(A) The full name of the reporting company;

(B) Any trade name or ''doing business as'' name of the reporting company;

(C) The business street address of the reporting company;

(D) The State or Tribal jurisdiction of formation of the reporting company (or for a foreign reporting company, State, or Tribal jurisdiction where such company first registers); and

(E) The Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) of the reporting company, or where a reporting company has not yet been issued a TIN, one of the following:

(*1*) Dun & Bradstreet Data Universal Numbering System (DUNS) Number of the reporting company; or

(*2*) Legal Entity Identifier (LEI).

(ii) For every individual who is a beneficial owner of such reporting company, and every individual who is a company applicant with respect to such reporting company:

(A) The full legal name of the individual;

(B) The date of birth of the individual;

(C) The complete current address consisting of:

(*1*) In the case of a company applicant who files a document described in paragraph (e) of this section in the course of such individual's business, the business street address of such business; or

(*2*) In any other case, the residential street address that the individual uses for tax residency purposes;

(D) A unique identifying number from one of the following documents:

(*1*) A non-expired passport issued to the individual by the United States Government;

(*2*) A non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying the individual;

(*3*) A non-expired driver's license issued to the individual by a State; or

(*4*) A non-expired passport issued by a foreign government to the individual, if the individual does not possess any of the documents described in paragraph (b)(1)(ii)(D)(*1*), (*2*), or (*3*) of this section; and

(E) An image of the document from which the unique identifying number in paragraph (b)(1)(ii)(D) of this section was obtained, which includes both the unique identifying number and photograph in sufficient quality to be legible or recognizable.

(2) *Additional voluntary information.* In addition to the information required under paragraph (b)(1) of this section, a reporting company may include in its initial or any subsequent report the TIN of any beneficial owner or company applicant, provided that:

(i) The reporting company notifies each such beneficial owner or company applicant; and

(ii) Obtains consent from each such beneficial owner or company applicant on a form prescribed by FinCEN.

(3) *Special rules*—(i) *Reporting company owned by exempt entity.* If an exempt entity under paragraph (c)(2) of this section has or will have a direct or indirect ownership interest in a reporting company and an individual is a beneficial owner of the reporting company by virtue of such ownership interest, the report shall include the name of the exempt entity rather than the information required under paragraph (b)(1) of this section with respect to such beneficial owner.

(ii) *Minor child.* If a reporting company reports the information required under paragraph (b)(1) of this section with respect to a parent or legal guardian of a minor child consistent with paragraph (d)(4)(i) of this section, then the report shall indicate that such information relates to a parent or legal guardian.

(iii) *Foreign pooled investment vehicle.* If an entity would be a reporting company but for paragraph (c)(2)(xviii) of this section, and is formed under the laws of a foreign country, such entity shall be deemed a reporting company for purposes of paragraphs (a) and (b) of this section, except the report shall include the information required under paragraph (b)(1) of this section solely with respect to an individual who exercises substantial control over the entity. If more than one individual exercises substantial control over the

entity, the entity shall report information with respect to the individual who has the greatest authority over the strategic management of the entity.

(iv) *Deceased company applicant.* If a reporting company was created or registered before [effective date of the final rule], and any company applicant died before [one year after effective date of the final rule], the report shall include that fact, as well as any information required under paragraph (b)(1) of this section of which the reporting company has actual knowledge with respect to such company applicant.

(4) *Contents of updated or corrected report.* If any required information in an initial report is inaccurate or there is a change with respect to any such required information, an updated or corrected report shall include all information necessary to make the report accurate and complete at the time it is filed with FinCEN. If a reporting company meets the criteria for any exemption under paragraph (c)(2) of this section subsequent to the filing of an initial report, its updated report shall include a notification that the entity is no longer a reporting company.

(5) *FinCEN identifier*—(i) *Application for FinCEN identifier.* (A) An individual may obtain a FinCEN identifier by submitting to FinCEN an application containing the information about themselves required under paragraph (b)(1) of this section.

(B) A reporting company may obtain a FinCEN identifier by submitting to FinCEN an application at or after the time that the entity submits an initial report required under paragraph (b)(1) of this section.

(C) Each FinCEN identifier shall be specific to each such individual or reporting company, and each such individual or reporting company may obtain only one FinCEN identifier.

(ii) *Use of FinCEN identifier.* (A) If an individual has obtained a FinCEN identifier and provided such FinCEN identifier to a reporting company, the reporting company may include such FinCEN identifier in its report in lieu of the information required under paragraph (b)(1) of this section with respect to such individual.

(B) If a reporting company has obtained a FinCEN identifier, the reporting company may include such FinCEN identifier in a report in lieu of the information required under paragraph (b)(1) of this section with respect to such reporting company.

(C) If an individual is or may be a beneficial owner of a reporting company by an interest held by the individual in an entity that, directly or indirectly, holds an interest in the reporting company, and if such intermediary entity has obtained a FinCEN identifier and provided the entity's FinCEN identifier to the reporting company, then the reporting company may include such entity's FinCEN identifier in its report in lieu of the information required under paragraph (b)(1) of this section with respect to such individual.

(D) Any individual or entity that obtains a FinCEN identifier shall file an updated or corrected report to update or correct any information previously submitted to FinCEN in an application for a FinCEN identifier. Such updated or corrected report shall be filed at the same time and in the same manner as updated or corrected reports filed under paragraph (a) of this section.

(c) *Reporting company*—(1) *Definitions.* For purposes of this section, the term ''reporting company'' means either a domestic reporting company or a foreign reporting company.

(i) The term ''domestic reporting company'' means any entity that is:

(A) A corporation;

(B) Limited liability company; or

(C) Other entity that is created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe.

(ii) The term ''foreign reporting company'' means any entity that is:

(A) A corporation, limited liability company, or other entity;

(B) Formed under the law of a foreign country; and

(C) Registered to do business in any State or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe.

(2) *Exemptions.* Notwithstanding paragraph (c)(1) of this section, the term ''reporting company'' does not include:

(i) *SEC reporting issuer.* Any issuer of securities that is:

(A) An issuer of a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or

(B) Required to file supplementary and periodic information under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)).

(ii) *Governmental authority.* Any entity that:

(A) Is established under the laws of the United States, an Indian tribe, a State, or a political subdivision of a State, or under an interstate compact between two or more States; and

(B) Exercises governmental authority on behalf of the United States or any such Indian tribe, State, or political subdivision.

(iii) *Bank.* Any bank, as defined in:

(A) Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(B) Section 2(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)); or

(C) Section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)).

(iv) *Credit union.* Any Federal credit union or State credit union, as those terms are defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).

(v) *Depository institution holding company.* Any bank holding company as defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), or any savings and loan holding company as defined in section 10(a) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)).

(vi) *Money transmitting business.* Any money transmitting business registered with FinCEN under 31 U.S.C. 5330 and 31 CFR 1022.380.

(vii) *Broker or dealer in securities.* Any broker or dealer, as those terms are defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), that is registered under section 15 of that Act (15 U.S.C. 78o).

(viii) *Securities exchange or clearing agency.* Any exchange or clearing agency, as those terms are defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), that is registered under section 6 or 17A of that Act (15 U.S.C. 78f, 78q–1).

(ix) *Other Exchange Act registered entity.* Any other entity not described in paragraph (c)(2)(i), (vii), or (viii) of this section that is registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(x) *Investment company or investment adviser.* Any entity that is:

(A) An investment company as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), or is an investment adviser as defined in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2); and

(B) Registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 *et seq.*).

(xi) *Venture capital fund adviser.* Any investment adviser that:

(A) Is described in section 203(l) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(l)); and

(B) Has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or

any successor thereto, with the Securities and Exchange Commission.

(xii) *Insurance company.* Any insurance company as defined in section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a–2).

(xiii) *State-licensed insurance producer.* Any entity that:

(A) Is an insurance producer that is authorized by a State and subject to supervision by the insurance commissioner or a similar official or agency of a State; and

(B) Has an operating presence at a physical office within the United States.

(xiv) *Commodity Exchange Act registered entity.* Any entity that:

(A) Is a registered entity as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a); or

(B) Is:

(*1*) A futures commission merchant, introducing broker, swap dealer, major swap participant, commodity pool operator, or commodity trading advisor, each as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a), or a retail foreign exchange dealer as described in section 2(c)(2)(B) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(B); and

(*2*) Registered with the Commodity Futures Trading Commission under the Commodity Exchange Act.

(xv) *Accounting firm.* Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7212).

(xvi) *Public utility.* Any entity that is a regulated public utility as defined in 26 U.S.C. 7701(a)(33)(A) or (D) that provides telecommunications services, electrical power, natural gas, or water and sewer services within the United States.

(xvii) *Financial market utility.* Any financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010 (12 U.S.C. 5463).

(xviii) *Pooled investment vehicle.* Any pooled investment vehicle that is operated or advised by a person described in paragraph (c)(2)(iii), (iv), (vii), (x), or (xi) of this section.

(xix) *Tax-exempt entity.* Any entity that is:

(A) An organization that is described in section 501(c) of the Internal Revenue Code of 1986 (Code) (determined without regard to section 508(a) of the Code) and exempt from tax under section 501(a) of the Code, except that in the case of any such organization that ceases to be described in section 501(c) and exempt from tax under section 501(a), such organization shall be considered to be continued to be described in this paragraph (c)(2)(xix)(A) for the 180-day period beginning on the date of the loss of such tax-exempt status;

(B) A political organization, as defined in section 527(e)(1) of the Code, that is exempt from tax under section 527(a) of the Code; or

(C) A trust described in paragraph (1) or (2) of section 4947(a) of the Code.

(xx) *Entity assisting a tax-exempt entity.* Any entity that:

(A) Operates exclusively to provide financial assistance to, or hold governance rights over, any entity described in paragraph (c)(2)(xix) of this section;

(B) Is a United States person;

(C) Is beneficially owned or controlled exclusively by one or more United States persons that are United States citizens or lawfully admitted for permanent residence; and

(D) Derives at least a majority of its funding or revenue from one or more United States persons that are United States citizens or lawfully admitted for permanent residence.

(xxi) *Large operating company.* Any entity that:

(A) Employs more than 20 full time employees in the United States, with ''full time employee in the United States'' having the meaning provided in 26 CFR 54.4980H–1(a) and 54.4980H–3, except that the term ''United States'' as used in 26 CFR 54.4980H–1(a) and 54.4980H–3 has the meaning provided in § 1010.100(hhh);

(B) Has an operating presence at a physical office within the United States; and

(C) Filed a Federal income tax or information return in the United States for the previous year demonstrating more than $5,000,000 in gross receipts or sales, as reported as gross receipts or sales (net of returns and allowances) on the entity's IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120–S, IRS Form 1065, or other applicable IRS form, excluding gross receipts or sales from sources outside the United States, as determined under Federal income tax principles. For an entity that is part of an affiliated group of corporations within the meaning of 26 U.S.C. 1504 that filed a consolidated return, the applicable amount shall be the amount reported on the consolidated return for such group.

(xxii) *Subsidiary of certain exempt entities.* Any entity of which the ownership interests of such entity are controlled or wholly owned, directly or indirectly, by one or more entities described in paragraph (c)(2)(i), (ii), (iii), (iv), (v), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi), (xvii), (xix), or (xxi) of this section.

(xxiii) *Inactive entity.* Any entity that:

(A) Was in existence on or before January 1, 2020;

(B) Is not engaged in active business;

(C) Is not owned by a foreign person, whether directly or indirectly, wholly or partially;

(D) Has not experienced any change in ownership in the preceding 12-month period;

(E) Has not sent or received any funds in an amount greater than $1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding 12-month period; and

(F) Does not otherwise hold any kind or type of assets, whether in the United States or abroad, including but not limited to any ownership interest in any corporation, limited liability company, or other similar entity.

(d) *Beneficial owner.* For purposes of this section, the term ''beneficial owner,'' with respect to a reporting company, means any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company.

(1) *Substantial control.* Substantial control over a reporting company includes:

(i) Service as a senior officer of the reporting company;

(ii) Authority over the appointment or removal of any senior officer or a majority or dominant minority of the board of directors (or similar body);

(iii) Direction, determination, or decision of, or substantial influence over, important matters affecting the reporting company, including but not limited to:

(A) The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;

(B) The reorganization, dissolution, or merger of the reporting company;

(C) Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;

(D) The selection or termination of business lines or ventures, or geographic focus, of the reporting company;

(E) Compensation schemes and incentive programs for senior officers;

(F) The entry into or termination, or the fulfillment or non-fulfillment of significant contracts; and

(G) Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; and

(iv) Any other form of substantial control over the reporting company.

(2) *Direct or indirect exercise of substantial control.* An individual may directly or indirectly exercise substantial control over a reporting company through a variety of means, including through board representation; through ownership or control of a majority or dominant minority of the voting shares of the reporting company; through rights associated with any financing arrangement or interest in a company; through control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; through arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees, or through any other contract, arrangement, understanding, relationship, or otherwise. An individual who has the right or ability to exercise substantial control as specified in paragraph (d)(1) of this section and this paragraph (d)(2) shall be deemed to exercise such substantial control.

(3) *Ownership interests.* (i) The term ''ownership interest'' means:

(A) Any equity, stock, or similar instrument, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, interest in a joint venture, or certificate of interest in a business trust, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or represents voting or non-voting shares;

(B) Any capital or profit interest in a limited liability company or partnership, including limited and general partnership interests;

(C) Any proprietorship interest;

(D) Any instrument convertible, with or without consideration, into any instrument described in paragraph (d)(3)(i)(A), (B), or (C) of this section, any future on any such instrument, or any warrant or right to purchase, sell, or subscribe to a share or interest described in paragraph (d)(3)(i)(A), (B), or (C) of this section, regardless of whether characterized as debt; or

(E) Any put, call, straddle, or other option or privilege of buying or selling any of the items described in paragraph (d)(3)(i)(A), (B), (C), or (D) of this section without being bound to do so.

(ii) An individual may directly or indirectly own or control an ownership interest of a reporting company through a variety of means, including but not limited to:

(A) Joint ownership with one or more other persons of an undivided interest in such ownership interest;

(B) Through control of such ownership interest owned by another individual;

(C) With regard to a trust or similar arrangement that holds such ownership interest:

(*1*) As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;

(*2*) As a beneficiary who:

(*i*) Is the sole permissible recipient of income and principal from the trust; or

(*ii*) Has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or

(*3*) As a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust:

(*i*) Through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company; or

(*ii*) Through any other contract, arrangement, understanding, or relationship.

(iii) In determining whether an individual owns or controls 25 percent of the ownership interests of a reporting company, the ownership interests of the reporting company shall include all ownership interests of any class or type, and the percentage of such ownership interests that an individual owns or controls shall be determined by aggregating all of the individual's ownership interests in comparison to the undiluted ownership interests of the company.

(4) *Exceptions.* Notwithstanding any other provision of paragraph (d) of this section, the term ''beneficial owner'' does not include:

(i) A minor child, as defined under the law of the State or Indian tribe in which a domestic reporting company is created or a foreign reporting company is first registered, provided the reporting company reports the required information of a parent or legal guardian of the minor child as specified in paragraph (b)(3)(ii) of this section;

(ii) An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;

(iii) An employee of a reporting company, acting solely as an employee and not as a senior officer, whose substantial control over or economic benefits from such entity are derived solely from the employment status of the employee;

(iv) An individual whose only interest in a reporting company is a future interest through a right of inheritance;

(v) A creditor of a reporting company. For purposes of this paragraph (d)(4)(v), a creditor is an individual who would be a beneficial owner under the other provisions of paragraph (d) of this section solely through rights or interests in the company for the payment of a predetermined sum of money, such as a debt and the payment of interest on such debt. For the avoidance of doubt, any capital interest in the reporting company, or any right or interest in the value of the reporting company or its profits, are not such rights or interests for payment of a predetermined sum, regardless of whether they take the form of a debt instrument. If the individual has a right or ability to convert the right to payment of a predetermined sum to any form of ownership interest in the company, that individual is not a creditor of a reporting company for purposes of this section.

(e) *Company applicant.* For purposes of this section, the term ''company applicant'' means:

(1) For a domestic reporting company, any individual who files the document that creates the domestic reporting company as described in paragraph (c)(1)(i) of this section, including any individual who directs or controls the filing of such document by another person; and

(2) For a foreign reporting company, any individual who files the document that first registers the foreign reporting company as described in paragraph (c)(1)(ii) of this section, including any individual who directs or controls the filing of such document by another person.

(f) *Definitions.* For purposes of this section, the following terms have the following meanings.

(1) *Employee.* The term ''employee'' has the meaning given the term in 26 CFR 54.4980H–1(a)(15).

(2) *FinCEN identifier.* The term ''FinCEN identifier'' means the unique identifying number assigned by FinCEN to an individual or reporting company under this section.

(3) *Foreign person.* The term ''foreign person'' means a person who is not a United States person.

(4) *Indian tribe.* The term ''Indian tribe'' has the meaning given the term ''Indian tribe'' in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5130).

(5) *Lawfully admitted for permanent residence.* The term ''lawfully admitted for permanent residence'' has the meaning given the term in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)).

(6) *Operating presence at a physical office within the United States.* The term ''has an operating presence at a physical office within the United States'' means that an entity regularly conducts its business at a physical location in the United States that the entity owns or leases, that is not the place of residence of any individual, and that is physically distinct from the place of business of any other unaffiliated entity.

(7) *Pooled investment vehicle.* The term ''pooled investment vehicle'' means:

(i) Any investment company, as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)); or

(ii) Any company that:

(A) Would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of that Act (15 U.S.C. 80a–3(c)); and

(B) Is identified by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the Securities and Exchange Commission.

(8) *Senior officer.* The term ''senior officer'' means any individual holding the position or exercising the authority of a president, secretary, treasurer, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function.

(9) *State.* The term ''State'' means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands, and any other commonwealth, territory, or possession of the United States.

(10) *United States person.* The term ''United States person'' has the meaning given the term in section 7701(a)(30) of the Internal Revenue Code of 1986.

(g) *Reporting violations.* (1) It shall be unlawful for any person to willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance with this section, or to willfully fail to report complete or updated beneficial ownership information to FinCEN in accordance with this section.

(2) For purposes of this paragraph (g), the term ''person'' includes any individual, reporting company, or other entity.

(3) For purposes of this paragraph (g), the term ''beneficial ownership information'' includes any information provided to FinCEN under this section.

(4) A person provides or attempts to provide beneficial ownership information to FinCEN if such person does so directly or indirectly, including by providing such information to another person for purposes of a report or application under this section.

(5) A person fails to report complete or updated beneficial ownership information to FinCEN if such person directs or controls another person with respect to any such failure to report, or is in substantial control of a reporting company when it fails to report complete or updated beneficial ownership information to FinCEN.

Himamauli Das,

Acting Director, Financial Crimes Enforcement Network.

[FR Doc. 2021–26548 Filed 12–7–21; 11:15 am]

BILLING CODE 4810–02–P

Reader Aids

Federal Register

Vol. 86, No. 233

Wednesday, December 8, 2021

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, DECEMBER

68103–68388 1
68389–68532 2
68533–68874 3
68875–69156 6
69157–69574 7
69575–69974 8

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

200 68533

3 CFR

Proclamations:
10314 68103
10315 68385
10316 68867
10317 68869
10318 69157
10319 69575
Executive Orders:
13803 (Superseded and revoked by EO 14056) 68871
13906 (Superseded and revoked by EO 14056) 68871
14056 68871

6 CFR

Proposed Rules:
5 69587

7 CFR

915 69159
1471 68875
1484 68880
1485 68882
Proposed Rules:
983 68932
986 68934

9 CFR

2 68533
92 68834
93 68834
94 68834
95 68834
96 68834
98 68834

10 CFR

429 68389
430 68389
Proposed Rules:
429 69544
430 69544

12 CFR

204 69577
209 69578
614 68395
615 68395
620 68395
628 68395
1026 69716

14 CFR

39 ....68105, 68107, 68109, 68884, 68887, 68889, 68892, 68894, 68897, 68899, 68902, 68905. 68907, 68910, 69161, 69163, 69165, 69579
71 ....68395, 68538, 68912, 69581
91 69167
97 ....68539, 68541
Proposed Rules:
39 ....68166, 68168, 68171, 68937
71 ....68173, 68571, 69181

16 CFR

306 69582

17 CFR

211 68111
240 68330
Proposed Rules:
240 ....68300, 69802

19 CFR

12 ....68544, 68546

20 CFR

Proposed Rules:
655 68174

21 CFR

1 68728
11 68728
16 68728
129 68728
868 68396
876 68398
882 ....68399, 68401
888 68403
890 69583
Proposed Rules:
112 69120
1308 ....69182, 69187

23 CFR

645 68553

25 CFR

Proposed Rules:
514 68445
537 68446
559 68200

26 CFR

Proposed Rules:
1 68939
301 68939

27 CFR

Proposed Rules:
1 68573
17 68573
19 68573
20 68573

22.....68573
26.....68573
27.....68573
28.....68573
31.....68573

28 CFR

72.....69856

29 CFR

1910.....68560, 69583
1915.....68560, 69583
1917.....68560, 69583
1918.....68560, 69583
1926.....68560, 69583
1928.....68560, 69583
4044.....68560

Proposed Rules:

1910.....68594
1915.....68594
1917.....68594
1918.....68594
1926.....68594
1928.....68594

31 CFR

Proposed Rules:

Ch. X.....69589
1010.....69920

33 CFR

100.....68405
135.....68123
138.....68123
153.....68123
165.....68406, 68407, 68562, 68564, 68566, 68913

Proposed Rules:

100.....69602
165.....68948
328.....69372

34 CFR

Proposed Rules:

Ch. VI.....69607

36 CFR

219.....68149

37 CFR

380.....68150

Proposed Rules:

1.....69195
201.....69890
220.....69890
222.....69890
225.....69890
226.....69890
227.....69890
228.....69890
229.....69890
230.....69890
231.....69890
232.....69890
233.....69890

38 CFR

3.....68409

39 CFR

Proposed Rules:

3065.....68202

40 CFR

52.....68411, 68413, 68421, 68568, 69173
180.....68150, 68915, 68918, 68921
272.....68159

Proposed Rules:

52.....68447, 68449, 68954, 68957, 68960, 69198, 69200, 69207, 69210
82.....68962
120.....69372

42 CFR

100.....68423

Proposed Rules:

Ch. IV.....68594

45 CFR

1117.....69583

Proposed Rules:

1336.....69215

47 CFR

1.....68428
63.....68428

Proposed Rules:

1.....68230
4.....69609
73.....68203

48 CFR

502.....68441
509.....68441
511.....68441
512.....68441
514.....68441
532.....68441
536.....68441
538.....68441
552.....68441

Proposed Rules:

Ch. 1.....69218
Ch. 12.....69452

49 CFR

1180.....68926

50 CFR

223.....69178
648.....68569

Proposed Rules:

223.....68452
224.....68452
648.....68456
679.....68608, 68982

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List December 6, 2015

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.